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# TABLE OF CONTENTS

# EDITORIAL

The power of a pen is enormously larger than a sword. What a sharp edged sword can't achieve can be achieved by the help of a minute tip of a pen. What it implies is that the power of writing is much stronger than the power of hatred, war, and fighting. But in the current times, is this age old adage faltering? The truth is that apart from being the perfect antithesis to the destructive power of sword, the creative power of a pen is also responsible for innovation and development. A scribbling pen is chronicling events of present for posterity, it is posing questions and concerns plaguing the current times, and it is also the medium meant to achieve the answers to the questions posed. This pen is thus an antithesis of ignorance and death, it creates, enables and achieves.

In the legal profession, writing's importance cannot be overstated. Perhaps it is the lubricant in the wheels of the chariot of progress or perhaps it is the horse. Nevertheless, it certainly is responsible for the germination and development of ideas and concepts. These are then tested against the tides of time. Ask any law student about the general precepts in law and policy, and their quite old and ancient origins. This proves that it is imperative that new ideas and concepts be given a place to germinate and grow. The public must be exposed to the diversity in thoughts and perspectives for a healthy and accepting society. It is this pursuit of diversity that is being realised by this seventh edition of the RMLNLU Law Review. This edition showcases seminal works embodying ideas and postulates about several issues that define our social structure.

# EXAMINING THE POWER OF CONSUMER DISPUTE REDRESSAL AGENCIES TO RECALL AND REVIEW ORDERS : LEGAL POSITION AND POSSIBLE REFORMS

[*] *ADITYA MANUBARWALA & SHARDOOL KULKARNI*

## INTRODUCTION: STATUTORY PROVISIONS

Prior to the Amendment in the Consumer Protection Act, 1986[1] (hereinafter 'the Act') there were no express provisions pertaining to the power of Consumer Dispute Redressal Agencies with regard to the ability to recall their own orders. The Consumer Protection (Amendment) Act, 2002 led to the insertion of Section 22A in the Consumer Protection Act,[2] which may be read as follows –

> "22A. Where an order is passed by the National Commission ex parte against the opposite party or a complainant, as the case may be, the aggrieved party may apply to the Commission to set aside the said order in the interest of justice."

Section 22 was also replaced with following proviso:

> "22 (1) Provisions of sections 12, 13 and 14 and the rules made there under for the disposal of complaints by the District Forum shall, with such modifications as may be considered necessary by the Commission, be applicable to the disposal of disputes by the National Commission.
>
> (2) Without prejudice to the provisions contained in sub-section (1), the National Commission shall have the power to review any order made by it, when there is an error apparent on the face of record."

A bare reading of the aforementioned provision makes it amply clear that the National Consumer Disputes Redressal Commission, (hereinafter referred as the 'National

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[1] The Consumer Protection (Amendment 2003) Act 1986.
[2] The Consumer Protection (Amendment) Act 2002, s 20.

Commission') has been vested with the power of setting aside an ex parte order in the interests of justice and to restore complaints dismissed in default. However, no corresponding amendment has been made with respect to the State Commission and District Forum. At this point, it becomes essential to draw attention to Order IX, Rule 13 of the Civil Procedure Code, 1908,[3] which reads as under:

> "13. Setting aside decree ex parte against defendant. - In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an Order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an Order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:
>
> Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be sent aside as against all or any of the other defendant also:
>
> Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.
>
> Explanation: Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule of setting aside the ex parte decree."

Meanwhile, Order IX, Rule 4 of the Civil Procedure Code provides for restoration of a suit that has been dismissed:[4]

[3] The Code of Civil Procedure 1908, order IX rule 13.
[4] The Code of Civil Procedure 1908, order IX rule 4.

> "4. Plaintiff may bring fresh suit or Court may restore suit to file— Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."

Thus, it becomes essential to examine to what extent the District Forum and State Commission have been empowered to exercise the powers of a civil court, particularly with regard to the Civil Procedure Code. Section 13(4) of the Consumer Protection Act, 1986 reads as follows – [5]

> "13(4) For the purposes of this section, the District Forum shall have the same powers as are vested in a civil court under Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely: —
>
> (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
> (ii) the discovery and production of any document or other material object producible as evidence;
> (iii) the reception of evidence on affidavits;
> (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
> (v) issuing of any commission for the examination of any witness, and
> (vi) any other matter which may be prescribed."

The aforesaid provision has also been made applicable to the State and National Commissions.[6] It is also necessary to draw attention to Section 26(1) of the Consumer Protection Regulations, 2005, which reads as under:

[5] The Consumer Protection Act 1986, s 13(4).
[6] The Consumer Protection Act 1986, s 18.

> "26. Miscellaneous – (1) In all proceedings before the Consumer Forum, endeavour shall be made by the parties and their counsel to avoid the use of provisions of Code of Civil Procedure, 1908 (5 of 1908):
>
> Provided that the provisions of the Code of Civil Procedure, 1908 may be applied which have been referred to in the Act or in the rules made there under."

The cardinal question for enquiry is whether or not the State Commission and District Forum are empowered to set aside their own ex parte orders or recall dismissed complaints.

## JUDICIAL PRONOUNCEMENTS: CEMENTING STATUTORY SHORTCOMINGS

In the case of *Court Master, UCO Bank v. Ram Govind Agarwal*,[7] the Bihar State Commission held that the District Forum, which had set aside its own ex parte order, had no jurisdiction to do so, as the Consumer Protection Act does not empower dispute Redressal agencies to set aside or recall ex parte orders or to restore matters dismissed for default. A similar view was taken by the National Commission in *Director, Forest Research Institute v. Sunshine Enterprises*.[8]

The question finally came for consideration before the Supreme Court in the case of *Jyotsana Arvind Kumar Shah v. Bombay Hospital Trust*,[9] wherein an appeal had been preferred against an order of the State Commission setting aside its own ex parte order. After the State Commission or proceeded ex parte and awarded compensation to the complainant on merits, the respondents, instead of preferring an appeal filed a writ petition before the Bombay High Court. The High Court, whilst dismissing the writ petition observed that the respondent could prefer an appeal or make an application before the State Commission for setting aside the ex parte order, if permissible by law. On the basis of this order, the petitioner subsequently made an application to the State Commission, which set aside its previous ex parte order. An appeal was preferred by the complainant to the Supreme Court, which stated that the respondent could benefit from the observation of the High Court only if the same was 'permissible by law'. Laying reference to the aforementioned orders of the National Commission and the Bihar State

[7] *Court Master, UCO Bank v Ram Govind Agarwal* (1996) 1 CPR 351.
[8] *Director, Forest Research Institute v Sunshine Enterprises* (1997) 1 CPR 42.
[9] *Jyotsana Arvind Kumar Shah v Bombay Hospital Trust* (1999) 4 SCC 325.

Commission, it held that the order of the State Commission setting aside the ex parte decision was without jurisdiction.

However, a conflicting view on this issue emerged in the case of *New India Assurance Co. Ltd. v. R. Srinivasan*,[10] where the Supreme Court held that the State Commission could recall or review its ex parte order. The original complainant, who was the respondent in the said matter, had filed a complaint with the State Commission for an insurance claim that was dismissed in default and not restored by the State Commission. Consequently, the respondent filed a fresh complaint in the District Forum, which allowed the claim. The appellant's contention that the complaint in the district forum was not maintainable since a similar compliant had been instituted and dismissed in default by the State Commission, was rejected by both the State and the National Commission. When the matter reached the Supreme Court, it upheld the orders of the National Commission, State Commission and District Forum on the grounds that the interests of justice cannot be comprised by mere technicality, particularly since the claim of the respondent was undisputed. Whilst taking note of the fact that Order 9 of the Civil Procedure Code did not apply to proceedings before the State Commission or District Forum, the court emphatically stated that the interests of justice cannot be compromised by a rule of technicality.

It would be pertinent to note here that all of the previously mentioned judgements were passed prior to the 2002 Amendment to the Consumer Protection Act. As such, whilst they do not hold true for the National Commission, they continued to hold good for the State Commissions and District Forums.

The Supreme Court has therefore clearly taken contrary stands on this issue in the two instances that it came before it for consideration. The position of law was finally settled in *Rajeev Hitendra Patekar v. Achytut Kashinath Karekar and Another*.[11] In the said case, the respondent's wife had died due to alleged medical negligence on part of the appellants. However, the State Commission had dismissed the complaint for want of prosecution. Upon receiving an application for recalling the said order of dismissal from the respondent-complainant, the State Commission restored the complaint. The National Commission rejected the arguments of the appellants that the order of the State Commission was without jurisdiction, and dismissed the revision petition.

[10] *New India Assurance Co Ltd v R Srinivasan* (2000) 3 SCC 242.
[11] *Rajeev Hitendra Patekar v Achytut Kashinath Karekar* [2011] 10 SCR 513.

The court's attention was drawn to both the statutory provisions and the judgement of the Andhra Pradesh High Court in the case of *M/s Eureka Estates (P) Ltd. v. A.P. State Consumer Disputes Redressal Commission*,[12] wherein it was held that the State Commission and District Forum can only exercise those powers that have been specifically conferred on them by the Consumer Protection Act and Rules. This line of argument was further substantiated by the counsel for the appellants by placing reliance upon the Supreme Court's judgements in *Morgan Stanley Mutual Fund v. Kartick Das*[13] and *Gulzari Lal Agarwal v. Accounts Officer*[14] wherein it had laid down the principle that Consumer tribunals can derive powers only from express statutory provisions. On the other hand, the respondent contended that he had lost track of the matter due to old age and that the State Commission had rightfully restored the complaint. However, the Supreme Court ultimately held that the Tribunals are creatures of the statute, and hence the State Commission and District Forum cannot exercise any power that has not been expressly conferred upon them. Thus, the court held the judgment in the case of *Jyotsana* to be a good law with the judgment delivered in case of *New India Assurance* to be untenable.

## THE CURRENT LEGAL POSITION: A TRAVESTY OF JUSTICE?

The law, as it stands today, does not allow State Commissions and District Forums to recall their ex parte decisions or restore complaints dismissed in default. While some may hail this move as a step in the right direction, which may deter those sellers who are negligent in appearing before the tribunals and filing their written statement, the cascading effect of this position is that poor litigants, who are sometimes unable to adhere to the time frames stipulated under the Consumer Protection Act and by the Tribunals, are put in a position where they must incur the expenditure of travelling all the way to Delhi in order to get their complaints restored. The position of law, both in the statute books and as held by the Supreme Court in *Rajeev Hitendra Patekar* disadvantages the poorest of complainants, as it is the State Commission and District Forums that are unable to recall orders or restore complaints. At this point, it would be pertinent to draw attention to Article 39A of the Constitution of India. Whilst this Directive Principle of State Policy primarily deals with the issue of legal aid, it also states that the legal system must promote justice on the basis of equal opportunity. It further states that opportunities for securing justice should not be denied to any citizen by virtue of economic or other disabilities. This is also in consonance with the Preamble of the Constitution wherein the State

[12] *M/s Eureka Estates (P) Ltd v AP State Consumer Disputes Redressal Commission* AIR 2005 AP 118.
[13] *Morgan Stanley Mutual Fund v Kartick Das* (1994) 4 SCC 225.
[14] *Gulzari Lal Agarwal v Accounts Officer* (1996) 10 SCC 590.

undertakes to provide 'Justice – social, economic and political'. The current position of law ensures that the richest of litigants, having claims of over 1 Crore rupees are able to get speedy justice from the National Commission, which hears their complaints in the first instance,[15] whereas poorer litigants with smaller claims are unable to avail of the same benefits from their forum of choice. Thus, this position of law not only goes against the constitutional principles enshrined in Article 39A but also defeats the very essence of the Preamble as well.

This state of affairs, if anything, only serves to defeat the very essence of the Consumer Protection Act, which seeks to give speedy and cost-effective justice to consumers, particularly the ones belonging to the sections of society which do not have the resources or time to indulge in long-drawn and expensive litigation. A mere glance at the facts of *New India Assurance*[16] as well as *Rajeev Hirendra Patekar*[17] will reveal that it was, in fact, the consumer who suffered because of this skewed position of law.

## CONCLUSION: THE WAY FORWARD

Litigants, particularly consumers approaching the District Forum and State Commission, who tend to be laypersons, are often subject to supervening circumstances beyond their control. Yet, it is only the National Commission that has been vested with the power to restore complaints dismissed in default and recall ex parte decisions. The judgement in the case of *Rajeev Hirendra Patekar v. Achyut Kashinath Karekar*[18] continues to be the law of the land. Of course, the inherent shortcomings of the 2002 Amendment to the Consumer Protection Act were responsible for this vexed position of law continuing to exist post-2002 in the first place. As such, the only way forward appears to be moving requisite amendments to the Consumer Protection Act and endowing District Forums and State Commissions with the power to restore complaints dismissed in default and recall ex parte decisions. However, the exercise of this power by all three dispute redressal agencies must be subject to certain caveats to safeguard the interests of consumers. Granting the power of restoring complaints dismissed in default and recalling ex parte decisions will not only further the interests of justice but also reduce revisions filed before the National Commission, thereby reducing the seemingly insurmountable pendency and arrears of cases.

[15] The Consumer Protection Act 1986, s 21(a)(i).
[16] *New India Assurance Co Ltd v R Srinivasan* (2000) 3 SCC 242.
[17] *Rajeev Hirendra Patekar v Achyut Kashinath Karekar* (2011) 9 SCC 541.
[18] ibid.

# THE OLYMPICS' RULE 40: AN UNFAIR RESTRAINT ON THE ATHLETES' INTERESTS

* *AGNISH ADITYA & AKASH SRINIVASAN*

## INTRODUCTION

"*I am honored to be an Olympian ... but I can't Tweet about my only sponsor.*"[1]

Through the course of the XXXI Summer Olympics and the XV Paralympics at Rio, concerns regarding Rule 40 and ambush marketing were raised yet again. Although the International Olympic Committee (IOC) has relaxed the ambit of Rule 40 to a certain extent, it still raises concerns of encroaching the personal freedoms and liberties of the athletes.[2] Many athletes and organizations have taken to social media to voice their discontent against this over-restrictive rule. Agitation against this rule can be seen not only from participants in the Games, but also from viewers of the Olympics and Paralympics.

The intention behind Rule 40 was to prevent ambush marketing—a clever tactic employed by brands, where they intentionally associate themselves with events sans any agreement or any official association[3]in the Olympics and to protect the exclusive advertising rights of the Official Sponsors. It also seeks to prevent "over-commercialization of the Games"[4] and to retain the focus on the athletes' performance.[5] However, doubts have been raised whether Rule 40 is actually fulfilling its intended purpose or whether it acts as an unfair restraint and burden on the athletes by making them focus on adhering to the rule rather than on their performance. It is also argued that Rule 40 inhibits the athletes from commercializing on their hard work during their peak point of visibility. We further argue that the inaction by the NOCs (National Olympic Committees) (particularly focusing on the Indian Olympic Association and the

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[1] Martin Rogers, 'American Athletes Lead Revolt Against IOC Ban on Social Media Use to Promote Sponsors', (*Yahoo! Sports*, 30 July 2012), <http://sports.yahoo.com/news/olympics--u-s--leads-revolt-against-ioc-banagainst-social-media-use-to-promote-sponsors.html> accessed 22 August 2016.
[2] Rosie Duckworth & Annabel Hodge, 'Rio 2016: IOC's "relaxation" of Rule 40', (*Sports IP Focus*) <www.squirepattonboggs.com/~/media/files/insights/publications/2016/04/rio-2016-iocs-relaxation-of-rule-40/rio-2016-iocs-relaxation-of-rule-40.pdf> accessed 22 August 2016.
[3] Adam Epstein, 'The Olympics, Ambush Marketing and Sochi Media' (2013-14) 3 Sports & Ent LJ 109.
[4] ibid.
[5] International Olympic Committee, 'Rule 40 of the Olympic Charter: What you need to know as a Participant' <https://inside.fei.org/system/files/Rule_40-Rio_2016-QA_for_Athletes_0.pdf> accessed 22 August 2016.

Paralympic Committee of India) has annulled the effect of the IOC's relaxation of Rule 40. This essay attempts to analyze the concerns of the IOC and its official sponsors on one hand and that of the athletes on the other. In essence, this essay argues that Rule 40 is an over-restrictive burden on the athletes and does not serve the intended purpose.

## THE UNIQUE NATURE OF OLYMPICS AND RULE 40

The Olympic Games trace their roots to the 8th Century BC.[6] The Olympic Games were revived in 1896 that witnessed participation from only 14 countries.[7] The Modern Olympic Games has now become the largest and most participated international sporting event in the world. Many of the symbols and practices that are used today find their roots in the ancient Olympics.[8] Since then, it has undergone tremendous changes in its structure, governance, conduct and rules.

The Olympic Games today is more than just a sporting event: they've progressed to become a cultural, political and economic phenomenon. It has become the perfect media event for opportunists to harness the tremendous potential that the Games offer in terms of marketing and tourism, as a catalyst for development and as a source of inspiration for the youth.[9]

The International Olympic Committee (IOC) was one of the creations of Pierre de Coubertin in 1984. It is legally constituted as an International non-governmental, non-profit organization and is the governing body of the Olympic movement.[10] At the domestic level, there are National Olympic Committees (NOCs) which are organizations appointed by the IOC to "*develop, promote and protect the Olympic Movement in their respective countries.*"[11]

The Olympics has always strived to be a non-political and non-commercial movement. Bye-law 3 to Rule 40 of the Olympic Charter is one of the measures which seeks to preserve the Olympics as a non-commercial movement by preventing over-commercialization. Rule 40 restricts competitors in the Olympics from advertising any brand apart from the Official sponsors.

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[6] University of Pennsylvania Museum of Archaeology and Anthropology, 'The real story of the Ancient Oympic Games' (*Penn Museum*) <http://www.penn.museum/sites/olympics/olympicorigins.shtml> accessed 28 October 2016.
[7] Heather Whipps, 'How the Olympics Changed the World', (*Live Science*, 7 July 2012) <www.livescience.com/2733-olympics-changed-world.html> accessed 22 August 2016.
[8] Andy Miah and Beatriz Garcia, *The Olympics: The Basics* (Routledge 2012) 16.
[9] Kristine Toohey and AJ Veal, *The Olympic Games: A Social Science Perspective* (CABI 2009).
[10] Battonnier Rene Bondoux, 'The Legal Status of the International Olympic Committee' (1992) 4 Pace YB Int'l L 97.
[11] The International Olympic Committee, 'The Organisation' (*Olympic Games)* <www.olympic.org/ioc-governance-national-olympic-committees> accessed 22 August 2016.

The IOC's regulation of the athletes' advertising activities can be traced to Rule 26 of the Eligibility Rules of the International Olympic Committee, 1962. It states that "…*if an athlete is paid for the use of his name or picture or for a radio or television appearance, it is capitalization of athletic fame…*"[12] This rule was made with the intention of ensuring that the athletes always maintained their amateur status, thus preserving the sanctity of the Olympics. This eventually lead to the incorporation of Rule 40 into the Olympic Charter in 1991[13]with the aim of protecting the official sponsors of the Games, who invest astronomical amounts to gain exclusive global rights to be associated with it, from ambush marketing.

## THE CONTROVERSY BEHIND RULE 40

The purpose of Rule 40 is, not surprisingly, about the money. The purpose behind it is to prevent ambush marketing while the Games take place and granting the official sponsors' exclusive advertising rights. Rule 40 was incorporated with the purpose of limiting the number of companies that free-ride on the popularity of the Games.[14]

The essence of Rule 40 is that before and during the Olympics (the blackout period), no non-official sponsors are allowed to use the following words— '"2016", "Rio/Rio de Janeiro", "Gold", "Silver", "Bronze", "Medal", "Effort", "Performance", "Challenge", "Summer", "Games", "Sponsors", "Victory", "Olympian", "Olympic", "Olympics", "Olympic Games", "Olympiad", "Olympiads", "Citius, Altius, Fortius" (and any translation of it). They are not even allowed to associate their brand with the Olympic athletes, which includes wishing them on social media, and re-tweeting Olympic related tweets that feature them.

Athletes have vehemently voiced their frustration against Rule 40's restrictive nature and stringent enforcement. The London 2012 Olympics witnessed the rise of the #WeDemandChange campaign spearheaded by Olympic gold medalist Sanya Richards-Ross. This year, Emma Coburn registered her protest against Rule 40 by taking to the social media

[12] Olympic Charter, 'Eligibility Rules of the International Olympic Committee' <www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/1962-Eligibility_rules_of_the_IOC.pdf> accessed 22 August 2016.
[13] International Olympic Committee, 'Olympic Charter 1991' <www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/1991_Olympic_Charter.pdf> accessed 22 August 2016.
[14] Michael Sol Warren, 'Rule 40: An Olympics Advertising Explainer' (*Paste*, 18 July 2016) <www.pastemagazine.com/articles/2016/07/rule-40-an-olympics-advertising-explainer.html> accessed 22 August 2016.

and thanking her sponsor just a day before the commencement of the 'blackout' period.[15] Sportswear manufacturer Brooks Running Co. has initiated a campaign titled "Rule 40" which consists of social media posts opposing Rule 40. In another instance, Dawn Harper, an athlete from the United States, tweeted an image of herself with her mouth covered by a duct tape which read "Rule 40," making her opinion of Rule 40 amply clear.[16]

Amidst all the negative response Rule 40 is stirring up, this year's Rio Olympics gives us an opportunity to revisit the issue.

## THE CONFLICTING INTRESTS

Rule 40 creates a conflict between the interests of athletes and non-official sponsors on one hand, and the rights of the IOC and the official sponsors on the other hand. While the official sponsors need protection from ambush marketing, the athletes should be enabled to commercialize and promote themselves during the Games. It is important to understand the conflicting rights and interests and strike a balance between them.

### THE NEED TO PREVENT AMBUSH MARKETING

The IOC, being a non-profit NGO, heavily relies on funds from various sponsors, to make the Olympic Games happen. This year, the total funds secured from sponsors reached $1.3 Billion[17] and their official sponsors are indispensable to the organization of the event. Companies like Nike and Coca-Cola invest millions of dollars every year to procure such sponsorship contracts.[18] The reason why the sponsors shell out such generous amounts for the Olympic Games is because of the enormous marketing opportunity it gives them. In terms of media coverage, the Olympics are one of the world's largest sporting events. The London 2012 Olympic Games, for example, garnered 3.6 billion unique viewers throughout the games.[19]

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[15] Lori Shontz, 'Rio Runners Finding Creative Ways Around Olympic Rule 40' (*Runner's World*, 19 August 2016) <www.runnersworld.com/olympics/rio-runners-finding-creative-ways-around-olympic-rule-40> accessed 22 August 2016.

[16] Adam Shergold, 'US Athletes Launch 'Gag' Protest Against Olympic Rule that Bans Them from Promoting Their Sponsors' (*Mail Online*, 31 July 2012) <www.dailymail.co.uk/news/article-2181501/London-2012-US athletes-launch-gag-protest-Olympic-rule-bans-promoting-sponsors.html> accessed 22 August 2016.

[17] Ben Chapman, 'Rio 2016: The richest Games in 120 years of Olympic history' (*Independent*, 4 August 2016) <www.independent.co.uk/news/business/analysis-and-features/rio-2016-olympic-games-richest-ever-usain-bolt-mo-farah-a7171811.html> accessed 22 August 2016.

[18] Daniel Kaplan, 'Nike Spending Billions for Endorsements and Sponsorships' (*Portland Business Journal, 17 April 2008*) <www.bizjournals.com/portland/stories/2008/04/14/daily39.html> accessed 22 August 2016.

[19] Sponsorship Intelligence, 'London 2012 Olympic Games Global Broadcast Report' <https://stillmed.olympic.org/Documents/IOC_Marketing/Broadcasting/London_2012_Global_%20Broadcast_Report.pdf> accessed 22 August 2016.

Also, brands feel that Olympic casts over them a 'halo effect' which increases their credibility and this is why they find Olympics sponsorship to be a really good marketing strategy apart from the monetary benefits they get during the games.[20]

With such huge investment, the sponsors of the Games have a vested interest in ensuring that they extract maximum possible returns out of such sponsorship arrangements. The downside here is the continuing threat to the sustainability of these sponsorship arrangements, and failure on part of the IOC to address these concerns may lead to, these corporations becoming reluctant to invest in future editions of the Games. That threat is ambush marketing. Ambush marketing tends to 'devalue' the exclusive rights granted by the IOC and other International Sporting Organizations, such as the National Basketball Association (NBA), International Federation of Association Football (FIFA), National Football League (NFL), etc. Brands do this to 'free-ride' on the popularity of the event to create positive publicity for their own products or services.[21]

At first glance, the practice of ambush marketing appears no different from competitive marketing. However, ambush marketing discourages the companies to invest huge amounts on sponsorship agreements as they could achieve equivalent returns by engaging in ambush marketing and spending a fraction of the amount.

The nature of sporting events, such as the Olympics, makes them an obvious target for ambush marketing. Moreover, sports spectatorship is increasing[22] and that, in turn, generates opportunities for corporations that seek to advertise during sporting events.[23] That same popularity, though, makes sports advertising very expensive, which creates the incentive to engage in ambush marketing.[24] The cost of hosting a modern Olympic Games imposes an astronomical burden on the host country. Sponsorship agreements are probably the best way to offset the costs that go into organizing the event. For the Olympics to attract sponsors, it needs

[20] John A Davis, *The Olympic Games Effect*: *How Sports Marketing Builds Strong Brands* (Wiley 2012) 33.
[21] The Chartered Institute of Marketing, 'Ambush Marketing and the Law' <www.cim.co.uk/media/1979/cim-insights-ambush-marketing-and-the-law.pdf> accessed 22 August 2016.
[22] Simon Hendery, 'Drink up, It's Time to Cash in on the Cup' *New Zealand Herald* (20 November 2003) <www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=3535083> accessed 22 August 2016.
[23] Brian Stelter, 'NBC Making the Most of Its Super Bowl Coverage' *New York Times* (29 January 2009) <www.nytimes.com/2009/01/29/business/media/29adco.html?_r=0> accessed 22 August 2016.
[24] John A Tripodi and Max Sutherland, 'Ambush Marketing- 'An Olympic Event'' (2000) 7 J Brand Mgmt 412.

to ensure a certain degree of protection with regards to these exclusive sponsorship rights while fending off competitive advertising.[25]

One of the pertinent concerns for the IOC, this time around, is the ambush marketing campaigns taking place in social media platforms. Social media has been cleverly used for ambush marketing by various brands including Nike, Pepsi and Google.[26] Social media platforms have become extremely difficult to monitor due to a shift towards video based social networking platforms.[27] This makes the task of tackling ambush marketing in the social media, a herculean one.

In order to protect the official sponsors from such ambush marketing, the IOC has taken several measures which include facilitating enactment of national legislations in host countries as well its own rules and codes of conduct.[28] The NOCs are also extremely important for protecting the Olympic trademarks in their respective countries. Rule 40 is one of the measures which address this issue.

## ATHLETES' RIGHTS TO COMMERCIALIZE ON THEIR PERFORMANCE

Even though the IOC does not require the competitors to be amateurs, the athletes who participate in the Olympics often struggle to make the ends meet. Even in countries like the United States most athletes earn a living by taking up odd jobs.[29] A great number of athletes survive on incomes below the poverty line, which is mostly made up of the prize money, sponsorships and part time jobs.[30] India has the worst Olympic record in terms of medal per head, and it is attributed to meagre spending on athletes.[31] Stories of Indian athletes ending up

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[25] David Vinjamuri, 'U.S. Athletes are Right about Twitter: Rule 40 Exposes The Flaw in Olympic Thinking' (*Forbes*, 1 August 2012) <www.forbes.com/sites/davidvinjamuri/2012/08/01/the-athletes-are-right-about-twitter-rule-40-exposes-the-paradox-at-the-core-of-the-olympic-games/#2eee51991016> accessed 22 August 2016.

[26] 'Ambush Marketing at the Olympics: Driven by Social Media and Online Video' (*Knowledge Vision*, 20 August 2012) <www.knowledgevision.com/ambush-marketing-at-the-olympics-driven-by-social-media-and-online-video> accessed 22 August 2016.

[27] Max Willens, 'Rio Olympics Advertising Problems: Snapchat and Ambush Marketing Has IOC Throwing up Hands' (*International Business Times*, 29 June 2016) <www.ibtimes.com/rio-olympics-advertising-problems-snapchat-ambush-marketing-has-ioc-throwing-hands-2385395> accessed 22 August 2016.

[28] Suzan Ryan, 'Ambush marketing and the Rio Olympics' (*Mumbrella*, 11 March 2016) <https://mumbrella.com.au/ambush-marketing-rio-olympics-stephen-von-muenster-352277> accessed 22 August 2016.

[29] 'How Olympic Athletes Make a Living' (*Sports Management Degree Hub*) <www.sportsmanagementdegreehub.com/olympic-athletes-salaries/> accessed 22 August 2016.

[30] Rule40, 'Facts, reasons to join the fight' (*rule40*) <http://rule40.com/> accessed 23 August 2016.

[31] Kumar Vikram, 'Meagre Spending On Players Behind India's Poor Olympic Show' (*Business Today*, 12 August 2016) <www.businesstoday.in/current/world/meagre-spending-on-players-behind-indias-poor-olympic-show/story/236077.html> accessed 23 August 2016.

in poverty are not uncommon.[32] Even the IOC officials are compensated much more than the athletes, who only get to enjoy a miniscule fraction of what the Olympics earns.[33]

The plight of the Paralympians is also a major concern. This year, the Indian Paralympians have brought laurels for the country by outshining their Olympics counterparts.[34] However, their situation is far worse than that of the Olympians. Not only are they socially discriminated and ignored, but they are also subjected to day to day institutional barriers.[35] The Paralympics are a very important event for them to get noticed and bring a change in the outlook towards physically challenged people. Rule 40 not only obstructs them from appearing in the limelight, but also impairs their chances of being recognized by potential sponsors.

Since, the Olympics and Paralympics give amateur athletes a platform to exhibit their skills and years of hard work and perseverance, it is natural for them to expect monetary gains through it. The athletes' have often lamented that Rule 40 inhibits their right to commercialize on their performance by acknowledging their sponsors during their peak point of visibility. Sponsorships and endorsements are the main source of income for most athletes and it is imperative that they build strong relationships with their sponsors and give them a good image.

## IS RULE 40 STRIKING A BALANCE?

The purpose behind Rule 40 was to prevent ambush marketing. However, as can be seen, it also places unfair restraints on the athletes' interests. Apart from the fact the rule does not further the objective of preventing ambush marketing, it also exceeds its scope by restricting the athletes' personal rights.

### RULE 40 DOES NOT HELP PREVENT AMBUSH MARKETING

[32] Mail Today Bureau, 'Athletes Who Brought Laurels to the Nation Are Languishing in Poverty, Thanks to Centre's Apathy' (*India Today*, 21 April 2013) <http://indiatoday.intoday.in/story/athletes-in-poverty-centre-negligence/1/266857.html> accessed 23 August 2016.
[33] Will Hobson, 'Olympic Executives Cash in on a 'Movement' That Keeps Athletes Poor' *The Washington Post* (30 July 2016) <www.washingtonpost.com/sports/olympics/olympic-executives-cash-in-on-a-movement-that-keeps-athletes-poor/2016/07/30/ed18c206-5346-11e6-88eb-7dda4e2f2aec_story.html> accessed 23 August 2016.
[34] Karan Deep Singh, 'India's Paralympians Are Winning More Medals than Their Olympic Colleagues' *The Wall Street Journal*, (14 September 2016) <http://blogs.wsj.com/indiarealtime/2016/09/14/indias-paralympians-are-winning-more-medals-than-their-olympic-colleagues/> accessed 28 October 2016.
[35] Firstpost.com, 'India's Paralympians want to know why their achievements are ignored' (Firstpost, 23 March 2015) <www.firstpost.com/sports/discriminated-and-ignored-the-sad-story-of-indias-paralympians-2053495.html >accessed 28 October 2016.

Although the main purpose of Rule 40 is to prevent ambush marketing, it is difficult to argue it has succeeded in doing so. Even if athletes are not involved, organizations can still engage in clever ambush marketing tactics and hijack the event. The classic example of Nike's ambush needs mention to this effect. Even though Michael Johnson's golden spikes incident occurred, it could be treated as an unintentional ambush.[36] The real strategy was in the highly creative commercials which were visible all around Atlanta, distributing Nike flags and the opening of a Nike showroom in the vicinity of the Olympics Village.[37]

Constraints tend to make people more creative and "strike the innovation fire".[38] This increases their ability to innovate and find new ways to circumvent the rule, and yet enjoy the benefits which they are not entitled to. Moreover, how difficult is it for a person to do a Google or Wikipedia search on a player and find out which brand he or she endorses? The more the IOC restricts and make athletes do absurd things like forcefully making them paste tape on their apparels or even skin to cover nearly invisible logos of Normal Operating Procedures (NOPs)[39], the more it makes spectators curious about the controversy, which ultimately reveals the corporation endorsed by the player.

It can, thus be argued that Rule 40, by itself, fails to curb ambush marketing; since brands will often come up with creative campaigns which need not involve athletes.The IOC's endeavors to generate a positive image of their sponsors and acknowledge their efforts are thwarted by creative ambush marketing campaigns.[40] It makes it disastrous for the IOC.

## IT UNFAIRLY RESTRICTS ATHLETE'S RIGHT TO FREE SPEECH AND TO COMMERCIALIZE ON THEIR PERFORMANCE

Rule 40 has been enforced against seemingly harmless social media posts by athletes. It deprives the athletes of their opportunity to acknowledge their sponsors end endorsers. This subsequently deprives them of their right to commercialize on their hard work and enjoy the fruits of their labour.While it is a matter of honor and prestige to represent one's nation, from

[36] Derrick Wright, 'The Danger of Ambush Marketing in the Olympic Games, and Balancing the Interests of the Athlete's Sponsors with the Olympics' Official Sponsors' (2013-14) 3 Sports & Ent LJ 109.
[37] Epstein (n 3).
[38] Tom Jacobs, 'Constraints Can Be a Catalyst for Creativity', (*Pacific Standard*, 25 April 2016) <https://psmag.com/constraints-can-be-a-catalyst-for-creativity-d5997d2030f7#.ertdfk8nh> accessed 22 August 2016.
[39] Abe Sauer, 'London 2012 Watch: Olympic #Rule40 Backfires as Fans Embrace Non-Sponsors' (*Brand Channel*, 6 August 2012) <http://brandchannel.com/2012/08/06/london-2012-watch-olympic-rule40-backfires-as-fans-embrace-non-sponsors/> accessed 22 August 2016.
[40] ibid.

another perspective it can also be said that athletes tend to be unpaid entertainers.[41]In a world which is getting increasingly competitive, this restriction seems unnecessary and unfair.

Athletes have taken to social media and other forms of media to express their disappointment with this rule, which has led Rule 40 to backfire. For instance, U.S. Star Runner Nick Symmonds has criticized the IOC's measures vehemently, lamenting that sponsorship agreements are the only way to keep training and pursue their Olympic dreams. Dominique Blake, a United States track star, also tweeted: "Trying out my new Headphones from my sponsor that I cannot name SMh #rule40." The IOC fails to understand that with the social media trend, one such tweet will lead to many others probing the matter, and ultimately revealing the NOP. It imposes a burden on the athletes to be overcautious before using social media and impinges on their free speech rights. Even though free speech rights might not be enforceable against the IOC or NOCs, this is a universal right that the IOC must give deference to.[42]

Moreover, Rule 40 puts an unnecessary burden on the athletes, coaches, official, etc. to prevent their non-official sponsors from using their name, person, picture, etc. in advertisements during the blackout period of the Games. Ironically, the IOC proclaims the goal of Rule 40 to ensure the focus to remain on the athletes' performance. But what the IOC fails to understand is that by imposing such a burden on the athletes, they (the athletes) would not be able to focus on their own performance, and would have to additionally keep an eye on Rule 40's restrictions. Why should the burden be on the athletes? The authors believe that this burden must be transferred onto their respective sponsoring corporations, considering that they are the ones who want to be promoted, and they should be carrying out their promotional activities within the reasonable bounds of Rule 40.

It is for these undue restrictions that athletes have vehemently criticized Rule 40 and in turn attracted negative attention for the Olympics movement. Commentators have noted that such negative sentiments must be avoided in order to reach the younger generation who are active on social media platforms.[43] Unfairly restricting the athlete's right to use social media and to

[41] David Vinjamuri, 'U.S. Athletes Are Right about Twitter: Rule 40 Exposes the Flaw in Olympic Thinking' (*Forbes Magazine*, 1 August 2012) <www.forbes.com/sites/davidvinjamuri/2012/08/01/the-athletes-are-right-about-twitter-rule-40-exposes-the-paradox-at-the-core-of-the-olympic-games/#2eee51991016> accessed 22 August 2016.
[42] Alexander Larry, 'Is Freedom of Expression a Universal Right?' (2013) 50 San Diego L Rev 707.
[43] Megan Ormond, '#WeDemandChange: Amending International Olympic Committee Rule 40 for the Modern Olympic Games' (2014) 5 Case W Res JL Tech & Internet 179.

commercialize on their performance only brings contempt towards the Olympics movement, which itself generates huge revenues but deprives the athletes of it.

### THE SPONSORS OF THE ATHLETES NEED TO GET RECOGNIZED TOO

An argument supporting athletes' right to commercialize on their performance cannot be separated from the argument that the non-official sponsors of the athletes need their recognition too. Many small sponsors do not get the recognition they deserve for training, nurturing and endorsing athletes for the Olympics. For instance, Oiselle, a small size woman's running and athletic apparel company sponsors 32 elite athletes. They claim that such sponsorship payments are a significant part of their budget. There's zero visibility for such companies and there's zero visibility for their Olympic athletes to talk about them. For bigger companies, such as Under Armour, going through the waiver process might not have a significant impact on their budget. Oiselle ultimately did not pursue the waiver to get their proposed advertising campaigns approved.[44] These smaller companies tend to see such sponsorships as unworthy of their money, and ultimately withdraw, having a consequent negative impact on the athletes.

It can fairly be argued that non-official sponsors should be prevented from advertising in the Olympic venue to prevent ambush marketing. But even then commentators have argued that ambush marketing should not be viewed as an immoral or disgraceful tactic, considering that the IOC itself is a highly commercialized and political entity.[45] Creative marketing tactics employed by various brands are often viewed as clever and get positive response and may even dilute the effect of the official sponsors. Allowing certain amount of advertisements, especially in the social media, might counter that effect as those sponsors would not feel the need to antagonize the IOC or the official sponsors.

## RECOMMENDATIONS

[44] Kelly O' Mara, 'What is the Fight over Rule 40 and Why You Should Care' (*Competitior.com*, 1 July 2016) <http://running.competitor.com/2016/07/features/what-is-the-fight-over-rule-40-about-and-why-should-you-care_150052> accessed 22 August 2016.
[45] Arthur Solomon, 'The Case for Ambush Marketing' (*O'Dwyer's*, 31 December 2013) <http://www.odwyerpr.com/story/public/1650/2013-12-31/case-for-ambush-marketing.html> accessed 22 August 2016.

The primary issue, which Rule 40 gives rise to, is the issue of balancing the rights of the athletes and that of the IOC and its official sponsors. The official sponsors' and the IOC's rights cannot be undermined due to the huge transactions involved, however the athletes are the Olympics viewers' primary concern. The IOC has moved past its origins to become an increasingly profit-oriented commercial entity. The 'unique' nature it seeks to preserve is leading to absurd restrictions. The IOC's focus now should be towards betterment of the athletes.

It is suggested that restricting athletes from appearing in advertisements in traditional media can be seen as a reasonable restriction.[46] However, regulating expression on social media encroaches upon personal liberty of the athletes, especially the freedom of speech and expression. Such stringent regulations are not viewed favorably by either the athletes or the viewers; but are rather subject to strong criticism. This has made the IOC subject to animosity and widespread criticism. Going beyond control of advertising in the Olympic venue, and trying to regulate the conduct of athletes in their social media handles and their public interaction sponsors, who have invested in them, will ultimately antagonize the Olympic Games. Further, the relaxation of this rule will not harm the official sponsors adversely.

Closer home in India, the NOCs for India, i.e., the Indian Olympic Association (IOA) and the Paralympic Committee of India (PCI) need to endeavor to support our athletes in every manner possible. The dormancy of the Indian NOCs has severely influenced the Indian Olympians and Paralympians throughout the years. Particularly this year, the IOA and the PCI have thwarted the chances of Indian athletes getting a Rule 40 exemption by not establishing clear procedural guidelines in this regard.[47]

It is no secret that the athletes are often deprived of institutional support from the government during the most valuable period where they can leverage and foster long-term associations with potential sponsors. In such cases, a Rule 40 exemption would at least allow them to harness the tremendous coverage the Olympics provide.

## CONCLUSION

[46] Ormond (n 43).
[47] The Sports Law & Policy Centre, 'Rule 40: A Lost Opportunity for Indian Olympians and Paralympians' (*Sportslaw.in*, 3 August 2016) <http://sportslaw.in/home/wp-content/uploads/2016/08/SLPC-Note-on-IOA-and-Rule-40.pdf> accessed 28 October 2016.

Authors have made extreme arguments that Rule 40 should be done away with.[48]However, we believe this will not be a cogent solution as the application of Rule 40 in traditional media is a reasonable restraint. We suggest that posts of acknowledgment and thanks should not be treated as advertising. The sanctions should also be reduced, as disqualifying an athlete or stripping her of her title is too harsh for just a tweet or blog post. Rule 40 must make clear demarcations between what is a legitimate post and what is not and must not use sweeping general terms, which confuses the athletes and in effect chills their thoughts.

Further, it is not enough for the IOC to relax Rule 40 and allow for exemptions. Inaction by the NOCs thwarts all such efforts. In such cases, the IOCs must see to it that the NOCs are aware of such developments and act upon it. The ultimate burden in this regard is, however, on the NOCs themselves to ensure that the athletes who toil to bring laurels to their nation receive adequate support.

Although Rule 40 was framed with legitimate intentions of protecting the official sponsors' valuable investments, the IOC lost track of how social media operates and thereby lead it to its backfire. Rule 40, as it exists now, is by no means a measure that is effective and is helping in preserving the 'unique nature' of the Olympics. The Olympics must take into account the hardships the athletes face and realize how unfair and restrictive Rule 40 is. The social media backlash, which Rule 40 is facing, has already brought disrepute to the games. The IOC must recognize that the athletes are the most important part of the Olympics. Regulating technology or social media is not an exercise that the IOC should indulge in as such regulations have never been successful in the past.

[48] Breeanne Nicole Glaviano, 'Ambush Marketing in Mega-Sporting Events: Drawing the Line with Freedom of Expression' (Thesis, The University of Arizona 2013) <http://arizona.openrepository.com/arizona/bitstream/10150/297615/1/azu_etd_mr_2013_0082_sip1_m.pdf> accessed 22 August 2016.

# OBERGEFELL AND NALSA: A COMPARATIVE LEGAL ANALYSIS OF DECISIONS IN U.S. AND INDIA ON LGBT RIGHTS

* *ANU SHRIVASTAVA*

## INTRODUCTION

In a celebrated judgment delivered in June 2015, *Obergefell v Hodges,*[1] the Supreme Court of the United States held that states, that did not recognise marriage between homosexuals, violated the Fourteenth Amendment's Equal Opportunity and Due Process Clause.[2] This judgment came subsequent to decisions in the U.S. that struck down laws that made homosexuality an offence, or otherwise discriminated against homosexuals. The minority opinion has considered the majority opinion led by Justice Kennedy as judicial overreach, impinging on the realm of the legislature. According to the minority, the majority judges had effectively decided to change the definition of marriage by flouting the democratic process and disregarding separation of powers between the legislature and the judiciary.

Strikingly different to what was held in the U.S., the Indian Supreme Court in *Suresh Kumar Koushal v Naz Foundation & Ors.*[3] reversed a decision of the Delhi High Court[4] which had decriminalized homosexuality by reading down the provisions of Section 377 of the Indian Penal Code, 1860 (IPC). This decision was shortly followed by another decision of the Supreme Court, *National Legal Services Authority v Union of India,* (*NALSA*)[5] which legally recognized trans-genders as a third gender, and asked the executive to undertake measures in furtherance of their upliftment. The inconsistency between the two judgments with a bearing upon the rationale of the decisions in the two countries is the focal point of this article. The crux of the matter would essentially boil down to the debate between judicial restraint and judicial activism. While the Indian Courts have usually donned their activist-hat in securing

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[1] *Obergefell v Hodges* 576 US 1 (2015).
[2] US Const amend XIV 1868, s 1.
[3] *Suresh Kumar Koushal v Naz Foundation & Ors* (2014) 1 SCC 1.
[4] *Naz Foundation v Govt of NCT of Delhi,* (2009) SCC OnLine Del 1762.
[5] 2014 AIR 1863 (SC).

rights for various sections of the society, was it correct for the Supreme Court to shirk away from its responsibility to do so in *Koushal*? Moreover, what repercussions would the decision in *NALSA* have upon the future interpretations of Article 14 and 15 of the Constitution of India[6] (The Constitution)?

In a jurisdiction that follows a strict separation of powers doctrine,[7] the Court while interpreting the provisions of the constitution in an unorthodox manner, went on to actively confer rights to homosexuals. On the other hand, in the humble opinion of the author, the Indian Supreme Court failed to give satisfactory explanation for not interpreting Article 14, 15 and 21 of the Constitution in a manner to avoid discrimination on the basis of sexual orientation, and for ensuring dignified treatment of homosexuals. There seem to be glaring contradictions in the Supreme Court's reading of Fundamental Rights in *Koushal* and *NALSA*. In *Koushal*, the Court failed to interpret Fundamental Rights harmoniously to decriminalize homosexuality, which would have allowed homosexuals to lead a dignified life. On the other hand, in *NALSA*, the Supreme Court adopted the harmonious interpretation of Fundamental Rights to give legal recognition to trans-genders. The Supreme Court's judgement in *NALSA* is sufficient to make arguments against the decision in *Koushal*. Homosexuals, akin to trans-genders, should not be subjected to differential treatment only on the basis of their sexual orientation. This is the basis of Article 14 and 15 of the Constitution that seems to have been overlooked by the Supreme Court while deciding *Koushal*.

The first part of the article analyses the decision of the U.S Supreme Court followed by the Indian cases on homosexuality. The next section seeks to undertake a comparative analysis of these two decisions and underline the differences between the two. This is followed by the last section dealing with the general duty of courts to judicially review laws vis-a-vis the responsibility to not impinge upon the legislature's realm while exercising judicial restraint. In conclusion, the article proposes that irrespective of the debates surrounding judicial review and judicial deference, furtherance of the interests of the people is what should be given paramount consideration in order to strike a balance between the functions of judiciary, executive, and the legislature.

[6] The Constitution of India 1950, art 14 and 15.
[7] M P Jain, *Indian Constitution Law* (6th edn, LexisNexis 2010) 16.

## OBERGEFELL TO NALSA

There has been a recent trend across jurisdictions to recognise the rights of homosexuals and protect them from discrimination based on their sexual orientation.[8] The decision of the United States Supreme Court in *Obergefell* went a step further in assuring rights for homosexuals by declaring that all states in the U.S. had an obligation to recognise marriages between homosexuals, even if the laws in that state restricted the definition of marriage only to heterosexual couples. The Court held that not recognising homosexual couples as married violated the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.[9] The right to marry had been recognised in previous cases to be a substantive right capable of being protected under the Due Process and Equal Protection Clauses.[10] With *Obergefell*, this protection was extended to same sex couples, whose marriages might have been legally valid in states that recognised same-sex marriages, but were otherwise not recognised by the laws of other states in the country.

On the other hand, in India, the Supreme Court reversed Delhi High Court decision in *Naz Foundation v Govt of NCT of Delhi*[11] which had decriminalised homosexuality by reading down the provisions of Section 377 of the IPC. The decision of the Supreme Court had attracted criticism from various sections of the society including academicians and eminent lawyers for the lack of coherent reasoning in arriving at its conclusion.

Shortly thereafter, the same court, in *NALSA* recognised trans-genders as a third gender and asked the Government to undertake steps for their betterment including providing for reservation in government jobs. The Court's reasoning was based on the practical understanding that not recognising them as a third gender led to widespread discrimination against the entire transgender community. Article 14, 15, 19 and 21 of the Constitution mandate that trans-genders should be allowed to lead a dignified life and enjoy civil rights which are based on gender identification. Most of all, the main thrust behind the Supreme Court's reasoning was to recognise an otherwise emancipated community in order to remove the stigma

[8] *Corbett v Corbett* [1970] 2 All ER 33; *Attorney General v Otahuhu Family Court* (1995) 1 NZLR 603; *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6; , *AB v Western Australia* (2011) HCA 42; *Bellinger v Bellinger* [2003] All ER 593; *Norrie v NSW Registrar of Births, Deaths and Marriages* (2013) NSWCA 145.

[9] US Const amend XIV 1868, s 1.

[10] *Loving v Virginia* 388 US 1, 12 (1967); *Zablocki v Redhail* 434 US 374, 384 (1978); *Turner v Safley* 482 US 78, 95 (1987); *Goodridge v Department of Public Health* 440 Mass 309, 798 NE 2d 941 (2003).

[11] *Naz Foundation v Government of NCT* [2010] Cri LJ 94.

attached and to confer on them the right to freedom of expression and the right to live with dignity.

The three decisions, *Obergefell, Koushal* and *NALSA*, illustrate the different interpretations on a similar issue in determining the extent of rights enjoyed by the citizens and the different conclusions that can be reached via recourse to judicial review. An understanding of the decisions in the U.S. and the three judgments in India would be necessary to better appreciate the reasoning adopted by courts in both the jurisdictions and their correctness. We shall first look at the decisions in the United States followed by those in India.

## THE KENNEDY TRIUMVIRATE – U.S. DECISIONS ON HOMOSEXUALITY

Justice Kennedy is remembered for his judgments in the three sexual orientation cases that came up before the Supreme Court of U.S. before the decision in *Obergefell*: *Romer v Evans,*[12] *Lawrence v Texas*[13] and *United States v Windsor.*[14] Much has been written about the treatment of rights of same sex couples under the Equal Protection Clause and the Due Process Clause.[15]

In *Romer*, the Court invalidated an amendment to the Colorado Constitution[16] which repealed local laws that prohibited discrimination on the basis of sexual orientation. Justice Kennedy, writing for the Court, went on to hold that the amendment had only placed a disability on a single group, making it an invalid form of legislation."[17]

Next, in *Lawrence*, a Texas statute[18], which provided for the criminalisation of sodomy performed by same-sex couples was challenged before the Court, on the basis of the Equal Protection and Due Process Clause.[19] In this case, Justice Kennedy noted that an analysis of the case could not be based solely on equal protection grounds. According to him, the rights at issue were also protected by the substantive guarantee of liberty, and a decision based on due process grounds encompassed equal protection interests as well.[20] The Court relied on the dissent by Justice Steven in *Bowers v. Hardwick,*[21] stating that decisions by married persons in

[12] *Romer v Evans* 517 US 620 (1996).
[13] *Lawrence v Texas* 539 US 558 (2003).
[14] *United States v Windsor* 133 S Ct 2675 (2013).
[15] Stacey Sobel, 'Windsor Isn't Enough: Why The Court Must Clarify Equal Protection Analysis For Sexual Orientation Classifications' (2014) 24 Cornell Journal of Law & Public Policy 493.
[16] Colo Const amend II 1992.
[17] *Romer* (n 12) 627.
[18] Texas Penal Code 2003, Ann s 21.06(a).
[19] US Const amend XIV, s 1.
[20] *Lawrence* (n 13) 575.
[21] *Bowers v Hardwick* 478 US 186 (1986).

their individual capacities about their physical relationship (even in furtherance of procreation) is a liberty that is covered by the substantive component of the Fourteenth Amendment's Due Process protection.[22] The Court ruled that the Texas law[23] did not further any legitimate state interest and made same-sex activity legal in every U.S. state and territory by invalidating the sodomy laws in 13 other states in the same stroke.

In the third case, *United States v Windsor*,[24] the Court held that Section 3 of the Defence of Marriage Act, ("*DOMA*") 1996 was unconstitutional on the ground that a limitation on the recognition of marriages only to the union of man and woman resulted in the deprivation of the liberty of homosexuals. This decision also relied on the linkage between protection of liberty by the Due Process clause and the Equal Protection clause. The DOMA had no legitimate purpose, like its predecessors, and did not refer to a specific standard of review which had to be applied to the case at hand. In all the three above mentioned cases, the government's justifications could not satisfy even the lowest standard of review. The Court's decision hinged on the reasoning that no legitimate purpose was being served by the DOMA and the state could not justify its purpose and effect to disparage and injure the personhood and dignity of citizens. However, the judgement does little to clarify the exact hurdle or threshold that the government was required to meet.[25]

## THE INCONSISTENT POSITION IN INDIA

The Delhi High Court in *Naz*[26] struck down Section 377 of IPC which made sexual intercourse between two men a crime, as being violative of Articles 14, 15 and 21 of the Constitution. The Court stated that there was no rational basis for differentiating between homosexuals and straight couples and targeting homosexuals as a class. It also stated that the section did not serve any legitimate interest of the State and the provision violated Article 15 of the Constitution, which prohibits discrimination on the basis of sex. The term 'sex' should not solely be restricted to gender, but should be read to include sexual orientation. The impugned provision was also held to be against the right to privacy of homosexual couples and was therefore violative of Article 21 of the Constitution.

[22] *Lawrence* (n 13) 578.
[23] Texas Penal Code 2003, Ann s 21.06(a).
[24] *United States v Windsor* 133 S Ct 2675 (2013).
[25] *United States v Windsor* 133 S Ct 2675 (2013); Laurence H Tribe, 'Lawrence v Texas: The Fundamental Right that Dare Not Speak Its Name' (2004) 117 Harvard LR 1893, 1897-98.
[26] *Naz Foundation v Government of NCT* 2010 Cri LJ 94.

On appeal, Apex court considered different sexual conducts that were covered by the impugned provision and arrived at the conclusion that the provision was justified in differentiating between 'ordinary sexual conduct' and 'carnal intercourse against the order of nature'. What is meant by 'ordinary' and what is meant by 'intercourse against the order of nature' has not been clarified on the basis of any scientific, psychological or behavioural study. The term 'ordinary sexual conduct' has been equated with sexual conduct practised by a majority of the population which undermines the foundation of the idea behind protecting minority rights. The judgment creates two different classes, without basing it on any intelligible differentia. Even if an intelligible differentia is found, there is no rational nexus or legitimate governmental objective behind the differentiation.[27] On this basis alone, the requirements of upholding the provision have not been met.

The Court relied on the doctrine of the presumption of constitutionality of a statute, and held that there was nothing in the section which violated the right to equality or the right to life. However, the judgment lacked convincing arguments to show that the provision did not violate any of the fundamental rights, or reasons to hold that the Delhi High Court was wrong in its approach. There is nothing in the judgement to show why homosexuality is 'carnal intercourse against the order of nature' and not natural. It was the basis of this differentiation which was challenged before the Delhi High Court and the High Court did not find any reasonable classification. A practice by majority of the population of being heterosexual does not automatically mean that anything else should be considered 'against the order of nature.'

Next, the Supreme Court held that Section 377 of IPC was a neutral provision and was not directed against any class or community. By doing this the Supreme Court did not consider the full effect and impact of the provision. The Court should have weighed the real effect and impact of the provision on fundamental rights while deciding its constitutionality in light of its earlier decision in *Minerva Mills v Union of India*.[28]

Finally, the Supreme Court also had a problem with the High Court's reading down of the provision to exclude homosexuality.[29] This, the Supreme Court considered was beyond its

[27] Gautam Bhatia, 'The Unbearable Wrongness of Koushal v Naz Foundation Indian Constitutional Law and Philosophy' (WordPress: Indian Constitutional Law and Philosophy, 11 December 2013.) <https://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation/> accessed 26 October 2016.
[28] *Minerva Mills v Union of India* [1980] AIR 1789 (SC).
[29] *Suresh Kumar Koushal v Naz Foundation* [2014] 1 SCC 132.

powers. However, the doctrine of reading down a provision has been applied by the Indian judiciary in various cases.[30] This was not considered by the Supreme Court in its decision.

Soon after the decision in *Koushal*, the Supreme Court took a progressive stand in *NALSA* in recognising trans-genders as a third gender and asking the Government to undertake steps for their upliftment. The reasoning adopted by the Supreme Court here is quite far-removed, if not contrary to the orthodox stand taken by the Court in *Koushal*. The judgment seems to mirror the decision of the Delhi High Court in *Naz*. The Court recognised sexual and gender identity as a component of Article 21of the Constitution and the right to live with dignity. The Court in *NALSA* also considered the right to freedom of expression and held that Article 19(1)(a) includes the freedom to express a chosen gender identity through speech, manners, clothing etc. [31]

Regarding Articles 14 and 15 of the Constitution, the Supreme Court observed that Article 14 does not only ensure equal protection before law but also confers a positive obligation on the State to ensure equal protection by bringing in necessary socio-economic changes. Since the trans-genders had been facing discrimination in all spheres of the society, not recognising their identity would deny them equal protection, especially in the fields of education, health, employment, etc. The Supreme Court also considered Articles 15 and 16 of the Constitution and held that the term 'sex' should also include gender identity and should not be limited to the biological sex of a male or a female.[32] Consequently, the Supreme Court read the Fundamental Rights mutually, harmoniously and in a broader manner in NALSA as opposed to a narrower and more-orthodox view taken by it in *Koushal*.

## THE PATH AHEAD OF NALSA

The Supreme Court in *NALSA* held that Article 15 of the Constitution prohibits discrimination on the basis of sexual identity. On the other hand, in *Koushal*the court held that there was no Fundamental Right which had been affected. In light of this contradiction, the decision of the Supreme Court in *Koushal* needs to be re-considered by a higher bench. A peculiar observation could also be noted in this context at paragraph 20 of the judgement in *NALSA* where the Supreme Court has tried to determine the meaning of sexual orientation and trans-genders. The

[30] *RMD Chamarbaugwalla v Union of India* [1957] 1 SCR 930; *Kedar Nath v State of Bihar* [1962] AIR 955 (SC); *Bhim Singhji v Union of India* [1981] AIR 234 (SC); *State of Andhra Pradesh v National Thermal Power Corporation* [2002] 3 SCR 278.
[31] *NALSA* (n 5) [71].
[32] *NALSA* (n 5) [66].

Court notes that sexual orientation is a reflection of a person's physical and romantic attraction to another person. This includes trans-genders, bisexuals, homosexuals, heterosexuals alike.[33] Though the judgement is more focused on the recognition of trans-genders as a third gender, it could be considered as having blurred the distinction between sexual orientation and gender identity. This is not only at variance with *Koushal* but also dilutes the rationale in it.

The thrust of the reasoning in *Koushal* was that there should be a presumption of constitutionality when a statute is challenged. Further, the Supreme Court could not find enough teeth in the arguments made before it to arrive at the conclusion that fundamental rights were indeed being violated by the provision in question. But *NALSA* has accepted that sexual identity was a component of human dignity as recognized under the ambit of Article 21[34] and even though trans-genders may constitute a minority, their rights would still have to be protected under the constitution. In addition, *Koushal* did not consider the intersectionality of Article 14, Article 19 and Article 21 of the Constitution. On the other hand, in *NALSA*, the Court construed these rights together to arrive at the conclusion that sexual identity was not only an expression under Article 19(1)(a) but it was also a component of human dignity because gender constituted an integral part of one's identity.

Second, as accepted by the Supreme Court, the term 'transgender', in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative trans-sexual people, who strongly identify with the gender opposite to their biological sex.[35] This includes cross-dressers, eunuchs, castrated men and to a certain extent even homosexuals. The court did clarify that the term 'transgender' for the purposes of the judgment would only be restricted to hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis, etc.[36] However, the reasonable differentia between homosexuals and trans-genders as understood by the judgement might still be questionable, especially because the degrading treatment meted out to homosexuals is no different from the other classes of trans-genders as referred to in the judgement.

[33] ibid [22].
[34] *National Legal Services Authority v Union of India* [2014] AIR 1863 (SC) [20], [68]. .
[35] ibid [11].
[36] ibid [108].

## ANALYSIS OF OBERGEFELL VIS-À-VIS KOUSHAL

This section will seek to analyse the reasoning in the U.S decisions on homosexuality vis-à-vis the decisions on homosexuality and trans-genders in India. It may be pertinent to point out here that *Naz* is more closely related to *Lawrence* in the U.S. and the decision in *NALSA* has more resemblance to the decision in *Obergefell.* In *Obergefell*, the petitioners approached the Court to claim active recognition by the state, the logical culmination of the right to marry. Similarly, in *NALSA*, the claim was for a recognition of the fundamental rights of trans-genders by conferring on them legal recognition as the 'third gender'. The decision in *Lawrence*, similar to the decision in *Naz* was more concerned with decriminalising homosexuality as a consequence of being violative of certain fundamental rights. The petitioners did not want a declaration from the Court that they were entitled to a certain right. They merely wanted the Court to recognise that a statute was against the already extant fundamental rights. Therefore, the difference between the two would boil down to the role of the judiciary as a protector of fundamental rights and as an active interpreter and creator of the same. The difference between India and the U.S., in this context, needs to be analysed with respect to the power of the courts in the two jurisdictions to interpret the constitution in light of the doctrine of separation of powers.

In the Indian context, it has been accepted that there is no rigid separation of powers between the executive, legislature and the judiciary. The fundamental aspect merely remains that each of them should be free from the interference of the other.[37] Three principles of constitutional law are relevant here for the upcoming analysis. First, the Indian Constitution relies more on the system of checks and balances and it has long been accepted that the power of judicial review does not go against the separation of powers but ensures that neither of the wings of the government enjoy unbridled powers.[38] Second, there have been various instances in the past where given the lacunae in law; the Supreme Court in the exercise of its powers under Article 141 and Article 142 has framed guidelines to have the force of law until the government came up with laws to fill in the lacunae.[39] Third, the doctrine of reading down of provisions to make laws more consistent with the changing nature of the society has also been recognised by courts

[37] *His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala* [1973] 4 SCC 225; *Bhim Singh v Union of India* [2010] 5 SCC 538.
[38] *Supreme Court Advocates on Record Association v Union of India* Writ Petition (Civil) No 13 of 2015.
[39] *Vishakha v State of Rajasthan* [1997] 6 SCC 241.

in India. A succinct example may be given with the reference of Section 309 of IPC, which has been read down to decriminalise passive euthanasia.[40]

The U.S. position is, however, slightly different because of the inherent belief in a strict system of separation of powers. Moreover, unlike its Indian counterpart, there is no obligation on the U.S. Government to undertake affirmative action to protect, uplift or confer rights on its citizens.[41] Under the Due Process clause and the Equal Protection clause the traditional understanding had only been to stop the government from impinging upon the rights of the individuals. This has been gradually broadened by the judiciary in the U.S. to include the protection of certain rights as well, but the scope of review in the U.S. still remains narrower as compared to India. The U.S. courts have the power to strike down laws that are against due process and equal protection clause but there is nothing which entitles the courts to confer more rights.[42]

In this backdrop, it is important to note that the Indian judiciary failed to stand by its role as a protector of the constitution when it refused to declare Section 377 of IPC as unconstitutional, despite having the power to do so. The only issues for consideration before the Supreme Court should have been to determine if there was a right to be protected against discrimination based on sexual orientation and if there was any reasonable classification inSection 377, IPC. If the Court is able to find a reasonable classification, it will still have to consider a legitimate state interest for retaining Section 377 IPC. Additionally, the Court should have considered whether the provision deprived homosexuals of a dignified life, personal liberty and freedom of expression.

The judgment does tend to touch upon these aspects but fails to satisfy the reader with reasons, as to why sexual orientation based discrimination is not *ultra vires* the Constitution and why criminalising homosexuals, does not deprive them of their personal liberty and dignity. Instead, the main and sole focus of the decision is the doctrine of presumption of constitutionality, reflective of judicial restraint. This is in variance with precedents where the Supreme Court ventured beyond its traditional role to recognise new rights under the Constitution and to intervene regularly to monitor their enforcement.[43]

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[40] *Aruna Shanbaug v Union of India* [2011] 4 SCC 454.
[41] *Obergefell* (n 1) 3 (Alito J), 22 (Roberts CJ).
[42] *Marbury v Madison* 5 US 137 (1803).
[43] *Bandhua Mukti Morcha v Union of India* [1984] AIR 802 (SC); *Consumer Education and Research Centre v Union of India* [1995] 3 SCC 4; *Vellore Citizens Welfare Forum v Union of India* [1996] AIR 2721 (SC);

## CONCLUSION: ABDICATION V. REVIEW – FINAL TAKEAWAYS

Judicial review has been accepted as a fundamental principle under the Constitutions of both India and the United States.[44] The origin of the principle rests on the assumption that the Constitution of any country is the source from which the executive and the legislature derive their power. Therefore, it is to be treated as the supreme law of the land that cannot be surpassed by any act of the Parliament. The traditional routes of judicial review, therefore, were seemingly rooted in the supremacy of the Constitution, and abrogated laws that went against the fundamental rights.[45] The origin of and the rationale behind judicial review has historically seen different perspectives and theories on them.[46] A common theme present in the application of judicial review in India, U.S. and the U.K. is that courts would strike at the abuse of power and uphold the rule of law.[47]

### DOES EXPANDING THE SCOPE OF RIGHTS AMOUNT TO A LEGISLATIVE FUNCTION?

Judicial review becomes judicial overreach when the courts start reviewing the laws made by the legislature on the basis of intention of the legislature and begin substituting their wisdom for the wisdom of the elected representatives of the people. It is considered prudent to leave law-making powers to those who are directly responsible to the masses. However, Courts should not abdicate their duty of judicial review and shrug off the responsibility of protecting fundamental rights. The Indian Supreme Court's decision in *Koushal*[48] seemed to have done exactly that.

Interpreting new fundamental rights within the ambit of extant fundamental rights is not a legislative function and does not go against the doctrine of separation of powers as has been held in a plethora of precedents in India and the U.S. This law creating function of the judges

*Vishakha v State of Rajasthan* [1997] AIR 3011 (SC); *Milk Men Colony Vikas Samiti v State Of Rajasthan* [2007] 2 SCC 413.

[44] HM Seervai, *The Position of Judiciary under the Constitution of India* (University of Bombay 1970), William O Douglas, *From Marshall to Mukherje: Studies in American and Indian Constitutional Law* (Eastern Law House1956).

[45] *Marbury v Madison* 5 US 137 (1803).

[46] Harry Woolf and others, *De Smith's Judicial Review* (1st edn, Sweet & Maxwell 2007).

[47] Mauro Cappellati, 'Judicial Review in Comparative Perspective' (1970) 58(5) California LR 1017; Dudley O McGovney, 'The British Origin of Judicial Review of Legislation' (1944) 93(1) UPA LR 1.

[48] Sujitha Subramanian, 'The Indian Supreme Court Ruling in Koushal v. Naz: Judicial Deference or Judicial Abdication?' (2015) 47 George Washington International LR 711, 755-58.

has been well recognised now.[49] Such an approach reflects the liberal and purposive approach towards judicial review, which takes, into consideration social values and the need to evolve.[50] As long as the judiciary does not go out of bounds while interpreting the Constitution,[51] re-interpreting existing laws to meet contemporary needs of the society should be appreciated.

## A BALANCING ACT

The tussle between the judiciary and the executive or the judiciary and the legislature has been long drawn out in different countries. This tussle itself is what gives the democratic process certain character as it emerges in the process of seeking to secure the rights and choices of the individual above everything else. The critics of judicial activism often forget that courts tend to be the last resort for a common man to raise his anguish and displeasure against the government without waiting for the next election season. As pointed out by J. Balakrishnan, the Supreme Court is often criticised for judicial overreach and for usurping power. However, these criticisms overlook the fact that the common man has nowhere to go if the Courts exercise restraint in situations where the other organs of the State do not perform their duties properly. There have been constant failures in governance and the courts have a responsibility to correct these failures.[52]

It is, therefore necessary, for not only the judiciary but also for the other wings of the government to strike a balancing act while bearing in mind that the citizens' interests are of paramount consideration. In every country governed by a written Constitution, the supremacy of the constitution is the cornerstone of legislative interpretation and yet there are bound to be interpretative challenges that demand a shift in the law. The legislatures of every country have to bear upon themselves the responsibility of ensuring that the laws of the nation do not become obsolete and are in accordance with the needs of a democratic society. However, history has shown that quite often, the legislature becomes prone to committing errors which are then required to be addressed by the judiciary as the final arbiter, protector and interpreter of rights of the citizens.

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[49] PN Bhagwati, 'Judicial Activism and Public Interest Litigation' (1985) 23 Columbia Journal of Transnational Law 561.
[50] *Saurabh Chaudhri v Union of India* [2003] 11 SCC 146; Alfred Thompson Denning, *From Precedent To Precedent* (1st edn, Clarendon Press 1959).
[51] *US v Butler* 297 US 1 (1935).
[52] KG Balakrishnan, 'Inaugural Address at Kerala Legislative Assembly Golden Jubilee Celebrations' (Seminar on Legislature, Executive and Judiciary, Kerala, 26 April 2008) <http://supremecourtofindia.nic.in/speeches/speeches_2008/26%5B1%5D.4.08.legislature-relationship.kerala.pdf> accessed 26 October 2016.

The question then arises, as to what extent the courts can go, to remedy the conundrums created by the inaction or misconduct of the legislature. There are proponents of judicial activism and there are those who support judicial restraint, each with meritorious arguments to their aid. But it always has to be kept in consideration by those who govern and those who sit in judgment that intellectual debates on separation of powers, review and abdication should not become a hurdle in assuring the rights of a common man who merely wants to go about the vicissitudes of life without being subject to arbitrary actions by the government and the courts.

In *Koushal*, this is exactly what had happened: two learned judges restrained themselves from remedying a situation that was undoubtedly against the spirit of Part III of the Constitution. This was not done for the lack of power, but merely because the court in its wisdom decided to leave the matter to the legislature, which had consistently avoided the issue in the past. Questions have also been raised about the Supreme Court's entertainment of the appeal when the Government had agreed to the stand taken by the Delhi High Court.[53] On the other hand, the same court, four months later, donned its activist-hat and ordered the executive to accord due recognition to the fundamental rights of a certain section of the population, and further ordered the legislature to enact laws to secure these rights in *NALSA*. While an analysis akin to the reasoning adopted in the U.S. was used in the former, the same seems to have escaped the Court's notice in the latter.

As Gautam Bhatia has pointed out, "every once in a way, the highest Court in the land delivers a judgment that is both constitutionally preposterous, and morally egregious."[54] This had happened once before in the *Habeas Corpus* case[55] and has happened yet again in the case of *Koushal.*

Parallel to the developments in India, in another diverse nation, the highest court of the nation not only protected the rights of a section of the society, but also conferred upon them a right that was not read into any statute or the Constitution by the legislature. This was achieved despite there being a strict separation of powers in the United States, the absence of any specific provisions on judicial review in the U.S. Constitution and the absence of the power to judicially

[53] Sujitha Subramanian, 'The Indian Supreme Court Ruling in Koushal v. Naz: Judicial Deference or Judicial Abdication?' (2015) 47 George Washington International LR 71756-57.
[54] Gautam Bhatia, 'The Unbearable Wrongness of Koushal v Naz Foundation Indian Constitutional Law and Philosophy' (WordPress: Indian Constitutional Law and Philosophy, 11 December 2013) <https://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation/ accessed> accesssed 26 October 2016.
[55] *ADM Jabalpur v Shivkant Shukla* [1976] AIR 1207 (SC).

review amendments in the U.S., unlike the position in India.[56] The courts here did not get digressed by debates on the merits and demerits of restraint, activism or abdication, but adhered to its sacred duty of protecting the rights of the people and the supremacy of the Constitution. It is entirely possible that the approach of the Indian Supreme Court, though based on a literal and narrow interpretation of the Constitution, was correct in leaving it on the wisdom of the legislature and the elected representatives in creating a better society based on consensus. But in doing so, the Supreme Court overlooked the principle of 'inclusiveness' as pointed out by Pandit Nehru in the 'Objective Resolution' moved on December 13, 1946. According to this resolution, there is a deeply ingrained underlying tenet of the Constitution, which recognises a role for every person in the society. This goes even to the extent where persons seen as different or deviants would not be socially excluded or ostracised. The Indian society by displaying this inclusiveness would assure a life of dignity and non-discrimination for all.[57]

The question of violation of fundamental rights has not been raised for the last time in the context of homosexuality and Section 377, IPC. The courts will again undoubtedly be faced with similar, if not the same issue, in future. The Supreme Court has already ordered the curative petition arising out of *Koushal* to be placed before a larger Constitutional Bench because questions of public importance had been raised. India has already witnessed a *Bowers*, it can now only be hoped that soon enough there is a *Lawrence* as well which confers basic human dignity upon homosexuals, without waiting for seventeen years, the period it took in the U.S. for the legal position to change.

[56] *US v Butler* 297 US 1 (1935); *State of Rhode Island v Palmer* 253 US 350 (1920); *Dillon v Gloss* 256 US 368 (1921); *United States v Sprague* 282 US 716 (1931); *Leser v Garnett* 258 US 130 (1922).
[57] *Naz Foundation v Government of NCT*, [2010] Cri LJ 94, 130-131.

# PROPORTIONALITY AND DEONTOLOGICAL REASONS: UNATTAINABLE IDEALS IN THE CRIMINAL JUSTICE SYSTEM

* *MOHD. SAAD KHAN*

## INTRODUCTION

When Canada adopted the Canadian Charter of Rights and Freedoms (hereinafter Charter) in 1982[1], the country joined a growing a number of jurisdictions in what has been labelled the "post-war paradigm"[2]. Proportionality analysis has spread across the new world of constitutionalism and its place in constitutional adjudication has yet to be assessed and refined. In this regard, the test set up in *R.* v. *Oakes*[3], the established way to assess proportionality in the Canadian context, is not devoid of any blind spots. One of these blind spots is the place given for non-instrumental reasons in the assessment of proportionality of legislation.

Commentators have already highlighted that proportionality is not compatible with a deontological conception of rights.[4] In this paper, I will deepen this exploration of the compatibility of deontological arguments and proportionality by showing that the structure of proportionality is not designed for deontological reasons for limiting the rights. I do not discuss if this is fatal to proportionality but I think it is important that scholars and judges alike be aware that proportionality analysis simply disregards an important set of genuine moral considerations. To do so, I will first examine the inherent instrumental and consequentialist nature of proportionality analysis **(I)**. Second, I will show that some pieces of legislation are enacted for non-instrumental reasons **(II)**. I will then give the example of retributive justice as a form of deontological and non-instrumental reason **(III)** and illustrate this with the Canadian case of *Sauvé II* to show that proportionality analysis is unfit for these kind of reasons **(IV)**.

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[1] Canadian Charter of Rights and Freedoms; Part I of the Constitution Act 1982; Schedule B, Canada Act 1982 (UK) c 11.

[2] Lorraine Weinrib, 'The Post-War Paradigm and American Exceptionalism' in Sujit Choudry (ed), *The Migration of Constitutional Ideas* (2007) 84.

[3] *R v Oakes* [1986] 1 SCR 103.

[4] Matthias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), *Law, Rights And Discourse: The Legal Philosophy Of Robert Alexy* (2007) 133; Aharon Barak, *Proportionality: Constitutional Rights And Their Limitations* (2012) 471.

Finally, I will show that the way the "proper purpose" requirement is framed makes deontological and non-instrumental reasons necessarily look suspect or improper **(V)**.

## THE INSTRUMENTAL NATURE OF PROPORTIONALITY

Proportionality analysis is based on a means-end and cost-benefit analysis.[5] The two step analysis that distinguishes between the scope of a right and the justification for its limitation is a way to determine if the limitation is for a proper purpose that is rationally connected and necessary to achieve the end the legislator is seeking to achieve, and if the marginal general social benefit of achieving this end is proportionate to the limitation of the right. What must be underlined here is that the analysis is focused on the means used by the legislature, i.e., the provision that limits a constitutional right – to achieve its policy objective.

Should we limit free speech and prohibit the distribution of child pornography in order to protect potential victims?[6] Should we limit the freedom of religion of certain public officials, like judges, to preserve the appearance of neutrality of the judiciary? Answering these questions involves an evaluation of the means used to achieve the end. The end is different from the means used. In this sense, the legislation is instrumental. Generally, when a legislator adopts a piece of legislation, he does so because he thinks that it can produce good social consequences. However, not every piece of legislation is necessarily instrumental. Instrumental provisions are easily identifiable in that it is clear that the purpose generally cannot be completely fulfilled. For example, fighting against the sexual exploitation of children is certainly a legitimate social policy objective. Nevertheless, this does not warrant constant electronic surveillance of the populace. There is a trade-off between the protection of the right to privacy of citizens and the need to protect children from sexual exploitation. Proportionality is good for balancing these competing claims. But in this case, it is clear that the result is that there will always be some sexual exploitation of children. The question is really: what level is tolerable for society? In this case, the purpose can be partially fulfilled, thus it is a scalar purpose, not an all-or-nothing purpose.

Unfortunately, the very structure of the proportionality analysis makes it difficult to analyze all-or-nothing and non-instrumental purposes. Let us examine the two steps analysis of proportionality as presented by Barak[7]:

[5] Kumm (n 4).
[6] *R v Sharpe* [2001] 1 SCR 45.
[7] Barak (n 4).

1. A right is limited

2. The limitation is justified, i.e.:

    A. There is a proper purpose

    B. There is a rational connection between the purpose and the piece of legislation

    C. The piece of legislation is necessary to achieve the purpose

    D. At the margin, what the whole society gains from achieving the purpose outweigh the limitation of the right (proportionality *stricto sensu*).

What is interesting to note is that stages B and C of the justification involve a means-end analysis while stage D involves a cost-benefit analysis The steps involving rational connection and necessity examine the link between the provision, i.e., the means and the goal (the "proper purpose" identified at stage A to see if there is a rational connection and no less restrictive means capable of fulfilling the purpose to the same extent. The proportionality analysis, *stricto sensu*, is a case of cost-benefit analysis. "It is an analytical process that places the proper purpose of the limiting law on one side of the scales and the limited constitutional right on the other, while balancing the benefit gained by the proper purpose with the harm it causes to the right."[8] All these stages presuppose that the purpose is external to the legislation, i.e., the piece of legislation is an instrument, or a means, to achieve a goal outside of it. Thus, proportionality analysis presupposes that all legislations are instrumental and therefore, the legislation's constitutionality is to be analysed in light of its consequences and not its inner coherence or justification. It limits, in a sense, the kind of reasons the legislator can provide to justify its piece of legislation.

## THE POSSIBILITY OF NON-INSTRUMENTAL PURPOSES

The problem is that even though most of the legislation enacted by parliamentary institutions nowadays fulfills some kind of regulatory role of social life, some still fall outside this

[8] ibid 343.

instrumental model. Sometimes, even if a piece of legislation produces some consequences, it is unclear that these consequences were the purpose guiding the legislator; they might simply be a side effect, the legislator having arguments of principle for adopting the statute.[9] Imagine that a legislator enacts, in a Civil Code, the following provision: "Nobody shall benefit from their wrongdoings"[10]. There may be some consequential arguments in favor of this principle, but are they a part of legislator's reasoning as well? It is more likely that the legislator will enact such a provision because it is simply a basic principle of justice, i.e., for deontological reasons. This entails that the reasons for enacting a law can be completely different from the actual effects of this law.[11] The justification for the enactment of such a provision is not its consequences but its moral content. The provision can be said to be just in and of itself, not because of any instrumental role it plays in social life. I want to explore here a kind of non-instrumental argument that can be offered to justify a limitation of a right that fit only strenuously within the means-end/cost-benefit proportionality test: deontological arguments for punishment.

## DEONTOLOGICAL ARGUMENTS: THE EXAMPLE OF RETRIBUTIVE PUNISHMENT

It is always problematic to identify the right level of abstraction at the proper purpose stage. This is even more problematic and crucial for non-instrumental purposes because they can always be reframed in a more abstract fashion. The problem is that at a certain level of abstraction, it fails to capture the real subjective intent of the legislator.[12] Let me illustrate this with the example of retributive punishment.

Imagine that a legislature wants to punish a certain type of crime by, say, the death penalty. Imagine that a person challenges the constitutionality of the death penalty based on its right to life. According to him, the death penalty is unconstitutional because it is not proportional. Before going forward, one thing must be clarified at the outset. Proportionality in the constitutional context is not like proportionality in the criminal context where it is normally used to mean that there must be a balance between the blameworthiness of the act and the punishment. In the constitutional context, the balance is between the social benefits furthered

[9] Ernest J Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale LJ 949 (1988). On the inherent coherence of private law, see Ernest J Weinrib, *The Idea of Private Law* (2012).
[10] Ronald Dworkin, *Taking Rights Seriously* Ch 1 (1977).
[11] See Ronald Dworkin, *A Matter Of Principle* (1985).
[12] ibid (n 4) 285-302.

by the legislation (the "proper purpose") and the punishment. In the criminal context, the punishment is seen as a consequence of the wrongful act while in proportionality analysis the punishment is seen as a cause of some social benefit pursued by the legislator.

The purpose can be said (A) to punish a crime with the death penalty because it is recognised as a highly blameworthy conduct. On the other hand, we can move one-step back and say (B) that the purpose is to punish this crime with the death penalty to manifest society's disapproval of such conduct. In (B), the punishment itself is framed as a means to achieve society's interest. Alternatively, we can move another step back and say that the real purpose is (C) to increase the level of confidence in the justice system. Alternatively, we can also divert our attention and say that (D) the elected representatives simply want to please the electorate and be re-elected.[13] These completely different purposes will trigger completely different analyses. The appropriate level of abstraction is crucial for the rest of the proportionality analysis. As I will argue here, however, I think it is possible to defend the proposition (A), i.e., that the purpose of a piece of legislation can be the very same thing it does. In other words, a piece of legislation can be genuinely non-instrumental. All other formulations (B, C and D) are scalar and instrumental purposes but (A) is an all-or-nothing non-instrumental purpose; either you punish this person with the death penalty or not. In fact, it is probable that even the subjective legislative intent was to enact a legislation imposing the death penalty because the representatives considered it to be just in these circumstances. The consensus in Parliament was about the appropriateness of this particular punishment. Therefore, the subjective legislative intent cannot be said to be "to punish this crime" or "to manifest social disapproval of this conduct". The subjective legislative intent was rather "to impose death penalty for this crime".

Now, once we admit that a purpose can be framed like (A), the rational connection and the necessity test become useless. Is punishing this person with the death penalty rationally connected to punishing this person with the death penalty? Of course. Is punishing this person with the death penalty necessary to punish this person with the death penalty? Of course. Do the social gains, at the margin, from punishing this person with the death penalty outweigh this person's right to life? However, what social gains are we discussing here? Did we not just say that the legislator saw the punishment as the consequence of the blameworthiness of the act, not as the cause of some alleged social benefit? If the purpose is to impose the death penalty, the social benefit is to impose the death penalty, not any side effect that imposing the death

[13] John L Austin, *How to Do Things with Words* (1962).

penalty may have. The proportionality *stricto sensu* is about the social benefits of achieving the proper purpose itself, not its side-effects[14]. As we can see, retributive arguments for punishment fit uneasily in the proportionality framework. This unease with deontological reasons is best exemplified by the *Sauvé* cases, which I will now discuss.

## THE CANADIAN EXPERIENCE IN *SAUVÉ*

The problem of non-instrumentalism discussed above has manifested itself in the Canadian context most famously in the *Sauvé* cases. M. Sauvé was an inmate serving a life sentence in prison. He challenged a provision of the Canada Elections Act prohibiting inmates from voting in federal election on the ground that this violated his constitutional right to vote as protected by Section 3 of the Canadian Charter of Rights and Freedoms.[15] In 1993, the Supreme Court of Canada ruled that the impugned provision of the Canada Elections Act was unconstitutional[16].

In response to this first decision, Parliament enacted a new piece of legislation reforming the Canada Elections Act and limiting the right to vote for inmates who were serving a sentence of more than two years of imprisonment.[17] Following a new constitutional challenge again launched by M. Sauvé, the Court had to re-examine the question in 2002.[18] In a surprisingly divided decision of 5-4, the majority noted that the purpose was "problematically vague" and "thin". Moreover, the majority held that the new limitation was not rationally connected to its end and struck down the impugned provisions. The minority, on the contrary, thought that the limitation rested on a question of philosophy and principle and that it was not for the Court to resolve it. The difference in the opinion of the majority and the minority is striking and illustrates the unease with which justices try to impose the proportionality analysis on non-instrumental piece of legislation. Writing for the majority, Chief Justice McLachlin said that "symbolic" purposes were "problematic".[19] However, writing for the minority, Justice Gonthier, explains:

> My disagreement with the reasons of the Chief Justice, however, is also at a more fundamental level. This case rests on philosophical, political and social considerations which are not capable of "scientific proof". It involves justifications

[14] ibid (n 4) 342.
[15] Charter, s 3.
[16] *Sauvé v Canada* [1993] 2 SCR 438.
[17] Criminal Code, RSC c C-46, s 743 1.
[18] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SC 519.
[19] ibid para16.

> for and against the limitation of the right to vote which are based upon axiomatic arguments of principle or value statements. I am of the view that when faced with such justifications, this Court ought to turn to the text of s. 1 of the Charter and to the basic principles which undergird both s. 1 and the relationship that provision has with the rights and freedoms protected within the Charter. Particularly, s. 1 of the Charter requires that this Court look to the fact that there may be different social or political philosophies upon which justifications for or against the limitations of rights may be based. In such a context, where this Court is presented with competing social or political philosophies relating to the right to vote, it is not by merely approving or preferring one that the other is necessarily disproved or shown not to survive Charter scrutiny. If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right in the context of a free and democratic society, then it ought to be upheld as constitutional.[20]

What is at stake in Justice Gonthier's comment is the very possibility of a justification that is non-instrumental in the proportionality framework. Moreover, this is particularly well illustrated by his comments regarding the all-or-nothing character of certain legislative purposes. Justice Gonthier explains: "In the case at bar, there is very little quantitative or empirical evidence either way. In such cases, the task of justification relates to the analysis of human motivation, the determination of values, and the understanding of underlying social or political philosophies — it truly is justification rather than measurement"[21]. Non-instrumental reasons cannot be framed as scalar purposes or "value-laden"[22]. Furthermore, since the end itself is not external to the legislation, you can either find it to be justified or unjustified. This is very problematic, especially with the necessity and proportionality *stricto sensu* analysis. The crucial point is that there is a kind of justification available for such piece of legislation but outside the consequentialist framework of proportionality analysis. It does not mean that, as long as a purpose is non-instrumental, everything is justified. It simply means that the kind of reasons that may justify a certain limitation of a constitutional right simply cannot always be accessed through a consequentialist analytical framework.[23] I will now explore briefly how this problem is rooted in the way the proper purpose requirement is framed.

[20] ibid para 67.
[21] ibid para 90.
[22] Barak (n 4) 343.
[23] See, Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, (1996) 37.

## SOME PROPER PROBLEMS WITH PROPER PURPOSES

As I explained in the first section with regard to the distinction between scalar and non-scalar purposes, scalar purposes always presuppose that there is an ideal situation, which we strive to achieve. Consequently, in a hypothetical problem-free society, there would be no use for legislation at all. The issue here is that some legislative action, though deontologically justified, can sometimes create problems rather than solve them[24]. The "proper purpose" question must therefore be carefully probed. A purpose can be proper even if there is no problem to be solved. This is really well exemplified by the retributive aspect of punishment. The retributive component of punishment is not about deterrence of future crimes or rehabilitating criminals. These last two principles are instrumental in nature. Retributivism, on the other hand, is a deontological reason for punishment. However, is this purpose proper? Moreover, how can we balance the purpose with the infringement of the right to liberty or the right to life? As Barak puts it: "Proportionality *stricto sensu* compares the positive effect of realizing the law's proper purpose with the negative effect of limiting a constitutional right. This comparison is of a value-laden nature"[25]. However, a legitimate legislative objective is not necessarily a solution to a social problem. The adoption of a just principle (deontologically speaking) can make the overall situation worse. But if the principle itself is just, should we judge it only in light of the consequences it produces or should we recognise that it can be reasonable and have some kind of inherent coherence and moral value? The actual proportionality framework simply does not recognise that some pieces of legislation can be justified by these kinds of deontological reasons.

## CONCLUSION

If proportionality were not useful, it would not have spread widely across so many different jurisdictions. The fact remains, nonetheless, that it can be refined to broaden the types of moral reasoning it is capable of considering without distortion. Proportionality is blind to some genuine moral considerations as its analysis is a straightforward consequentialist test. Despite the fact that most pieces of legislation are instrumental in nature, I have shown that some provisions are motivated by deontological considerations. A retributive consideration for punishment is a good example of such a case. Unfortunately, as we saw in the *Sauvé* case,

[24] Larry Alexander & Michael Moore, *Deontological Ethics*, *in* The Stanford Encyclopedia of Philosophy (Edward N Zalta ed, Spring 2015).
[25] Barak (n 4) 343.

courts deal only difficultly with deontological reasons. They lack, in a certain sense, the moral grammar of deontology. This is so because the way in which the proper purpose requirement is framed forces courts to find an external end and to see the legislation as a simple means to achieve this external social objective.

It is unclear whether it is possible or not to merge consequentialist and deontological considerations into one coherent analytical framework. It seems to me, however, that as an all-encompassing test to evaluate the constitutionality of every legislative provision, the proportionality test is too ambitious. The test suited to deontological provisions may have yet to be designed. Nonetheless, I have tried to highlight this problem and I hope that judges, lawyers and legal scholars will answer the call to resolve it.

# THE PARIS AGREEMENT: THE LANDMARK INTERACTION OF SCIENCE, DIPLOMACY AND INTERNATIONAL LAW

[*] *SIDDHARTH CHATURVEDI*

## INTRODUCTION: THE RED CARPET IN PARIS FOR ACTION ON CLIMATE CHANGE

Climate change has been a major concern in the contemporary times. It is not exaggerating to consider climate change as the most important as well as the most dreaded environmental phenomenon in the 21st century. Anthropogenic emissions of greenhouse gases have initiated the undesirable process of bringing about an increase in the average global temperatures, and if left unchecked, this process could culminate in a fundamental transformation of the global landscape for the worst.

The present paper is concerned with the global efforts aimed at curbing climate change. Chiefly, the paper aims to explore the very recent and much hyped international development in this regard: the adoption of the text of what has been popularly referred to as the 'Paris Agreement'.

The representatives of 195 countries of the world assembled in the city of Paris, France to negotiate an international agreement that would guide the future action against climate change.[1] Many have hailed the adoption of the Paris Agreement as a significant achievement, and therefore, the aim of this paper is to explore the salient features of this historic agreement.

However, the Paris Agreement is better understood along with the context in which it was negotiated. Therefore, the present paper will not be confined to a bare perusal of the text of the Paris Agreement and its analysis, but will provide an insight into the historical context in which the need for such an Agreement was felt. This will require a brief look into the global attempts at containing climate change under the aegis of the United Nations, beginning in 1992. Moreover, it will be interesting and enlightening to understand how different countries

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[1] 'Historic Paris Agreement on Climate Change' (*UN Climate Change Newsroom*, 12 December 2015) <http://newsroom.unfccc.int/unfccc-newsroom/finale-cop21/> accessed 15 October 2016.

perceived their role in the global action against climate change. This will include a study of the rift between the developed countries and the developing countries, as well as the rise of a new group representing the most vulnerable countries. In addition, this will enable an understanding of the contentious issues regarding climate change.

An understanding of the context described as aforesaid will then provide the groundwork for understanding how the contentious issues were sought to be resolved during the different negotiations that preceded the Paris climate talks, and then during the Paris climate talks.

## CLIMATE CHANGE: WHAT IS THE SCIENTIFIC EVIDENCE?

To begin with, it is important to understand the reason why a consensus has emerged around the world for the urgent action against climate change. The reason lies in the scientific evidence in various reports that point towards the fact that a rise in global temperatures is bound to be detrimental for the earth's existence. It is impossible to compile all the scientific evidence available in this regard; however, it is significant to look at that which has international acceptance.

The Intergovernmental Panel on Climate Change (hereinafter IPCC) Assessment Report enjoys international acceptance when it comes to relying on the evidence of climate change. The IPCC, set up in 1988 by the World Meteorological Organization and the United Nations Environment Programme, assesses contemporary scientific literature and publishes data that forms the basis for international policy formulation.[2]

IPCC's Assessment Reports have consistently pointed out that the threshold beyond which climate change will have drastic effects is the figure "2 degree Celsius". This means that an increase in average global temperatures by more than 2 degree Celsius will be fatal to the earth's existence.[3] In 2009, the global representatives agreed, in Copenhagen, that the threshold limit for adverse effects of the climate change is 2 degree Celsius. The basis of such a consensus was *inter alia*, the data in the Fourth Assessment Report of IPCC. The Copenhagen Accord, a manifestation of this consensus, reads as under:

> "We agree that deep cuts in global emissions are required according to science, and as documented by the IPCC Fourth Assessment Report with a view to reduce global

[2] IPCC Secretariat, 'IPCC Factsheet: What is the IPCC?' (*Intergovernmental Panel on Climate Change*,30 August 2013) <www.ipcc.ch/news_and_events/docs/factsheets/FS_what_ipcc.pdf > accessed 15 October 2016.
[3] Leo Hickman, 'Two degrees: The history of climate change's 'speed limit'' (*Carbon Brief*, 8 December 2014) <www.carbonbrief.org/two-degrees-the-history-of-climate-changes-speed-limit> accessed 15 October 2016.

> emissions so as to hold the increase in global temperature below 2 degrees Celsius, and take action to meet this objective consistent with science and on the basis of equity."[4]

However, it is also significant to note that in Copenhagen itself, the world leaders also decided to consider, as part of a long-term goal, containing the rise in the average global temperatures within 1.5 degree Celsius. Therefore, while the IPCC Report pointed out the threshold as 2 degree Celsius and the global community accepted it as one of its primary targets, the idea of making efforts to curb climate change also included the idea of making 1.5 degree Celsius a target. The relevant part of the Copenhagen Accord reads as under:

> "We call for an assessment of the implementation of this Accord to be completed by 2015, including in light of the Convention's ultimate objective. This would include consideration of strengthening the long-term goal referencing various matters presented by the science, including in relation to temperature rises of 1.5 degrees Celsius."[5]

## CLIMATE CHANGE: FROM 1992 ONWARDS, THE PACE OF NEGOTIATIONS

The negotiations have been one of the most highlighted aspects of the issue of climate change. This is because consensus had eluded the global community for long on the issue of climate change. In this section of the paper, a brief survey of some important international negotiations under the aegis of the United Nations concerning climate change is made.

The year 1992 marked a significant milestone for the international community when the world agreed to take action to combat climate change. For significant action, this global will was manifested in the United Nations Framework Convention on Climate Change (hereinafter UNFCCC). Under the UNFCCC, a provision was made for setting up of the Conference of the Parties (hereinafter COP), whose mandate is described as under:

> "The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. To this end, it shall:

[4] 'Copenhagen Accord' (Draft Decision, CP 15, Copenhagen, 18 December 2009) para 2 <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf> accessed 15 October 2016.
[5] ibid (12).

(a) Periodically examine the obligations of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge;…"[6]

The UNFCCC provides for the annual sessions of the COP, and consistent with the aforementioned mandate, attempts have been made to review the obligations of the member countries under the UNFCCC. Therefore, the annual sessions of COP have been the platform for global climate change negotiations and some of the important COPs have been mentioned below, reflecting the important milestones in the global action against climate change.

**The COP 3 1997: The Kyoto Protocol**

The Kyoto Protocol was the result of the annual session of the COP in Kyoto, Japan in 1997.[7] The "Kyoto Protocol" was adopted as a legal instrument linked to the UNFCCC. The Kyoto Protocol prescribed a time period during which the "developed countries" consistent with the fundamental principles governing the UNFCCC, were to reduce their greenhouse gas emissions. In consonance with the principles of the UNFCCC the Kyoto Protocol did not impose any obligation on the developing countries, . The relevant principles of the UNFCCC are reproduced hereunder:

"In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a

[6] 'United Nations Framework Convention on Climate Change' (1992) art 7(2). <http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf> accessed 15 October 2016.
[7] 'Making those first steps Count: An Introduction to the Kyoto Protocol'<http://unfccc.int/essential_background/kyoto_protocol/items/6034.php> accessed 15 October 2016.

disproportionate or abnormal burden under the Convention, should be given full consideration.

…."[8] (Emphasis supplied)

**THE COP 13: THE BALI ACTION PLAN**

This session of the COP, in Bali, Indonesia (2007), is significant in that it laid down the framework for the future course of negotiations on climate change.[9] Among other things, it provided that the negotiations would focus on mitigation, adaptation, climate finance and technology transfer. As it would be seen later in this paper, most of the contentious issues in the Paris climate talks in 2015 were in relation to the aforementioned issues. The aim was to complete the negotiating process by 2009 so that a new legal framework could be put in place after the commitments of the developed countries under the Kyoto Protocol end in 2012. The relevant part of the Bali Action Plan reads as under:

"The Conference of the Parties…

Decides to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session…"[10]

(The Fifteenth session of the COP was held in Copenhagen, Denmark in 2009, as will be seen below)

**THE COPENHAGEN COP-15**

The Copenhagen COP was a huge disappointment in terms of progress on climate change negotiations. The world leaders had assembled at Copenhagen, in Denmark (2009) to chart out a new agreement to replace the Kyoto Protocol, which was scheduled to end in 2012. However, the rift between the developing countries and the developed countries (for reasons that will be

[8] 'United Nations Framework Convention on Climate Change' (1992) art 3 <http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf> accessed 15 October 2016.
[9] 'Now, up to and beyond 2012: The Bali Road Map' <http://unfccc.int/key_steps/bali_road_map/items/6072.php>accessed 15 October 2016.
[10] 'Bali Action Plan' (Draft Decision, 1/CP. 13,Bali,14 March 2008) page 3 <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf> accessed 15 October 2016.

described in the pages that follow) led to an impasse and no binding agreement was arrived at. The most that could be done was to postpone matters for a later date. The major take away from the Conference was however, the recognition of the threshold limit of 2 degree Celsius.[11]

**CANCUN COP 16**[12]

The negotiations in Cancun, Mexico were significant in that they resulted in Cancun Agreements wherein the developed countries documented their commitment to cut back on carbon emissions. This was supplemented by an agreement concerning the developing countries where they demonstrated their readiness to cut carbon emissions. The Cancun Agreements were also important from the point of view of climate finance as a new Green Climate Fund was decided to be set up through the Agreements. The relevant part of the COP Decision is being reproduced hereunder:

> "102. Decides to establish a Green Climate Fund, to be designated as an operating entity of the financial mechanism of the Convention under Article 11, with arrangements to be concluded between the Conference of the Parties and the Green Climate Fund to ensure that it is accountable to and functions under the guidance of the Conference of the Parties, to support projects, programmes, policies and other activities in developing country Parties using thematic funding windows;"[13] (Emphasis supplied)

On the question of reviewing the Kyoto Protocol, as it was due to end in 2012, the same was postponed for consideration in the upcoming COP session in Durban, South Africa.

**THE DURBAN COP 17**

The COP 17 session in Durban, South Africa was a marked success over the previous COP sessions because the developed countries agreed to extend the commitment period under the Kyoto Protocol beyond 2012, until 2020. However, it was also decided that by 2015, a new legal agreement will have been negotiated which will take the place of the Kyoto Protocol, once the second commitment period is completed in 2020. This implied that the developing

[11] 'Q&A: The Copenhagen climate summit' *BBC News* (United Kingdom, 21 December 2009) <http://news.bbc.co.uk/2/hi/8278973.stm> accessed 15 October 2016.
[12] Adam Vaughan, 'Cancún climate agreements at a glance' (*The Guardian*, 13 December 2010) <www.theguardian.com/environment/2010/dec/13/cancun-climate-agreement> accessed 18 October 2016.
[13] 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' (Draft Decision 1/CP 16 Cancun, 15 March 2011) para 102 <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> accessed 18 October 2016.

countries could also be made to bear responsibility for the mitigation efforts in the action against climate change.[14] As the text of the decision reads:

> "4. Decides that the Ad Hoc Working Group on the Durban Platform for Enhanced Action shall complete its work as early as possible but no later than 2015 in order to adopt this protocol, another legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020;"[15] (Emphasis supplied)

Further, it was also agreed that negotiations would focus on technology transfer and climate finance to enable the developing countries to adapt to the effects of climate change.

**THE DOHA COP 18**

In Doha, Qatar (2012), the COP session resulted in the changes in the Kyoto Protocol to give effect to the decisions regarding the second commitment period taken in the Durban COP.[16] Moreover, the Doha COP session is important in the sense that it laid down the time table for the negotiations for a new legal agreement to be carved out by 2015, to replace the Kyoto Protocol at the completion of the Second Commitment period by 2020. The Decision of the COP reads as under:

> "4. Determined to adopt a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties at its twenty-first session, due to be held from Wednesday, 2 December to Sunday, 13 December 2015, and for it to come into effect and be implemented from 2020;"[17]

**THE WARSAW COP 19**

The Warsaw COP in Poland prepared the groundwork for negotiations towards a new legal instrument for climate change, whose proposed deadline was set as December 2015. At the COP 19, the representatives of the member countries agreed that they would submit their

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[14] 'Durban: Towards full implementation of the UN Climate Change Convention' <http://unfccc.int/key_steps/durban_outcomes/items/6825.php> accessed 18 October 2016.
[15] 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action' (Draft Decision 1/CP 17,Durban,15 March 2012) para 4 <http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf> accessed 18 October 2016.
[16] 'The Doha Climate Gateway'<http://unfccc.int/key_steps/doha_climate_gateway/items/7389.php>accessed 18 October 2016.
[17] 'Agreed outcome pursuant to the Bali Action Plan' (Draft Decision 1/CP 18, Doha, 28 February 2013) para 4 <http://unfccc.int/resource/docs/2012/cop18/eng/08a01.pdf > accessed 18 October 2016.

nationally determined contributions as part of the negotiations process.[18] The relevant part of the COP Decision reads as under:

> "To invite all Parties to initiate or intensify domestic preparations for their intended nationally determined contributions, without prejudice to the legal nature of the contributions, in the context of adopting a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties towards achieving the objective of the Convention as set out in its Article 2 and to communicate them well in advance of the twenty-first session of the Conference of the Parties (by the first quarter of 2015 by those Parties ready to do so) in a manner that facilitates the clarity, transparency and understanding of the intended contributions, without prejudice to the legal nature of the contributions;"[19] (Emphasis supplied)

**THE LIMA COP 20**

The Lima COP was intended to be the preparatory forum for the ultimate negotiations at the 2015 COP session in Paris, France. As per the decision of the COP 19 in Warsaw, Poland, the Lima COP provided for the factors that had to feature in the intended nationally determined contributions (hereinafter INDC) which were to form the basis for the negotiations in the Paris COP. Moreover, the fact that INDC were solicited at Warsaw signified that the Paris COP would take a more flexible, bottom up approach to avoid the disappointment of the Copenhagen COP, which had resulted in a negotiation deadlock. However, there was a great deal of uncertainty on the specifics of the legal agreement proposed to be drafted and adopted in the next COP session in Paris.[20] The relevant part of the Decision text read as under:[21]

> "13.Reiterates its invitation to all Parties to communicate their intended nationally determined contributions well in advance of the twenty-first session of the Conference of the Parties (by the first quarter of 2015 by those Parties ready to do so) in a manner that facilitates the clarity, transparency and understanding of the intended nationally determined contributions;

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[18] 'Warsaw Outcomes'<http://unfccc.int/key_steps/warsaw_outcomes/items/8006.php> accessed 19 October 2016.

[19] 'Further advancing the Durban Platform' (Draft Decision 1/CP 19, Warsaw, 31 January 2014) para 2(b) <http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf > accessed 19 October 2016.

[20] Suzanne Goldenberg, 'Lima climate change talks reach global warming agreement' (*The Guardian*, 14 December 2014) <www.theguardian.com/environment/2014/dec/14/lima-climate-change-talks-reach-agreement>accessed 19 October 2016.

[21] 'Lima Call for Climate Action' (Draft Decision, 1/CP 20, Lima, 2 February 2015) paras 13-14 <http://unfccc.int/resource/docs/2014/cop20/eng/10a01.pdf> accessed 15 October 2016.

14. Agrees that the information to be provided by Parties communicating their intended nationally determined contributions, in order to facilitate clarity, transparency and understanding, may include, as appropriate, inter alia, quantifiable information on the reference point (including, as appropriate, a base year), time frames and/or periods for implementation, scope and coverage, planning processes, assumptions and methodological approaches including those for estimating and accounting for anthropogenic greenhouse gas emissions and, as appropriate, removals, and how the Party considers that its intended nationally determined contribution is fair and ambitious, in light of its national circumstances, and how it contributes towards achieving the objective of the Convention as set out in its Article 2;" (Emphasis supplied to underline the factors that were suggested to be included in the INDCs that were to be submitted by the countries)

## THE WAR OF WORDS: THE POINTS OF CONTENTION ON THE EVE OF THE PARIS CLIMATE TALKS

Before undertaking a review of the Paris Agreement, it is necessary to provide a brief insight into the major points of difference or controversy that existed on the eve of the Paris Climate talks and that had continued to engage the negotiators during the talks which had to be extended beyond the scheduled period as no consensus was in sight (unless of course the consensus was arrived upon subsequently).

The issues are more than one but it must be kept in mind that the conflict between the developed countries and the developing countries lies at the heart of the whole debate. This aspect needs to be understood in order to better appreciate the points of difference that exist between the countries on the issue of climate change (the points will be elaborated upon in this section).

When the UNFCCC was agreed upon in the first place, there was a mutual agreement that the developed countries (or the industrialised countries) were more responsible for the state of climate change than the other countries. Their "historical" emissions were one of the major causes that had brought the world to such a state of emergency in respect of climate change. Moreover, being industrialised and developed, such countries also had the capacity to lead in the global action against climate change. This implied that the developed countries are required to take more onerous responsibilities in the fight against climate change.

However, the developed countries were of the view that of late, some of the developing countries, (the ones that are designated nowadays as "emerging economies") like India and China, are also contributing to the burden of carbon emissions through the developmental actions that they are undertaking. In view of the same, they are also required to bear similar onerous responsibilities for fighting climate change. However, countries like India and China have countered this argument by asserting that the concerns of development require continued emissions and therefore they should reasonably be exempted from compliance with legally binding commitments on climate change.

The aforesaid being the background of the contentious issues between the developed and the developing countries, following are the specific points on which the countries were in disagreement:

**EFFORTS AT MITIGATION**

Earlier, for the reasons mentioned above, the developing countries had been exempted from any legally binding commitments towards mitigating the carbon emissions. This was the reason that no developing country among the Annex I parties to the Kyoto Protocol (the parties that were required to undertake emission cuts mandatorily). However, due to the insistence of the developed countries, there was considerable pressure on the developing countries to undertake responsibility for emission cuts. However, the developing countries still insisted that the commitments under the Paris Agreement should be ones that agree with the UNFCCC's principles of equity and Common But Differentiated Responsibilities (hereinafter CBDR) whereby the commitments should correspond to the level of development of the country instead of being uniformly applicable for every nation regardless of her development needs and capabilities.[22]

**ADAPTION**

The developing countries also emphasised the need for the proposed new legal instrument to address the issues pertaining to "adaptation" to the effects of climate change. The developing countries were of the view that the historical carbon emissions by the developed countries had resulted in irreversible changes in the climate, which is evident through unseasonal rains,

[22] Gwynne Taraska, '4 of The Most Controversial Issues At The Paris Climate Talks, Explained: Differentiation' (*Climate Progress*, 10 December 2015) <http://thinkprogress.org/climate/2015/12/10/3730298/four-stumbling-blocks-paris/>accessed15th January, 2016.

droughts and floods. Therefore, the developing countries argued that the proposed legal instrument should also focus on the aspects where the industrialised countries would actively assist the process of adaptation by the developing countries, in view of their developmental needs.[23]

## CLIMATE FINANCE

Industrialised countries have enough funds to effectively counter the climate change, something that eludes the developing countries. Being historically responsible for carbon emissions, the industrialised countries should commit towards raising funds for the developing countries to undertake efforts aimed at mitigation as well as adaptation. This assertion of the developing countries had resulted in a series of initiatives under the legal framework of the UNFCCC, such as the Green Climate Fund, as referred to in the previous section on negotiations. However, problem arose when the developed countries failed to commit for a specific amount to be raised and insisted on the emerging economies like India and China to contribute to the Fund as well. This position of the developed countries did not go down well with the developing countries.[24]

## TECHNOLOGY TRANSFER

The developing countries have been asserting that developed countries have the green technology that assists in mitigating emissions and adapting to the effects of climate change. However, the pro-intellectual property regime in most of the developed countries has implied that this technology is not accessible to the developing countries. For example, huge amount of license fees for using an innovation will obviously discourage a "fund deficient" developing country from being able to utilise the innovation for sustainable development. Therefore, the developing countries have been consistently demanding a legal framework whereby the transfer of technology can be affected to enable the developing countries to take effective action as part of their mitigation and adaptation strategies. For example, the European Union has been able to come up with drought resistant crops. The technology to develop similar crops could prove very fruitful for the development concerns of a country like India, thus assisting in her efforts at adaptation. A cost effective strategy at adaptation may enable countries like India to

[23] Background Paper, 'Adaptation to Climate Change in the context of Sustainable Development' (*TERI*) <www.teriin.org/events/docs/adapt.pdf> accessed 19 October 2016.
[24]Amitabh Sinha, 'Paris Climate Talks: Money does the talking' (*The Indian Express*, 9 December 2015) <http://indianexpress.com/article/explained/paris-climate-talks-money-does-the-talking/> accessed 19 October 2016.

devote more of their resources towards achieving their mitigation targets, which will be beneficial for the whole world.[25]

### THE THRESHOLD TEMPERATURE RISE

While the consensus among the negotiating parties has been to the effect that the average global temperature rise has to be contained below the mark of 2 degree Celsius, yet there has been a group of countries arguing that this limit be further reduced to 1.5 degree Celsius. This group of countries refer themselves as "most vulnerable" and comprise mostly of the small island nations around the globe. The rise in sea levels due to the effects of climate change is believed to be the biggest concern for these island countries. However, their demand requires the mitigation efforts be augmented so as to achieve the target of 1.5 degree Celsius because the scientific opinion is that the INDC submitted by the countries are even short of meeting the 2 degree Celsius target.[26] The speech of the United States President Barack Obama, at the Paris climate talks was quite vocal of these concerns of the island nations, as he had observed:

"…We know the truth that many nations have contributed little to climate change but will be the first to feel its most destructive effects. For some, particularly island nations –whose leaders I'll meet with tomorrow–climate change is a threat to their very existence…"[27]

## THE BIG LEAP FORWARD: THE PARIS AGREEMENT AND ITS SALIENT FEATURES

When the COP 21 began in Paris, France, there was the apprehension that Copenhagen disappointment may be repeated, given the number of contentious issues (which have elaborated upon above). Even during the annual session of the COP, the differences remained, which forced the extension of the session beyond its scheduled timetable.[28] However, to the relief of all, the negotiators arrived at a landmark global agreement, "the Paris Agreement",

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[25] 'Technology' (*UNFCCC Official Website*) <http://unfccc.int/technology/items/2681.php> accessed 19 October 2016.
[26] Gwynne Taraska, '4 Of The Most Controversial Issues At The Paris Climate Talks, Explained: Closing the emissions gap' (*Climate Progress,* 10 December 2015) <http://thinkprogress.org/climate/2015/12/10/3730298/four-stumbling-blocks-paris/>accessed 19 October 2016.
[27] Office of the Press Secretary, The White House, 'Remarks by President Obama at the First Session of COP21'(*The White House Official Website,*30 November 2015) <www.whitehouse.gov/the-press-office/2015/11/30/remarks-president-obama-first-session-cop21> accessed 19 October 2016.
[28] Express News Service, 'Paris Climate Talks Extended a Day as Differences Remain' (*The New Indian Express,* 12 December 2015) <www.newindianexpress.com/nation/Paris-Climate-Talks-Extended-a-Day-as-Differences-Remain/2015/12/12/article3172954.ece> accessed 19 October 2016.

which would replace the Kyoto Protocol when the Kyoto Protocol's second commitment period ends in 2020.

In the present section, an attempt has been made to analyse the salient features of the Paris Agreement. Broadly, the salient features correspond to the contentious issues that had plagued the negotiators throughout the long period preceding the drafting and adoption of the Paris Agreement in 2015.

## RESOLVING THE ISSUE OF THRESHOLD TEMPERATURE

At the very outset of the Paris Agreement, a unique compromise has been affected in respect of the threshold of temperature rise. The Agreement stipulates that the temperature rise is to be contained "well below" the 2 degree Celsius threshold and efforts are required to be undertaken to limit the increase in temperature to 1.5 degree Celsius. It is important to note here that the use of the term "well below" entirely changes the legal mandate from what it would have been if the text would have read, "shall not exceed". This implies that the 2 degree Celsius is not the threshold. The relevant part of the text of the Paris Agreement reads as under:

> "(a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change;"[29]

## MITIGATION EFFORTS: UNIVERSAL DUTY, WITH DIFFERENTIATION

In respect of the efforts aimed at mitigation, the principle of equity and CBDR are sought to be maintained. However, there is a marked departure from the legal mandate of the Kyoto Protocol. This can be appreciated through the following points:

1. Unlike the Kyoto Protocol, there is no longer any reference to "Annex I" countries, which are to take emission cuts. Instead, the responsibility of emission cuts has now been spread out to cover all countries, including the developing countries, which had been excluded previously under the Kyoto Protocol. This seems to be a significant achievement for the industrialised countries which had been advocating hitherto to make the developing countries responsible for

[29] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 2(1)(a) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.

emission cuts too. As can be seen from the following extract of the text of the Paris Agreement, "each Party" is now mandated to carry out mitigation efforts:

> "2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[30]

2. Unlike the Kyoto Protocol, there are no emission cuts prescribed by the Agreement. Rather, a bottom up approach has been adopted whereby the mitigation efforts are to be reflected in the INDC that have been submitted by the countries under the Lima COP framework. The Paris Agreement accords legal recognition to the INDC and assigns specific importance to these in that they will serve as the guiding factors for emission cuts. This is an achievement for all the countries to some extent: this is because their sovereignty has been respected in deciding on emission cuts rather than forcing a target on them. This is relevant because the countries are best suited to frame their emission cut targets according to their national circumstances. This has been recognised in the beginning of the Agreement itself where the countries' "national circumstances" have been accorded due weightage. As it can be seen from the text of the Paris Agreement, relevant part of which is mentioned as under:

> "3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."[31]

3. The fact that the Paris Agreement is a significant compromise is also evident from the fact that the distinction between the developed and developing countries has been duly maintained. This implies that even if the developing countries are no longer immune to legally binding commitments, they have been accorded relaxation in the manner of implementation when it comes to achieving the mitigation targets. This is evident from two factors:

(a). Firstly, the fact that the countries are to achieve the targets as per their INDC implies that the developing countries can follow their developmental needs and priorities while taking

[30] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015), art 4(2) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf > accessed 19 October 2016.
[31] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 4(3) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.

action against climate change. In fact, the Paris Agreement, at the very outset, has clearly laid down that the principle of CBDR continues to govern the framework for action against climate change. The text reads:

> "2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."[32] (Emphasis supplied)

(b). Secondly, and very significantly, while the developed countries are required to continue undertaking economy-wide absolute emission reduction, the developing countries are only encouraged to move towards such reduction gradually over time keeping up with their respective national circumstances. This means that although the developing countries are required to undertake efforts aimed at mitigation, unlike the developed countries they have not been mandated to take quantified emission cuts immediately. Following is the relevant portion from the text of the Paris Agreement:

> "4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."

The aforesaid is a big relief for the developing countries who had apprehensions of the consequences of the new Paris Agreement considering their concerns about the development programme. For example, India has to fight the challenges of poverty and unemployment so this might restrain initially India's efforts at mitigation, and therefore it would be very unfair to expect her to undertake absolute emission cuts immediately. However, the Paris Agreement has provided enough flexibility for countries like India to pursue their mitigation efforts while also meeting their developmental needs.[33]

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[32] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 2(2) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.

[33] Amitabh Sinha, 'Paris climate talks: Differentiation of developed and developing stays, India Happy' (*The Indian Express*, 14 December 2015) <http://indianexpress.com/article/india/india-news-india/paris-climate-talks-differentiation-of-developed-and-developing-stays-india-happy/> accessed 19 October 2016.

## ADAPTATION EFFORTS: CONCERN FOR VULNERABLE COUNTRIES

In respect of adaptation, the Paris Agreement is quite significant in the manner that it recognises the need for adaptation, especially in respect of the developing countries which are vulnerable to the effects of climate change. The Agreement provides that:

> "1. Parties hereby establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2."[34]

The Paris Agreement accordingly provides for the setting up of a mechanism whereby the information about efficient adaptation practices could be shared among the parties to the Paris Agreement. This will enable the developing countries to identify and implement adaptation strategies that are most suited to their needs and circumstances. More importantly, the Paris Agreement provides for special assistance to the developing countries in their efforts aimed towards adaptation. The relevant part of the Agreement reads as under:

> "6. Parties recognize the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change."[35]

## FINANCIAL ASSISTANCE: DISCLOSURES IS THE NEW NORM

The financial assistance had been one issue on which the developed countries were hesitant on committing to a specific amount. Rather they wanted the emerging economies to also contribute towards raising the funds of action against climate change. However, the developing countries were unequivocal in their demand for an unambiguous framework of financial assistance under the new legal instrument.

As a result, the Paris Agreement is quite clear about the mandate on the developed countries to contribute towards raising finance for assisting the efforts aimed at both mitigation and adaptation. However, there is an added provision that encourages other parties to contribute to raising finance voluntarily. This is an achievement for the developed countries that can now

[34]'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 7(1) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.
[35] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 7(6) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.

create pressure on some other countries to contribute towards financial assistance even if that contribution is to be a voluntary one. Although there is no legal obligation under the Paris Agreement as such, this paves the way for bilateral or multilateral negotiations aimed at pressurising all countries but the developed ones to contribute towards the pool of financial resources which have to be mobilised for effective action against climate change. The relevant part of the Agreement reads as under:

> "1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.
>
> 2. Other Parties are encouraged to provide or continue to provide such support voluntarily."[36]

However, there is also an element of satisfaction for the developing countries in respect of their demand for a specific commitment on the part of developed countries for financial contributions. Although no specific amount has been earmarked as part of the operative text of the Paris Agreement, a provision has been made for a biennial declaration of specific commitments on the part of the developed countries, for financial contributions. This implies that there will be certainty in the financial assistance segment under the framework of the UNFCCC and the Paris Agreement. The relevant part of the Agreement reads as follows:

> "5. Developed country Parties shall biennially communicate indicative quantitative and qualitative information related to paragraphs 1 and 3 of this Article, as applicable, including, as available, projected levels of public financial resources to be provided to developing country Parties. Other Parties providing resources are encouraged to communicate biennially such information on a voluntary basis."[37]

For developed countries, the absence of a specific amount for commitment in the text of the treaty itself is a big relief, which provides them with enough flexibility to decide on their respective share of contribution. This is another instance of the bottom up approach that has been followed in drafting the terms of the Paris Agreement.

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[36] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 9(1)-(2) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf > accessed 19 October 2016.
[37] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 9(5) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.

## TECHNOLOGY TRANSFER: CLOSER INTERNATIONAL COOPERATION SOUGHT

The transfer of technology, as mentioned previously in this paper, has been an important contentious issue between the developing and the developed countries. The Paris Agreement has made significant strides in this domain too by encouraging the countries to take a long-term vision on this issue. The Paris Agreement provides for facilitating cooperation between the countries in respect of transfer of technology for undertaking effective mitigation and adaptation efforts. The Agreement reads as under:

> "2. Parties, noting the importance of technology for the implementation of mitigation and adaptation actions under this Agreement and recognizing existing technology deployment and dissemination efforts, shall strengthen cooperative action on technology development and transfer."[38]

Again, the Paris Agreement provides for special assistance for the developing countries in respect of transfer of technology at different stages. The Agreement reads:

> "6. Support, including financial support, shall be provided to developing country Parties for the implementation of this Article, including for strengthening cooperative action on technology development and transfer at different stages of the technology cycle, with a view to achieving a balance between support for mitigation and adaptation…"[39]

The Paris Agreement also recognises the need to promote innovation so that the existing technology is improved upon, thereby facilitating efforts towards coming up with newer technology to assist in the global action against climate change. The Agreement reads as follows:

> "5. Accelerating, encouraging and enabling innovation is critical for an effective, long-term global response to climate change and promoting economic growth and sustainable development. Such effort shall be supported appropriately(including by the Technology Mechanism) and through financial means(by the Financial Mechanism of the Convention), for collaborative approaches to research and development and

[38] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 10(2) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.
[39] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 10(6) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.

facilitating access to technology, in particular for early stages of the technology cycle, to developing country Parties."[40] Emphasis supplied)

The promotion of innovation may have the objective of liberalising the intellectual property law and competition law regimes in countries where the protection of IPRs and competition is weaker, which in turn discourages innovation.

**Capacity Building: Assistance for Developing and Vulnerable Countries**

The provision for capacity building is in a sense, the manifestation of the intention to use technology transfer and climate finance to create capacity in countries that do not have the same, to take effective measures towards mitigation and adaptation. This provision is especially pro-developing and least developed countries as it highlights as well as addresses their concern for capacity building to fight climate change. The relevant part of the Agreement reads as under:

> "Capacity-building under this Agreement should enhance the capacity and ability of developing country Parties, in particular countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective climate change action, including, inter alia, to implement adaptation and mitigation actions, and should facilitate technology development, dissemination and deployment, access to climate finance, relevant aspects of education, training and public awareness, and the transparent, timely and accurate communication of information."[41]

## IMPLEMENTATION CONCERNS REGARDING THE PARIS AGREEMENT: AFTER CONSENSUS.WHAT NEXT?

Being an international agreement, it will always be interesting to note how the Paris Agreement could be effectively enforced. Also, one may wonder that given the "bottom up" approach that has been consistently adopted throughout the operative text of the Paris Agreement, how would it be possible to dictate the countries to do what they have actually committed themselves to doing, in their INDC? A "top down" approach towards implementation of the Agreement does not seem appropriate for an Agreement where so much emphasis has been put upon the

[40] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 10(5) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.
[41] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 11(1)<http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.

principles of equity, CBDR, and the national circumstances. In such a scenario, the onus of the implementation of the Paris Agreement falls upon the countries themselves.[42]

The Paris Agreement seems to "facilitate" action rather than "regulating" the same. This is evident from the provisions in the Agreement which emphasise on sharing of information between the countries in respect of mitigation, adaptation, climate finance, technology transfer, capacity building, etc. Some of these provisions have been mentioned previously in this section of the paper.

In line with the same, the Paris Agreement has provided for the establishment of a transparency mechanism for action and support so that the countries could regularly share information regarding the carbon emissions in their respective domestic spheres and their progress in achieving the targets of their respective INDC.[43] The relevant part of the Agreement reads as under:

> "7. Each Party shall regularly provide the following information:
>
> (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement;
>
> (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4."[44]

The intention behind such a transparency framework is to utilise the "peer pressure" that the countries will exert over each other for meeting their INDC targets in time. The transparency framework will also enable the information to be shared with media groups, members of the civil society and most importantly, with the citizens of the world, who are the most affected by the effects of climate change. Perhaps, this will enable the issue of climate change to become an electoral issue in many democracies where the fate of the political leaders may come to depend on their promises towards containing climate change, and their action in respect of the

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[42] Tyler Hamilton, 'What's next after the historic Paris climate change agreement? '(*The Star*,14 December 2015) <www.thestar.com/news/canada/2015/12/14/whats-next-after-the-historic-paris-climate-change-agreement.html> accessed 19 October 2016.
[43] The Paris Agreement, art 13(1), FCCC/CP/2015/L9/Rev1 <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.
[44] The Paris Agreement, art 13(7), FCCC/CP/2015/L9/Rev 1 <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.

same. Although it may be acknowledged that there is no mechanism to ensure that a country in default be penalised, that would have been ineffective given the flexibility inherent in the Paris Agreement itself for the parties to take actions in the light of their national circumstances.

Moreover, another aspect of the transparency framework will be to enable the countries to take stock of the measures taken by the other countries and emulate them when it comes to best practices adopted. This will enable the achievement of the objectives of the Paris Agreement that relate to adaptation and capacity building.

In addition, the Paris Agreement provides for "global stocktake".[45] That is, the Paris Agreement requires the countries to take a stock of the collective progress in respect of the objectives of the Agreement. The first such "global stocktake" is required to be taken in the year 2023 and thereafter, the same shall be taken after every five years' period.[46]The Paris Agreement requires the global stocktake to be comprehensive in that it should be in respect of not only mitigation, but also adaptation and "the means of implementation and support", and the basis for the same should be the best available science and the principle of equity.[47] Among other things, the countries would be able to assess whether their collective efforts will result in containing the average temperature rise "well below" the figure of 2 degree Celsius, and whether the countries would be able to achieve the more ambitious agenda of "1.5 degree Celsius". The countries can accordingly arrive at newer solutions to tackle with the shortcomings in their approach that they find.

## CONCLUSION: MILES TO GO BEFORE WE SLEEP!

According to a survey conducted by the United Kingdom based market research group Ipsos Mori, 73 per cent of respondents from all countries agreed that urgent action is required to contain the phenomenon of climate change. 78.6 percent of Indian respondents had the same opinion.[48]

The aforesaid data shows, to a considerable extent, the public awareness regarding the issue of climate change. The adoption of the Paris Agreement is merely the beginning of a new chapter

[45] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 14<http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.
[46] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 14(2) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.
[47] 'The Paris Agreement' (Draft Decision-/CP 21, Paris, 12 December 2015) art 14(1) <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 19 October 2016.
[48] 'Most Indians, Chinese seek urgent climate action, US most sceptical' (*The Indian Express*, 14 December 2015).

on international cooperation on action against climate change. As seen in the paper itself, the text of the climate change Agreement is one that persuades the countries to take effective action. This element of persuasion has come in useful in creating a consensus in the Paris climate talks, but the same persuasion has added another responsibility on the countries: that of taking timely and effective action by themselves. Therefore, there are voices in the public opinion that are sceptical about the implementation of the Paris Agreement.

However, being sceptical is of no significance. The next step should be to build upon the mechanisms that have been provided for in the Paris Agreement and march ahead. It is fortunate to note that there are positive signals in this respect. In fact, at the very beginning of the climate change summit in Paris, the Indian Prime Minister Mr. Narendra Modi cooperated with the other countries to form an ambitious "International Solar Alliance", with a view to accelerate the development of alternative and renewable sources of energy so that the dependency on fossil fuels could be reduced, which are the prime source of carbon emissions in the world.[49]

The International Solar Alliance thus goes on to show that there is a need for more such proactive initiatives at the global level to tackle climate change. Innovation and energetic response is the need of the hour. Fortunately, the blame game and resistance, which had diminished the possibility of an agreement in Copenhagen in 2009, have been overcome successfully in Paris in 2015. The time has come for the countries to take effective action within their respective domestic spheres and cooperate internationally. Moreover, it is time that the media and civil society groups play their role to generate public awareness on the issue of climate change so that the people could bring in pressure on their governments to effectively fight against climate change.

[49] G Ananthakrishnan, 'Modi launches International Solar Alliance' (*The Hindu*, 1 December 2015) <www.thehindu.com/sci-tech/energy-and-environment/modi-launches-international-solar-alliance/article7934560.ece>accessed 19 October 2016.

# TRIPLE TALAQ ROW: VALIDITY OF JUDICIAL INTERFERENCE IN PERSONAL LAWS

*EESHA SHROTRIYA

## INTRODUCTION

Muslim personal law recognises three types of divorce: the first is 'talaq ahsan', which consists of a single pronouncement of divorce made during a period of menstruation followed by sexual abstinence during iddat.[1] The second type of divorce is 'talaq ahsan', consisting of three pronouncements made during successive tuhrs with no sexual relations taking place during this time.[2] The third form of divorce is 'talaq-ul-biddat'. It consists of three pronouncements made during a single tuhr in one sentence or a single pronouncement made during a single tuhr, clearly indicating an intention to dissolve the marriage irrevocably.[3] This form of divorce can be given in both oral and written forms. In many cases, women are notified of this intention through telephone or any other electronic means of communication.

It is common knowledge that this form of divorce has drawn a great deal of criticism. It has been argued that the unilateral nature of this form of divorce subjects the wife (and the marriage) to the whims and caprices of the husband. She is subjected to constant insecurity.

"*The threat of divorce casts a shadow on marital life.....Whenever he was displeased; he would say 'I shall divorce you.' I was constantly worried; where will I go if he utters those words*?"[4]

It prevents women from reporting marital abuse[5] and consolidates gender inequality within the conjugal family. She is left without financial, social, and emotional support after the divorce.

This form of divorce also causes legal confusion because it is difficult to prove its validity.[6] It is very difficult to prove the claims of either party, as they might be the only ones present when the divorce was supposedly pronounced.

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[1] Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (Eastern Law House 1955) 267.
[2] ibid.
[3] ibid.
[4] Gopika Solanki, *State Law and the Adjudication Process* (Cambridge University Press 2011) 132.
[5] ibid.
[6] ibid.

## ORIGIN AND QURANIC MEANING

It is essential to understand that though originally written in Arabic, Quran has been translated into many languages and interpreted by many jurists. Thus, it logically follows that texts were interpreted with a view to minimize friction with existing cultures and practices. Most of the interpretations reinforce the existing gender roles in the society. The Holy Quran lays down:

"*A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness...*"[7]

This simply means that the husband can only take back his wife after two pronouncements of divorce. If he divorces her for the third time, the divorce becomes irrevocable and he is not allowed to take her back. He can only do so if the wife marries another man, consummates that marriage, obtains a divorce and then remarries him.

Prof. Tahir Mahmood, an internationally recognized expert on Muslim Law, stated in an interview[8] that there are only two verses in Quran related to triple talaq - the first one allows the husband to divorce only twice, which has been explained above and the other verse relates to arbitration. The latter verse states:

"*If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their reconciliation:...*"[9]

This verse provides that if the husband wishes to divorce his wife, he must appoint an arbiter from his side and the wife must do the same. The arbiters must then try to bring about reconciliation over a period of time. Only after this process has been carried out, the husband is entitled to divorce his wife. Thus, this practice ensures that the husband does not arbitrarily divorce his wife.[10]

According to Hon'ble Justice (retd.) K. Kannan, triple talaq was an innovation so that "incorrigibly acrimonious couples" can be separated from each other as soon as possible.[11]

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[7] Abdullah Yusuf Ali (trs), *The Holy Qur'an* II: 229 (Baqara).
[8] Ajaz Ashraf, 'Ban Triple Talaq and Abolish Muslim Personal Law Board' (*Scroll*, 5 May 2015) <http://scroll.in/article/724902/ban-triple-talaq-and-abolish-muslim-personal-law-board-says-former-minorities-commission-chairman> accessed 15 October 2016.
[9] Abdullah (n 7) IV: 35 (Nissa).
[10] Khan Noor Ephroz, *Women and Law: Muslim Personal Law Perspective* (Rawat Publications 2003) 283.
[11] K Kannan, 'Frames of Reference' (*The Hindu*, 21 October 2016) <http://thehindu.com/opinion/lead/k-kannan-on-triple-talaq-laws-in-india-and-in-several-muslimmajority-countries-frames-of-reference/article9246389.ece> accessed 25 October 2016.

However, according to Mahmood, the Maulvis have decided that the first verse is Quranic law and the second one is Quranic morality.[12] However, this distinction has not been provided for in the Quran and the maulvis have done so without any authority.

According to Anees Ahmed, there can be two reasons for misinterpretations of the Quranic verses. One, the courts usually rely on inauthentic translations, because the original sources are in Arabic and Persian and thus, inaccessible. Secondly, personal laws of Muslims have not been interfered with, by the legislators as they fear "agitations and reprisals by conservative Muslims".[13]

## TALAQ-E-BIDDAT AND THE INDIAN JUDICIARY

Being the most controversial form of divorce, triple talaq has been on the judicial radar for a long time. The first known instance comes from a leading case on divorce, in which Justice Costello held that – "*I regret that I have to come to the conclusion that as the law stands at present, any Mohammedan may divorce his wife at his whim and caprice.*"[14]

Justice Batchelor held that, "*It is good in law, though bad in theology*."[15]

It is also pertinent to mention Justice Krishna Iyer's opinion that, "*The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions.....Indeed a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce.*"[16]

He further opined that, "*It is a popular fallacy that a Muslim male enjoys, under Quranic law, the unbridled authority to liquidate the marriage. The Holy Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, if they (namely women) obey you then do not seek a way against them...*"

In *Marium v Shamsi Alam*[17], it was held that - "*A divorce pronounced thrice in one breath by a Muslim husband would have no effect in law, if it was given without deliberation and without any intention of effecting an irrevocable divorce, such divorce is a form of talaaq-e-ahsan, and thus is revocable by the husband before the iddat expires*."

[12] Ashraf (n 8).
[13] Anees Ahmed, 'Reforming Muslim Personal Law' [2001] EPW 36.
[14] *Ahmad Kasim Malla v Khatoon Bibi* 59 ILR Cal 833.
[15] *Sarabai v Rabia Bai* ILR 30 Bom 537.
[16] *A Yusuf Rowther v Sowramma* AIR 1971 Ker 261.
[17] *Marium v Shamsi Alam* AIR 1979 All 257.

In *Ziaudiin Ahmad v Anwar Begum*,[18] Justice Bahrul Islam held that, "*Under Islamic law, a divorce is not valid unless there is a reasonable cause for it, and it has been preceded by an (unsuccessful) attempt at reconciliation by two arbiters representing the husband and the wife, as required by the Quran*."

While in another case[19], he stated that, "*A Muslim husband has effected a divorce must be duly proved. Even if proved, the court shall not recognize it, if it is not a valid divorce under Islamic law*."

The approach of the judiciary on this matter has been progressive and rational. The next important event in this timeline was in 1984, when a woman named Shahnaz Shaikh, who headed Mumbai's first feminist Muslim group, 'Awaaz-e-Niswaan', filed a writ petition in the Supreme Court, challenging the validity of triple talaq. She contended that the arbitrary exercise of this unilateral power is against Articles 14 and 15 of the Indian Constitution. This was an important step, which could have been a milestone in the development of Muslim personal laws regarding divorce. But due to the raging communal tensions in the country in the wake of the Babri Masjid demolition, Shehnaaz Shaikh withdrew her petition as she did not think the time was right to get courts to intervene in the personal laws of an already desolated community.[20]

In the landmark judgment of 2002, *Shamim Ara v. State of UP*[21], the apex court held that unilateral triple divorce is valid only if it is justified and pronounced in front of witnesses. A similar verdict was given in the Dagdu Pathan case[22] wherein, it was held that the mere recitation of oral divorce in front of the witnesses or the talaqnama was not sufficient to prove divorce.

In both the above cases, the court did not abolish the right of Muslim men to give unconditional divorce to their wives. It merely placed some restrictions on these privileges granted to men. Thus, it has accommodated minorities' sensibilities while protecting the rights of Muslim women.[23]

[18] *Ziaudiin Ahmad v Anwar Begum* AIR 1978 Guahati 145.
[19] *Must Rukia Khatun v Abdul Khalique Laskar* AIR 1982 Gau 224.
[20] Jyoti Punwani, 'Muslim Women: Historic Demand for Change' [2016] EPW 51.
[21] *Shamim Ara v State of UP* AIR SCW 4162.
[22] *Dagdu v Rahimbi Dagdu Pathan* 2003 (1) BomCR 740.
[23] Solanki (n 4) 135.

It is important to understand that despite these judgments, women continue to get divorced arbitrarily. One of the reasons behind this can be the failure of the lower courts to comply with these judgments. Article 141 of the Indian Constitution states that:

"*The law declared by the Supreme Court shall be binding on all courts within the territory of India*"

The doctrine of legal precedent holds that, following the dictates of the Supreme Court is the duty of the lower courts.[24] But the question which arises in this case is whether all the judgments of the higher courts have the force of law. It is unclear when a precedent is compelling enough to command judicial obedience from judges who resist it.[25]

Despite legal precedents, Family Courts have accepted unilateral divorces without examining the conditions in which the divorce took place.[26] Intricacies of Muslim personal laws are not usually debated in Family Courts because judges and lawyers are unfamiliar with them.[27]

One major hindrance in the way of proper coordination between the lower and higher courts on this matter is the communal outlook of some judges.[28] The comments on Prophet Mohd in the Shah Bano judgment attracted a lot of anger from the Muslim community in the country. Judges therefore, usually avoid commenting on Muslim Personal law in their judgments to avoid any controversy. Meanwhile, many of the women who come to Family Courts are illiterate and unfamiliar with such judgments; on the other hand, most of the women do not even approach courts and those who do, do not receive adequate legal representation.

Thus, although the higher courts have specifically ruled against the practice of triple talaq, the lower courts fail to comply with those rulings in many cases. Therefore, in order to ensure the conformity of lower courts, these laws need to be codified.

[24] Evan H Carminker, 'Why Must Inferior Courts Obey Supreme Court Precedents' [1994] 46 SLR 815.
[25] Randall Kelso & Charles D Kelso, 'How the Supreme Court is dealing with precedents in constitutional cases' [1996] 62 Brook L Rev 973.
[26] Solanki (n 4) 135.
[27] *NS v SK* Family Court Records 2002.
[28] Maitreyee Mukhopadyay, *Legally Dispossessed: Gender, Identity and the Process of Law* (Stree 1998).

# THE ON-GOING DEBATE

## TIMELINE OF EVENTS

The issue of the inherent inhumane nature of the practice of triple talaq is once again being discussed aggressively. To understand the current debate and its implications, it is important to trace the genesis of the debate.

In October 2015, the court, while hearing a case[29] related to gender discrimination in the Hindu Succession Act, 2005, directed the filing of a Public Interest Litigation (hereinafter PIL) against the practice of triple talaq and polygamy and the subsequent deprivation of fundamental rights.

In February 2016, a PIL, titled "Muslim Women's Quest for Equality", came up before a bench headed by the Chief Justice. The court accepted the application of the Jamiat-Ulema-e-Hind (hereinafter JeH) seeking to be made a party in the case. The JeH contended that Muslim Personal Law could not be challenged for violating fundamental rights because it was not passed by the legislature and thus did not come within "laws in force" under Article 13 of the Indian Constitution. The All India Muslim Personal Law Board (hereinafter AIMPLB) became a party too.

Meanwhile, in December 2015, a lawyer belonging to the Bharatiya Janata Party (hereinafter BJP) filed a PIL in the Supreme Court asking for the enactment of a Uniform Civil Code (hereinafter UCC). However, Chief Justice T S Thakur refused to entertain the PIL. He stated that the drafting of a Uniform Civil Code is a matter which comes within the purview of the legislature. He also stated that, no Muslim woman had "*questioned triple talaq on the ground that it was discriminatory. If a victim of triple talaq comes to the court and questions the validity of the procedure, we can surely examine the legality of triple talaq and find out whether it violated her fundamental rights.*"[30]

In February 2016, Shayara Bano, who had received triple talaq by speed post after 13 years of marriage, filed a petition asking for striking down the practice of triple talaq, halala and polygamy as they violated the fundamental rights guaranteed by the constitution. One month later, Nisa, a Kerala based women's organisation filed a similar petition. In May 2016, Afreen

[29] *Prakash v Phulwati* Civil Appeal No 7217 of 2013.
[30] Dhananjay Mahapatra, 'Civil code: SC lobs ball to Parl, Keeps Door Open on Triple Talaq' *The Times of India* (Mumbai, 8 December 2015) <http://epaperbeta.timesofindia.com/Article.aspx?eid=31804&articlexml=Civil-code-SC-lobs-ball-to-Parl-keeps-08122015001046> accessed 20 October 2016.

Rahman, who had received triple talaq by speed post after 17 months of marriage, approached the court with a similar grievance with the help of Bharatiya Muslim Mahila Andolan (hereinafter BMMA). The BMMA obtained 50,000 signatures on the petition.

In June, an advocate associated with Rashtriya Swayamsevak Sangh (hereinafter RSS) – affiliated Rashtrawadi Muslim Mahila Sangh asked for the codification of Muslim Personal Laws. In August, Ishrat Jahan from Kolkata also filed a similar petition.

Several other organisations like the Bebaak collective and the All India Muslim Women Personal Law Board have joined this fight. The centre, too, filed an affidavit, opposing the practice of triple talaq on the grounds that it is violative of fundamental rights and is not an integral part of the religion.

**ARE PERSONAL LAWS OUTSIDE THE SCOPE OF ARTICLE 13?**

One major argument of the orthodox Muslim community is that the Supreme Court cannot interfere with their personal laws because they are of divine origin. They cannot be challenged as being violative of fundamental rights under Article 13 of the Indian Constitution. Article 13 states that:

*"(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void*

*(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void*

*(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution...."*

It has been argued that Muslim Personal Laws do not come within the definition of "laws in force" according to Article 13 as they have not been enacted by the legislature.

The AIMPLB in its affidavit claimed, "*The Supreme Court cannot rewrite personal laws in the name of social reform. The validity of the rights in one religion can't be questioned by a court. As per the Quran, divorce is essentially undesirable, but permissible*"[31]

The contention of AIMPLB and others, that personal laws are not "state-made" laws is erroneous. According to Tahir Mahmood,[32] the uncodified Muslim law is in force in India not as part of the Muslim religion [as Muslim religious leaders presume] but because of its recognition by state legislation, mainly the Muslim Personal Law (Shariat) Application Act 1937[33]. According to Section 2 of the act:[34]

"*Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance... the rule of decision in cases where the parties are Muslims shall be the Muslim Personal law (Shariat).*"

In addition to this, several other personal laws of Muslims have been recognised in statutes enacted by the legislature. Section 129 of the Transfer of Property Act protects the Muslim law of gift. The section states that:

"*Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law*."[35]

Similarly, Section 2 of the Dowry Prohibition Act, 1961[36], defines dowry as:

*"In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly —*

*(a) By one party to a marriage to the other party to the marriage; or*

[31] The Hindu, 'AIMPLB Affidavit Reignites Debate on Women's Rights' *The Hindu* (New Delhi, 22 September 2016) <https://thehindu.com/news/national/AIMPLB-affidavit-reignites-debate-on-womens-rights/article14621976.ece> accessed 22 October 2016.
[32] Tahir Mahmood, 'There is no Immunity for Muslim Personal Law from the Jurisdiction of Supreme Court' (*Scroll*, 30 March 2016) <http://scroll.in/article/805825/opinion-there-is-no-immunity-for-muslim-personal-law-from-the-jurisdiction-of-supreme-court> accessed 25 October 2016.
[33] ibid.
[34] The Muslim Personal Law (Shariat) Application Act 1937, s 2.
[35] Transfer of Property Act 1882, s 129.
[36] Dowry Prohibition Act 1961, s 2.

*(b) By the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person,*

*At or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies."*

Thus, it expressly protects the practice of giving Mahr or dower under the Muslim Personal Law.

Thus, it is clear that some of the provisions of the personal law are expressly protected by the legislative enactments mentioned above. In addition to these, the Muslim Personal Law (Shariat) Application Act provides the authority to courts to decide issues on Muslim Personal Law, even though the personal laws are not codified in any legislative statute. According to Mahmood, there is no difference between the two types of authority.[37]

Apart from these legislations, the constitution too grants power to the central and state governments to legislate on the issues related to personal laws. Entry 5 of the Concurrent list in Schedule VII of the Indian Constitution includes:

*"Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."*

**IS ABOLITION OF TRIPLE TALAQ AGAINST FREEDOM OF RELIGION?**

Another argument given against abolition of triple talaq is the freedom of religion granted by the constitution. The chief of Jamaat-e-Islami Hind stated that laws on divorce and polygamy are *"an intrinsic part of their religion and are hence obliged to follow the Sharia in those matters"*. However, the central government's affidavit stated that, *"validity of triple talaq and polygamy should be seen in light of gender justice"* and that triple talaq, polygamy and nikaah halal *"were not integral to the practices of Islam or essential religious practices."*[38] It is a fact that the freedom of religion conferred by the constitution is not an absolute one and is subject to public order, morality and health. The state has the power to make laws for *"regulating or restricting any economic, financial, political or other secular activity which may be associated*

[37] Ashraf (n 8).
[38] Utkarsh Anand, 'Triple Talaq not Integral Part of the Religion: Centre in Supreme Court' *The Indian Express* (New Delhi, 13 October 2016) <http://indianexpress.com/article/india/india-news-india/triple-talaq-not-integral-to-religion-centre-in-supreme-court-3071125/> accessed 22 October 2016.

*with religious practice" and for "providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."*[39] It is clear from the provisions of the article that freedom of religion guaranteed in the Indian Constitution can be curbed by the judiciary in appropriate circumstances.

India, being a country with a rich cultural and religious diversity, is subject to conflicts between religion and law. Dr. BR Ambedkar stated in the Constituent Assembly Debate[40] on 2nd December, 1948, that:

*"The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion."*

The Indian judiciary has laid emphasis on the fact that the principles of equality and justice would prevail over religious laws in a number of its decisions. In *Ram Prasad Seth v State of UP*[41], a law which prohibited bigamy for those in public employment was challenged. The court held that bigamy "*cannot be regarded as an integral part of a Hindu religion*". It stated that even an adopted son can perform the funeral rites of his father, thus it isnot essential to have a bigamous marriage in order to beget a son.

In another case[42], it was held that sacrificing cows is not an integral part of the religion of Islam. The court, in a case[43], held that 'tandava' dance is not an integral part of the Anand Margi Sect; therefore, police can prevent such a procession. One of the important cases related to essential religious practices is *Nikhil Soni v Union of India*[44], in which the Rajasthan High Court held that the practice of Santhara, which includes systemic fasting unto death, is illegal because it amounts to '*attempt to suicide*'.

[39] The Constitution of India, art 25.
[40] Constitutional Assembly Deb December 1948.
[41] *Ram Prasad Seth v State of UP* AIR 1957 All 411.
[42] *Mohd Hanif Qureshi v State of Bihar* AIR 1958 SC 731.
[43] *Acharya Jagadishwara Avadhuta v Commissioner of Police* AIR 1984 SC 51.
[44] DB Civil Writ Petition No 7414/2006.

The Bombay High Court recently allowed the entry of women into Haji Ali Dargah's inner sanctum. The court examined whether the prohibition of entry of women in the inner sanctum of a shrine is an integral part of Islam or not. It held that an essential religious practice must *"constitute the very essence of that religion, and should be such, that if permitted, it will change its fundamental character"*[45]. The Haji Ali Dargah Trust failed to prove the same before the court.

These decisions of various courts are an evidence of the fact that the judiciary has always placed the principles of equality and non-discrimination on a higher pedestal than the rules and traditions of a particular religion. However, the essential religious practice test has been criticised on several grounds, one of them is the lack of legitimacy of the courts to decide whether a certain practice is essential to a religion or not. Gary Jacobsohn has noted that it has become 'an internal level of reform' by holding that certain regressive practices do not constitute 'essential' parts of a religion, the Court not only denies them constitutional protection, but also recharacterises the religion in a more progressive light.[46] Thus, the validity of this test is yet to be determined by a lucid Supreme Court judgment.

It is upon the judiciary to decide whether it wants to go down this road or not, because even if it doesn't, there are many other arguments in favour of the abolition of the practice of triple talaq.

**POSITION OF OTHER COUNTRIES**

It has been consistently contended by women's organisations that triple talaq's redundancy is proved by the fact that 22 Muslim countries have done away with this practice. The Hanbali scholar, Ibn Taimiyah, stated that three pronouncements of the word 'talaq' in one sitting would be counted as one. Therefore, this divorce would be revocable. This view has been adopted by many countries. Egypt was the first one to do so. Later, countries like Sudan, Syria, UAE, Qatar, Iraq, Jordan, Indonesia, Tunisia,etc. followed suit.[47] In Pakistan, Section 7 of the Muslim Family Law Ordinance, 1961 has impliedly abolished triple talaq.

[45] *Dr Noorjehan Safia Niaz v State of Maharashtra* [2015] PIL No 106 of 2014.
[46] Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton University Press 2005).
[47] Ajaz Ashraf, 'If Pakistan and 21 Other Countries have Abolished Triple Talaq, Why Can't India?' (*Scroll*, 18 April 2016) <http://scroll.in/article/806299/if-pakistan-and-21-other-counties-have-abolished-triple-talaq-why-shouldnt-india> accessed 23 October 2016.

According to Prof Tahir Mahmood, India is unable to change the Muslim Personal Laws because of the 'minority syndrome'. In an interview[48], he explains this by giving the example of Bangladesh, where Hindus are in a minority (12%). There has been no change in the Hindu laws of the country since its independence. On the other hand, Muslim laws in the country have undergone a number of changes and the practice of triple talaq has also been abolished. The same argument can be given in the case of India, where Muslims are in a minority (14.2%).[49] However, this argument fails when we look at the case of Sri Lanka, where the Muslim population is a little less than 10%.[50] Sri Lanka's Marriage and Divorce (Muslim) Act, 1951 requires that a husband who wishes to divorce his wife should give notice of his intention to the qazi who will then attempt reconciliation between the parties. Thus, it abides by the Quranic law of arbitration before divorce.

**THE EMERGING CONSENSUS**

It has been argued by certain religious extremists that abolishing the practice of triple talaq is an attempt at eroding the religious identity of the Muslim community. However, there are numerous examples which show that Muslims themselves have been opposing this unjust practice for a long time. After the Babri Masjid demolitions, standard nikahnamas (marriage contracts) were drawn which prescribed the Quranic method of divorce (which included arbitration) and also punishments for the men who violated it. However, the AIMPLB never supported this. It drew up its own nikahnama in 2005, which did not prescribe any punishments in case of violations.[51]

Bhartiya Muslim Mahila Andolan conducted a survey of 5000 Muslim women across 10 states in 2015 which showed that 92% of the women wanted a ban on oral/unilateral divorce. Similarly, 92% of the women wanted the practice of polygamy to be abolished.[52]

The biggest hurdle faced by Muslim women as far as triple talaq is concerned, is the absence of a concrete law which expressly declares the practice as unconstitutional. All they have today is a pile of judgments. There is an emerging consensus that Muslim Personal Laws should be

[48] Ashraf (n 8).
[49] Census of India 2011.
[50] Ashraf (n 47).
[51] Jyoti Punwani (n 20).
[52] Dr Noorjehan Safia Niaz and Zakia Soman, 'Seeking Justice within Family: A National Study on Muslim Women's Views on Reforms in Muslim Personal Law' (*Bhartiya Muslim Mahila Andolan*, March 2015) <https://bmmaindia.com/2015/08/10/bmma-publication-seeking-justice-within-family-a-national-study-on-muslim-womens-views-on-reforms-in-muslim-personal-law/> accessed on 24 October 2016.

codified. This would be helpful in eradicating the confusion caused by numerous interpretations of the Holy Quran by different jurists.

The government, even before independence, neglected the demands of the minority communities. Under the British rule, these matters were not touched upon as they were considered to be ‘sensitive’ issues. Not much has changed even after 69 years of independence. The government’s approach towards personal laws is still tainted with the fear of stirring up controversies. Even though the codification of Hindu personal laws began as early as 1955 with the Hindu Marriage Act, none of the aspects of the Muslim personal laws have been codified yet. This can, once again, be attributed to the ‘minority syndrome’.

## CONCLUSION

Triple talaq, in its present form, is an inhumane and appalling practice, which needs to be done away with. It would not be wrong to conclude that there is a budding consensus among all the communities that this practice should be brought to an end. A large chunk of the Muslim community has demanded for codification of the Muslim personal laws. The codification of these laws can prove to be a successful step towards erasing the deeply embedded gender bias in society. There have been demands for a Uniform Civil Code by certain groups. However, in the present scenario, these demands seem to be motivated by political desires. The most appropriate step would be codification of Muslim personal laws by experts who are well acquainted with all the sources-primary and secondary, of these laws. This would help in removing all the confusion caused by different interpretations of the same sources. Muslim personal laws need lucidity and specificity, which can be brought by codification.

# ASCHEMATISING THE POSITION OF COMMON LAW NATIONS: AN ANALYSIS OF ADMISSIBILITY OF EXPERT EVIDENCE

[*] *DEVERSHI MISHRA & KOMAL KHARE*

## INTRODUCTION

"*Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them*."[1]

As our technology and legal system matured, use of expert evidence has gained prominence and is ever pervasive. In cases involving the question of science toxic tort, the process of imparting untainted justice depends significantly on expert evidence. The perils associated with the procedure of inviting expert opinion have increased and attracted attention over time. Historically, the neutrality and unbiasedness in expert opinion was guarded by two systems, wherein judges who were expert in the matter in issue and the potential expert witness both were called to conclude the matter with a well-reasoned decision.[2] This method eventually lost its essence and use of Professional Expert witnesses became more frequent within the legal circuit.[3] Gradually, however, various problems associated with expert evidence became very apparent.[4]

With the increase in the inconsistencies in relation to the expert testimonies, the common law countries became cautious and acknowledged the possibility of flawed expert evidence due to human fallibility. Thereon, not only common law countries but the world community started hosting modification regarding expert evidence in their own jurisdiction.[5]

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[1] *Lord Abinger v Ashton* [1873] 17 L R E Q 358, 374 (Can).
[2] Learned Hand, 'Historical and Practical Considerations Regarding Expert Testimony' (1901) 15 Harvard L R 40.
[3] *R v D D* (2000) SCC 43 (Can).
[4] *R v J L J* (2000) SCC (Can).
[5] Bernard Robertson and GA Vignaux, 'Expert Evidence: Law, Practice and Probability Review Article' (1992) 12 Oxford Journal of Legal Studies 392.

Over the past two-three decades, we have witnessed a trend towards formal recognition of expert evidence laws in various common law nations. The impact of Woolf's "*Access to Justice"*[6] report in England, dominance of Daubert standard in U.S., impact of Australian Law Reform Commission in Australia, and formulation of expert duties in Canada are a few instances of the same.

The present study deals with the development of expert evidence laws in five common law countries, namely, U.S.A, Canada, Australia, England and India. The study seeks to examine the evolution of expert evidence and additionally, the reactions of the abovementioned nations to the need of tackling the hurdles of partiality and unaccountability associated with expert evidence.

## UNITED STATES OF AMERICA: SUSTAINMENT OF *DAUBERT* STANDARDS THROUGH *JOINER, KUMHO* AND RULE 702

### REIGN OF DAUBERT TRILOGY AND STANDARDS

The U.S. federal system encompasses not only the Federal Courts but also fifty State Courts. In recent times, an expectation has surfaced that the judges will play the role of "gate keeper" in controlling the admission of expert opinion evidence. Most of the jurisdictions follow one of the two principal approaches laid down in the leading cases of *Frye v. United States*[7] [Hereinafter '*Frye*'] and *Daubert v. Merrell Dow Pharmaceuticals*[8] [Hereinafter '*Daubert*'] Even though *Daubert* is commonly described as a four-five part test, it actually is only a two-part test which derives its source from Rule 702 of the Federal Rule of Evidence (FRE).[9] For an evidence to be admissible under the *Daubert* standard, two conditions need to be fulfilled: reliability and relevance.[10] It was by way of explaining the "reliability" criterion, that the court formulated four-five other criteria: (i) testing, (ii) peer review and publication, (iii) error rate and standards,[11] and (iv) general acceptance in the relevant scientific community.[12] These

[6] Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HM Stationery Office 1996).
[7] *Frye v United States* 293 F 1013 (DC Cir 1923).
[8] *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993).
[9] ibid 588-89.
[10] *Daubert* (n 8) 594-95.
[11] *Bond v State*, 925 N E 2d 773, 779 (Ind Ct App 2010).
[12] Gary Edmond, 'Supersizing Daubert Science for Litigation and Its Implications for Legal Practice and Scientific Research Symposium: Expertise in the Courtroom: Scientists and Wizards - Panel Three: Science, Scientists and Ethics' (2007) 52 Villanova L R 857.

criterions were never formulated with the intention of being used as a checklist, but as a flexible standard to be utilized to determine the admissibility of evidence, while adjudicating.

*Daubert* was further explained in the two appeals before the Supreme Court: *Electric v. Joiner*[13] [Hereinafter '*Joiner*'] and *Kumho Tire v. Carmichael*[14] [Hereinafter '*Kumho*'], which together constitute the Daubert Trilogy. Emphasizing the significance of flexibility in *Kumho,* the court explicated that the *Daubert* criteria may be utilized to determine the admissibility of non-scientific form of expert evidence, i.e., "technical" and "other specialized knowledge."[15] *Joiner,* significantly states that the standard of review adopted by the state courts to determine the admissibility of evidence is "abuse of discretion."[16] As a result, decisions determining the admissibility are not subject to strict review, and similar type of expert evidence can be treated differently in cases, courtrooms, across jurisdiction, and in the future.

**DISTINCTION BETWEEN FRYE AND DAUBERT AND INCEPTION OF RULE 702**

Rule 702 of the FRE, which formed the basis of *Daubert* and *Kumho,* was amended in the year 2000, in order to meet the requirement of "reliability" more explicitly.[17] It reads as:

*A witness, who is qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if: (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) The testimony is based on sufficient facts or data; (c) The testimony is the product of reliable principles and methods; and (d) The expert has reliably applied the principles and methods to the facts of the case.*[18]

However, the efficacy of the amended version seems limited and is largely understood as statutory codification of *Daubert* and *Kumho*.

Around sixteen states in U.S., some being among the most populous, continue to follow "general acceptance" principle laid down in the *Frye* judgement.[19] The *Frye* approach is

[13] *Electric v Joiner* 522 US 136 (1997).
[14] *Kumho Tire v Carmichael* 526 US 137 (1999); *See* D Michael Risinger, 'Goodbye to All That, or a Fool's Errand, By One of the Fools: How I Stopped Worrying about Court Responses to Handwriting Identification (and Forensic Science in General) and Learned to Love Misinterpretations of Kumho Tire v Carmichael Symposium: Daubert, Innocence, and the Future of Forensic Science' (2007) 43 Tulsa L R 447.
[15] *Kumho* (n 14) 147-48.
[16] *Joiner* (n 13) 141.
[17] Fed R Evi 702(c) (2000).
[18] ibid.
[19] Alice B Lustre, Annotation, 'Post-Daubert Standards for Admissibility of Scientific and ther Expert Evidence in State Courts' (2011) 90 ALR 5 453.

popularly called "deference" approach as under this approach, the trial judges tend to focus on how the "scientist community" is best placed to evaluate the evidence, rather than asking the trial judge to evaluate the validity and reliability of the evidence in place.[20]

Daubert test focus on the reliability of the evidence being presented in the court. Thus, while *Frye* standard talks about the general acceptability of the expert evidence, *Daubert*, on the other hand, is more case-centered at the inherent reliability of the expert opinion.

Today, around twenty nine states in US follow *Daubert* or a similar model.[21] It is also described as 'reliability validity' model.[22] The principle contribution of *Daubert*, as opposed to *Frye*, is that it mandates the trial court to initiate a separate assessment of the evidence to determine its admissibility.[23] This feature of *Daubert* has been criticized, especially by Chief Justice Rehnquist, for its presumption that Judges who lack scientific training, are assumed competent enough to decide upon scientific evidence.[24]

### IGNORING FINKELSTEIN: INJUDICIOUS OUTLOOK TOWARDS EVOLUTION OF EXPERT WITNESS LAWS

The troubling issue attached to Rule 702 is its unforthcoming attitude towards the statutory codification of the independence of expert witness, which makes it similar to *Daubert* standard. In U.S., Federal Judicial Centre has also pointed this apprehension extensively and raised concern about the admissibility of the expert evidence. The Centre has extensively been able to prove that bias remains the most controversial topic in the U.S. evidence law. In *Finkelstein v. Liberty Digital*,[25] judges affirmed that often biased contributions are made by the experts claiming to have academic and scientific expertise.[26]

## CANADA: CRYSTALLIZATION OF FOUR FUNDAMENTAL REQUIREMENTS ALONG WITH COST-BENEFIT ANALYSIS

[20] Paul C Giannelli, 'The Admissibility of Novel Scientific Evidence: Frye v United States, a Half-Century Later' (1980) 80 Columbia Law Review 1197.
[21] David E Bernstein and Jeffrey D Jackson, 'The Daubert Trilogy in the States Developments' (2003) 44 Jurimetrics 351.
[22] David H Kaye, *The New Wigmore: A Treatise on Evidence : Expert Evidence* (Aspen Publishers 2011).
[23] *Daubert* (n 8) 585-593.
[24] ibid 600-601.
[25] 30 Del J Corp L (2005).
[26] ibid.

Supreme Court of Canada has clearly laid down the criterion for the admissibility of expert evidence, securing "*reliability ... and emphasizing the important role that judges should play as 'gatekeepers' to screen out proposed evidence whose value does not justify the risk of confusion, time, and expense that may result from its admission*."[27] Canadian Supreme Court in *R v. Mohan*[28] formulated a two-point test to decide the admissibility of expert evidence:

A. The individual giving the evidence must meet the four basic requirements of admissibility.
B. If the basic requirement is fulfilled, then the trial judge should perform a cost-benefit analysis to decide "*whether otherwise admissible expert evidence should be excluded because its probative value is overborne by its prejudicial effect*."[29]

## FUNDAMENTAL REQUIREMENTS FOR THE ADMISSIBILITY OF EVIDENCE

Canadian Courts examine the following four factors in determining the admissibility of expert evidence- relevance, absence of an exclusionary rule, necessity in assisting the trier of facts and a qualified expert.[30] Courts consider one more factor i.e., reliability, if Novel Science is contested in any case.[31] The abovementioned four requirements form the basic premise that needs to be satisfied for the admissibility of expert evidence; any evidence failing these requirements is rendered inadmissible.[32] Once these conditions are met, only then does the evidence proceeds to the second level of "discretionary gatekeeping" step.[33]

### i. Relevance

Expert evidence, like any other evidence, must be relevant.[34] In *White Burgess Langille Inman,* Court adopted the *R v. Abbey* definition of relevancy as "logical relevancy."[35] To be logically relevant, evidence must "*have a tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without the evidence*."[36]

### ii. Absence of exclusionary rule

[27] *White Burgess Langille Inman* (2015) SCC 23 [16].
[28] *R v Mohan* [1994] 2 SCR 10-12, 20-25.
[29] *White Burgess Langille Inman* (2015) SCC 23 [19].
[30] ibid.
[31] ibid 23.
[32] ibid.
[33] *White Burgess Langille Inman* (2015) SCC 23 [19].
[34] *Mohan* (n 28).
[35] *White Burgess Langille Inman* (2015) SCC 23 [23]; *R v Abbey* 2009 ONCA 624 [82]).
[36] *R v Abbey*, 2009 ONCA 624 [82].

Due to the existing parallelism between expert and any other form of evidence, expert evidence must adhere to all exclusionary rules, whether statutory or otherwise, to be admissible.[37]

**iii. Necessity in assisting the trier of facts**

This standard requires that the evidence presented must necessarily be beyond the expertise and knowledge of the judges.[38] Further, expert evidence provided must enable the trier of facts, to assist the matter in issue, due to their technical nature.[39]

**iv. Qualified expert**

An expert, by virtue of being a witness, has some duties towards the court to maintain-impartiality, independence and absence of bias.[40] He must be aware of these duties and must be willing to carry them out.[41] To meet this standard, expert is required to attest and testify that he will be discharging these duties towards the court.[42]

**v. Reliability**

Canadian courts have followed the US *Daubert* decision to decide reliability of the expert evidence in the context of disputed Novel Science.[43] For his purpose, court looks into factors like: (1) "whether the theory or technique can be and has been tested;" (2) "whether the theory or technique has been subjected to peer review and publication;" (3) "the known or potential rate of error or the existence of standards;" and (4) "whether the theory or technique used has been generally accepted." [44]

## COST-BENEFIT ANALYSIS

As per this standard, accepted expert evidence will not be allowed if its probative value overshadows the prejudicial effect.[45] Before *White Burgess Langille Inman,* the pressing

[37] *Mohan* (n 28).
[38] ibid 23.
[39] ibid.
[40] *White Burgess Langille Inman* (2015) SCC 23 [32].
[41] ibid [46].
[42] ibid [47].
[43] *J-LJ* (2000) SCC 51[33]; *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993).
[44] ibid.
[45] *White Burgess Langille Inman* (2015) SCC 23 [19].

significance of cost benefit analysis used to be emphasised but without the explanation about its space in the overall test.[46] But in this case, the court made it clear that the risks associated with expert evidence cannot be ignored, and mere relevance and assistance of the evidence is not enough for its admissibility.[47] This standard ensures the balancing of benefits and risks associated with expert evidence by judges and assure that benefits justify the risks.[48]

## ENGLAND: ESTABLISHING THE PREMISE OF EXPERT LIABILITY THROUGH WOOLF REPORT

In *Pearce v. O.A. Partnership*[49], the court discussed the need to reformulate evidence laws to prevent the expert witnesses from developing the contentions of the advocates recruiting them, impartially. Justice Woolf in his report "Access to Justice"[50] carved out various reforms and suggestion pertaining to Expert evidence in England. Lord Woolf felt that the greatest difficulty faced by expert witnesses was to maintain neutrality in face of the authoritative ambit of their instructor. This complication arose from the fact that experts are initially recruited by an investigating team to work for a party and develop their contention, and are then expected to alter their roles to provide independent advice sought by the court.[51] Further, he suggested that new rules should be formulated to establish the overriding duty of the expert towards the court. Following are essential highlights of Woolf Report:

- The primary duty of the expert lies with the court, and this duty overrides any obligation arising out of the directives or enumeration received by an expert from any party.
- Experts must certify at the end of the report submitted that they understand and comply with their duty towards the court.
- It is necessary to have the sanction of the court before calling or introducing expert opinion as evidence.
- The court at any stage may call for discussion among the expert for an agreed opinion or for reaching consensus on any issue where contention among experts, with substantive reasoning exists.

[46] ibid 20.
[47] ibid 23.
[48] ibid 24.
[49] 2001 EWHC Ch 455.
[50] Woolf (n 6).
[51] ibid.

## IMPACT OF THE WOOLF REPORT: ENUMERATION OF THE DUTIES

Following the recommendation of Justice Woolf, new Civil Procedure Rules (1999) were formulated in England. Under the new civil procedure rules, it is the duty of an expert to help the court on matters within their expertise and this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.[52] Further, at the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.[53] The duties of the expert witnesses are as follows:

- Expert evidence must not only be independent of exigencies of litigation, but should also appear to be independent and uninfluenced.[54]
- Expert witness should also assist the court by providing objective unbiased opinion with respect to the matters within their expertise.[55]
- Expert witness should clearly state the material facts and assumption on which they premise their opinion. They should not consider omitting those material facts which could detract from their stated opinion.[56]
- They should clearly state if something falls outside the range of their expertise.
- If, in the opinion of the expert, evidence given is not properly researched due to lack of data, then he must state that opinion evidence provided is a just a provisional one.[57] In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
- If the expert witnesses alter their views after reading the other side's report or for any other reason, then that alteration must be communicated to the other party without any further delay.

## REPERCUSSIONS OF NON-COMPLIANCE WITH THE DUTIES

In *Jones v. Kaney,*[58] the Supreme Court of United Kingdom clearly held that immunity from danages cannot be attributed to the experts in civil cases if they are negligent in discharging his

[52] Civil Procedure Rules 1999, s 35.3.
[53] Civil Procedure Rules 1999, s 35.10 (2).
[54] *Whitehouse v Jordan* [1981] 1 W L R 246.
[55] *Pollivitte Ltd v Commercial Union Assurance Company* [1987] 1 Lloyd's Rep 379; Re J (1990) FCR 193.
[56] *Re J* (1990) FCR 193.
[57] ibid.
[58] [2011] UKSC 13.

duties. Failure of compliance with an expert's duties can result in the inadmissibility of evidence provided by him. The court can also reject the evidence tabled, which is otherwise admissible, if it develops unfavourable mindset about the impartiality of the expert providing it. There is suggestion in this respect that even unsubstantiated report of the expert, which does not fully adhere to civil procedure rules, must be tabled in the court, so that court can decide about its admissibility and reliability on their own.[59] Parallel situation arose in *Anglo Group Plc v Winter Brown*,[60] wherein an expert witness wrote an article expressing his views on expert evidence and the duty of expert witnesses towards his/her instructor, in addition to his testimony. The Judge dismissed the expert evidence citing skepticism about it.

## AUSTRALIA: MANIFESTATION OF JUDICIAL PROGRESSIVENESS THROUGH 'COMMON KNOWLEDGE' AND 'ULTIMATE ISSUE' TO THE PRESENT LAWS

### MAINTAINING THE STANDARDS: PAST TO PRESENT DEALING

Australia has always enjoyed the reputation of rigid common law jurisdiction with respect to expert witness provisions.[61] Australia, for a very long period of time, witnessed the application of two standards, 'Common Knowledge' rule and 'Ultimate Issue' rule.[62] According to 'Common Knowledge' rule, the court decides whether the jury is sufficiently capable to adjudicate upon a certain matter. This not only bars the entertainment of false expert testimonies in the court but also prevents the judges to be unduly influenced in an adversarial system. While 'Ultimate Issue' rule introduced in *Flavels v. Samuels*, mandates the presence of rigorous admissibility standard of expert evidence.[63] The court has propounded that expert evidence should be allowed only when it is absolutely necessary for deciding the matter in issue, and without which proper justice delivery cannot be assured. In fact, reading of *R v. Isobel Phillips*[64] suggests that evolution of Australian cases has been in a way that it significantly improvised the admissibility standard of expert evidence, warranting unbiased opinion and illustrious accountability in the Justice system.[65]

[59] *Burgoyne v Pendlebury* July 26, 2000.
[60] 2000 EWHC Technology 127.
[61] Practice Note CM7, Federal Court of Australia 2011.
[62] Australian Law Reform Commission, *The Movement Towards A Uniform Evidence Law*, 2014.
[63] ibid.
[64] ibid.
[65] ibid.

In contemporary Australia, Section 79 of the Uniform Evidence Act, 1995 guarantees the provision allowing for the admissibility of expert evidence, which is also followed by similar statutes in other jurisdiction. However, this provision only refers to the admissibility of the opinion of a person possessing special knowledge as an exception to the rule against opinion evidence. Furthermore, the act is silent on the operation of this exception and the duties expected from an expert.

**SAME WINE IN DIFFERENT GLASSES**

- **Federal court**

The Federal court in Australia has affected Practice direction for dealing with expert witnesses. These practice direction largely derive their source from the guidelines of Civil Procedure Rules [Hereinafter 'CPR'] and *Ikerian Reefer*.[66] The explanation of the memorandum of this Practice Direction explicates that these provisions aim to aid the expert witnesses in understanding the court's expectations with respect to their duties, and to ensure a restriction on perpetuation of unhealthy viewpoint of an expert as someone lacking objectivity and promoting impartiality.[67]

Part one of the Practice Direction states that the primary duty of the expert witnesses lies with the court, which overrides their duty towards any other person.[68] Furthermore, many states in Australia formulated their own code to guide the duties and obligation of expert witnesses.

- **New South Wales**

For instance, in New South Wales, Uniform Civil Procedure Rules (2005) were enacted, under Section 9 of the Civil Procedure Act, 2005. Schedule 7 of the Act contains the code of conduct for an expert witness.[69] This code is largely influenced by common law principles, provisions of England's Civil Procedure Rules and the *Ikerian Reefer* guidelines, all of which aver the need of an expert witness to not to act as a party's advocate but function independently and impartially.

Uniform Civil Procedure Rules also contains a section dealing with essentials of an expert report. But interestingly, NSW Law Reform Commission in its reports suggested the deletion of the provisos dealing with the numerous forms of expert evidence, instead of duties of

[66] (1993) 20 FSR 563.
[67] ibid.
[68] ibid.
[69] Supreme Court Rules 1970 (NSW) Part 36 rules 13C ff.

experts, because in the commission's view too many procedural provisions might impact the efficacy of the Code.[70] In the Commission's view, it would be better to accord separate space to the procedural provisions by incorporating them in a Practice note or rule.[71]

- **Queensland**

Likewise in Queensland, Uniform Civil Procedure Rules 1999, rules 423 to 429, and 212(2) governs the expert witness laws. Unlike NSW, these rules are procedural in nature and do not prescribe a code of conduct for the expert witness, but they make inferential reference to the duty owed by experts towards the court. These procedural requirements were basically articulated to ensure reflection of expert obligations towards the court. An example would be rule 436 of UCPR, which requires submission of the report and attestation by the expert, reflecting overarching duty of the experts towards against the court.[72]

- **Australian Capital Territory (ACT)**

Australian Capital Territory witnessed a major overhaul of the system with the inauguration of the Court Procedural Rules in 2006. Primary motivation for the introduction of these rules was reform and consolidation of all the procedural rules applicable to ACT Supreme and Magistrate court.[73]

Part 2.12 incorporates the guidelines governing expert witness rules. Rule 1202 of the Part mandates the submission of written agreement by the expert, wherein he agrees to be bound by the code of conduct enlisted in Schedule 1 of the Rules.

The code of conduct includes the conduct rules of the expert witnesses that were previously mentioned in the practice direction, with slight additional inclusion of provisions from New South Wales and Queensland. The code initiates with the reference to expert witnesses overriding duty towards the court and goes on to state the format of the expert witness report.

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[70] NSW Law Reform Commission, Report 109, *Expert Witnesses* (June 2005) at 9.15; Community Relations Division and NSW Department of Justice, 'Expert Witnesses' (1 September 2015) <www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_completedprojects2000_2009/lrc_expertwitnesses.aspx> accessed 24 September 2016.

[71] ibid 9.

[72] Wilson J, 'The New Expert Witness Rules' Breakfast Address to Australian Insurance Law Association Brisbane Club (28 October 2004).

[73] Explanatory Statement to the Court Procedure Rules 2006 SL2006-29 available at: <www.courts.act.gov.au/supreme/content/pdfs/Ct%20Procedures%20Rules%202006%20Explanatory%20Statement.pdf > accessed 24 September 2016.

The fourth part of the code empowers the court to summon a conference of expert witnesses and list out rules governing such conferences.

- **Professional Bodies**

Professional bodies in Australia whose members may be called upon to undergo the role of an expert witness have also articulated their Code enumerating the guidelines for the experts. For instance, Australian Council of Professions has their own guidance paper detailing the role and duties of experts, if called as expert witness in any legal matter.[74]

# INDIA: AUGMENTING THE NEED FOR CODIFICATION THROUGH EXPERT WITNESS STANDARDS ESTABLISHED IN LANDMARK JUDICIAL DECISIONS

## EXPERT EVIDENCE AND INDIAN EVIDENCE ACT, 1872

Expert evidence is dealt from Section 45 to 51 under the Indian Evidence Act, 1872. Section 45[75] of the Act allows expert evidence in cases which involve any question of science or art demanding recourse to previous study, and on which an inexperienced person is likely to render erroneous judgement. The Act permits an expert to produce evidence pertaining to the fact in issue and display his scientific and unbiased credibility. Section 46[76] says that facts, otherwise irrelevant, would be relevant if they are inconsistent or support the opinion rendered by an expert whose opinion is relevant. Section 47[77] deals exclusively with the opinion of experts with respect to handwriting, while admissibility of opinion evidence relating to customs is permitted under section 48.[78]

[74] Professions Australia ―Role and Duties of an Expert Witness in Litigation (1998) available at: <www.professions.com.au/index.cfm?paraID=61> accessed on 25 September 2016.
[75] S 45 - Opinions of experts —When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts. Such persons are called experts.
[76] S 46 - Facts bearing upon opinions of experts—Facts not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.
[77] S 47 - Opinion as to handwriting, when relevant.—When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.
[78] S 48 - Opinion as to existence of right or custom, when relevant.—When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

## UNDERSTANDING THE EVOLUTION THROUGH LANDMARKS CASES AND THE NEED FOR CODIFICATION

In *Delhi Administration v. Pali Ram,*[79] the court elucidated that, *"no expert could be absolutely sure of his opinion, as the opinion depends to a large extent upon the material put before him and the nature of the question asked."*

In *Ramesh Chandra Agarwal v. Regency Hospital Ltd,*[80] court defined expert as any person who invested his study and time to a special subject of learning. It was said that expert is not a judge but a mere witness possessing credibility. Further, in order to admit expert witness's evidence, it must be shown that he possesses special knowledge of the subject and has expertise appertaining to the same. The true function of an expert is to bring forth a report along with reason which helped him reach the conclusion, so that the court, who although is not expert, can pronounce a judgement, based on its observation of the report. An expert witness is of advisory character due to the absence of first-hand witnessing of the fact in issue. Hence, the duty of the expert is to render all scientific/specialised assistance to inspect accuracy of a conclusion, so that the judge can deliver a judgement by relying on those standards.

Further, in *State of Maharashtra v. Gopinath Shinde,*[81] it was held that mere assertion or mention without prudent rationale basis or data cannot be counted as evidence, even if it is produced by an expert. The court also said that such evidence although admissible, may be discarded or rendered inconsiderable later when it does not assist in reaching a correct judgment. Hence, expert opinion needs to be corroborated. Supreme Court through this decision, in a way, raised the standard of admissibility of expert evidence.

In *Kabul Singh v. Gurinder Singh,*[82] expert opinion regarding handwriting was sought. However, if in addition to the opinion sought, expert also delivers some opinion which was not required, such an opinion would be ignored. It further held that, unsought opinion should not be delivered and expert should limit their opinion to relevant facts and what is required to render justice. Furthermore, in cases where probability of the expert opinion going in favor of the party inviting them exists, and a possibility of conflict of opinion between the experts, the court in such cases can formulate and rely on its own opinion vis-à-vis signature on a

[79] *Delhi Administration v Pali Ram* (1979) 2 SCC 158.
[80] *Ramesh Chandra Agarwal v Regency Hospital Ltd* (2009) 9 SCC 709.
[81] *State of Maharashtra v Gopinath Shinde* AIR 2000 SC 1691.
[82] *Kabul Singh v Gurinder Singh* PLR (1999) 121 P&H 816.

documents or any such issue. This case is important in two aspects: first, it absolutely discouraged judicial interpretation of any additional expert opinion provided and second, it mandated an expert to maintain an unbiased attitude.

In *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee*,[83] in response to whether courts are bound by the opinion submitted to them on a particular fact in issue, court held that courts are not at all bound by the expert evidence delivered, which are basically advisory in nature. The court further added that it has the right to admit only that portion of the expert evidence which it considers necessary.

## CONCLUSION

The present study of expert evidence within common law nations suggests a trend towards increased codification of expert evidence laws in various nations. It is submitted that codification is a healthy and welcome step, if taken in the right direction. However, it is essential to ensure the formulation of a well developed expert law, outlining the rights, functions and standard of duty for expert witnesses and the consequences of failure to non-compliance with these standards. Well codified laws can ensure the liability of the expert giving false testimony, as that testimony given can be used subsequently to indict him.

Canada has been quite successful in launching potential steps towards modification of expert evidence laws to ensure unbiasedness and objectivity. In Canada, the expert is liable to specifically declare that his primary duty lies towards the court. This declaration warrants liability of the expert witness as mentioned above. Furthermore in Canada, expert is necessitated to pass the two point test laid down in *R v. Mohan* for the admissibility of his evidence. Under the aforementioned test, firstly, expert is required to meet the four basic admissibility criteria and secondly, the probative value given by the expert must not overshadow the prejudicial effect.

England has also maintained decent expert evidence standards by incorporating the changes suggested by Woolf report. In England, duty of the expert witness lies towards the court and he is required to certify that he understands those duties and will comply with them. Additionally, an expert is required to procure the approval of the court before the admissibility

[83] *Malay Kumar Ganguly v Dr Sukumar Mukherjee* (2009) 9 SCC 221.

of the evidence. These steps have proven effective in ensuring objectivity and impartiality of expert opinion in England.

In Australia, the use of 'Ultimate Issue rule' and 'Common Knowledge rule' for a very long period of time had guaranteed the authenticity of expert evidence. Moreover, Australian courts have declared that the mechanism of expert evidence should be employed only when it is *absolutely necessary* for deciding the case. Furthermore, many states in Australia have also developed their own strict admissibility standards for expert evidence mandating written acknowledgement by the expert that their primary duty is towards the court.

However, US appears to be only nation that almost reproduced the Daubert standard in the Rule 702. Therefore in US, *Daubert* continues to reign as the dominant expert admissibility standard criteria mandating no requirement of express declaration by the expert witness that his primary duty is towards the court. Hence, it is submitted that U.S. has failed to evolve their expert evidence laws properly, relying entirely on the Daubert standards. Hence, in US, there is an absence of codified expert admissibility standard which mandates a written or oral acknowledgement by the expert witness regarding his primary duty towards court and maintaining impartiality and neutrality. However, United States has adopted a careless and irresponsible attitude towards the requirement of codification even at the later stages of adjudicatory discourse. United States has emphatically ignored the judicial pronouncement in *Finkelstein v. Liberty Digital* wherein judges highlighted the frequent biased contributions by experts claiming to have academic and scientific expertise. Hence, it is submitted that there is need of codification in US, on the lines of Canada, to ensure better objectivity and impartiality.

Indian courts have been quite progressive in this aspect by coming up with well reasoned and coherent judgements in cases like *Pali Ram, Ramesh Chandra Agarwal, State of Maharashtra v. Gopinath Shinde, Kabul Singh* and *Malay Kumar Ganguly*, regarding expert admissibility standards. These judgments have clearly specified the duty of an expert witness towards the court to provide impartial opinion. In doing so, the Courts have clearly demarcated expert admissibility standards. However, there still persists a need of statutory codification of the standards enshrined in these judgments in India to prevent any remote possibility of miscarriage of justice.

# THE IMPLICATIONS OF IMPLICATION: DECONSTRUCTING THE MOORCOCK & THE CURIOUS CASE OF THE OFFICIOUS BYSTANDER

*ARMAAN PATKAR

## INTRODUCTION

"*Implication of terms is, in its character, oil for the wheels of commerce*"[1]

Contracts include both written terms and terms hidden in spaces between such terms. These hidden terms are silent things that are not said.[2] These hidden terms can be extrapolated by Judges from the silences of the contract, by implication in fact. This allows judges to find contractual expression outside the written form of the contract and by doing so, give effect to the true contractual bargain. Once such an implied term is found, it can be effectuated with the same force as express terms.[3] This lubricates the wheels of commerce, which would otherwise come to a grinding halt.

In terms of procedure, implication begins with identification of the reason for silence, which could be forgetfulness, or poor drafting; because the term was so obvious that there was no need to state it; or because the parties did not contemplate the term at all. Another reason could be that the parties favored business convenience during contract formation over drafting perfection, by focusing on and expressing, only important terms in written words, but leaving other terms to be understood. Having identified the reason for the silence, the Judge must determine whether there is sufficient ground to replace the silence in the contract with an implied term. In this process, Judges usually refer to the question "*what did the parties intend?*"

The *raison d'être* of this implication ensures that the answer to this question is rarely and readily apparent. Answering this question requires the application of subjective principles which can

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[1] Richard Austen Baker, Implied Terms in English Contract Law (Edward Elgar Publishing 2011).

[2] Carolyn Heaton, 'The Significance of Implied Contractual Terms' (30 August 2012) <www.morrisonkent.co.nz/uploads/PDF%20Articles/THE%20SIGNIFICANCE%20OF%20IMPLIED%20CONTRACTUAL%20TERMS.pdf> accessed 11 September 2016..

[3] *Imam Din v Dittu* [1925] AIR 174 (Lah) [3]; Pollock and Mulla, Indian Contract & Specific Relief Acts (13th edn, Lexis nexis 2006).

tempt judges to become silent parties to a contract and imaginatively introduce terms[4] by presuming the intentions of the parties. This temptation clashes with the Common Law principle of freedom of contract (i.e. that there must be no interference with the right of the parties to choose the terms on which they contract).[5] Therefore, it is writ large that the mandate of a Judge is not to impose his own views of contractual bargain or make the contract better, fairer or more reasonable. Further, in presuming the intentions of parties, judges cannot be presumptuous; they should not substitute their view as to that intention.[6]

In light of the above, Parts II, III and IV of this Article trace the milestones in the evolution of principles of implication, starting from Slade's case in 1602 and then evaluating Bowen, L.J.'s Business Efficacy Test and Mackinnon, L.J.'s Officious Bystander Test. In Part V, I critique two recent English judgements *viz. Attorney General of Belize v. Belize Telecom Limited*[7] (Belize Telecom**)** (which proposed a reasonability based test) and *Marks and Spencer PLC v. BNP Paribas Securities Services Trust Company* (Jersey Ltd)[8] (M&S) (which reinforced a nuanced, necessity-based business efficacy test); I propose that Belize Telecom should not be followed as reasonability is not enough, by itself, for implication. Instead, I advocate the nuanced principle making approach followed in M&S. In Part VI, applying a similar approach to principles of implication in India, I propose a restated principle of implication, with a caveat for implication of terms in commercial contracts.

## SLADE'S CASE: THE DEVELOPMENT OF IMPLIED PROMISES

While the Business Efficacy Test (1889) and the Officious Bystander Test (1939) are ubiquitous to implication, review of implication would be incomplete without venturing further in time to 1602, three centuries before Bowen, L.J. and Mackinnon, L.J. pronounced their celebrated tests. In 1602, while Shakespeare was writing The Twelfth Night, Popham's C.J.

[4] *Electronique Grand public SA v British Sky Broadcasting Limited* [1995] EMLR 472 (Phillips Electronique case).
[5] *Printing and Numerical Registering Co v Sampson* [1875)] LR 19 Eq 462, 465 (Sir George Jessel MR); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297 (Lord Denning MR).
[6] Andrew Phang 'The challenge of principled gap-filling: a study of implied terms in comparative context' [2014] 4 JBL 263, 312 (Phang J).
[7] [2009] 1 WLR 1988.
[8] [2015] UKSC 72 (M&S).

pronounced his far-reaching decision in Slade's Case.[9] In this case, Popham C.J. implied a promise to perform into executory contracts actionable in assumpsit, in the following words:

"*That every contract executory importeth in itself an assumpsit, for when one agreeth to pay money, or to deliver anything, thereby he promiseth to pay, or deliver it; and therefore when one selleth any goods to another, and agreeth to deliver them at a day to come, and the other in consideration thereof promiseth to pay so much money to the other, in this Case both parties may have an action of debt, or an action upon the case on assumpsit, for the mutual executory agreement of both parties importeth in itself reciprocal Action upon the Case, as well as Action of debt.*"[10]

Before Slade's Case, an action in assumpsit was only maintainable if there was a debt and a subsequent separate and express promise to repay the debt. Ames postulates that is was because the action of debt was originally conceived of as a grant, rather than as a contract. As such, at the time it was difficult to conceive that the same words used to create a debt, could also create another promise to repay this debt. It was more natural to consider that the force of the words used to create the debt was spent in creating the debt and that a separate expression of a promise to repay this debt would be required to succeed in an action for assumpsit.[11] Nevertheless, Popham C.J. gave a remedy in assumpsit for breach of this promise, though the debt itself could only be recovered in an action of debt.[12] This led to cases where the Courts supplied an implied promise to pay the amount of the services rendered or the worth of the goods delivered, where no price had been fixed by the parties. Therefore, it is considered that Popham C.J.'simplication of assumpsit may well be the source for the technique of implication, as we understand it today.[13]

[9] [1602], Rep 92a, 76 Eng Rep 1073; Baker (n 1); B Ames, 'The History of Assumpsit II, Implied Assumpsit' [1888] 2 Harvard LR 55 (Ames J); Theodore Plucknett, 'A Concise History of the Common Law' (5th edn, Little Brown & Co) 647, 649.
[10] Sir Edward Coke, The Selected Writings and Speeches of Sir Edward Coke (Steve Sheppard, edn 2003, vol 1).
[11] Ames (n 9) 55.
[12] Richard Austen-Baker, 'Implied Terms in English Contract Law in Commercial Contract Law, Transatlantic Perspectives' (L Dimatteo, edn 2013), 232.
[13] John Baker, 'An Introduction to English Legal History' (2nd edn 1979); Baker (n 1).

## THE BUSINESS EFFICACY TEST: THE MOORCOCK SAILS INTO CONTRACT LAW

In 1887, three centuries after Slade's Case, a steamship by the name of The Moorcock sailed into the river Thames. Its owner contracted with a wharfinger to discharge and load the Moorcock at a wharf by the river. At low tide, the Moorcock, which was moored alongside the jetty of the wharfingers, ran aground. Its hull was damaged due to the uneven condition of the river bed and the owner of the Moorcock successfully sued the wharfingers for damages. On the facts of the case, Bowen, L.J. treated the contract to contain an implied representation by the wharfingers to the ship-owner, that the wharfingers had examined the river bed and ascertained that it was in a condition which would not damage the vessel.[14] He stated that implication is justified if it follows the obvious or presumed intentions of the parties to the contract. In such cases, an implied term is necessary to give efficacy to the transaction and prevent a failure of consideration, which neither party would have intended. For this purpose, Bowen, L.J. put forth his Business Efficacy Test, which carries favour with English and Indian Courts to this day, thus:

*"In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men".*

This was a new principle of law that went beyond the authorities cited before the Court of Appeal.[15] It has been moulded, applied and restated into various formulations since.[16]

## SHIRLAW V. SOUTHERN FOUNDRIES: THE CURIOUS CASE OF THE OFFICIOUS BYSTANDER

Fifty years after the case of The Moorcock, Mackinnon, L.J, speaking for the Court of Appeal in *Shirlaw v. Southern Foundries Limited* ("**Shirlaw**"),[17] criticized the Business Efficacy Test. He stated that Bowen, L.J.'s words did not amount to a principle of law, though he admitted them to be sound and sensible. He lamented that the early 20th century witnessed the Moorcock

[14] (1889) 14 PD 64 (Esher LJ).
[15] ibid.
[16] *BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* [1977] HCA 40 (BP Refinery); *KC Sethia v Partabmull Rameshwar* [1950] 1 All ER 51.
[17] *Shirlaw v Southern Foundries Limited* (1939) 2 KB 206.

principle make frequent voyages into courtrooms, often in support of vague and uncertain grounds. Disappointed with this result and believing that implication must be exercised with care, he pronounced his Officious Bystander Test. This test is expressed as a conversation between the parties to the contract and an officious bystander, as follows:[18]

*"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!"*

It is interesting to note that Mackinnon, L.J. did not conceive this test in the Shirlaw judgement. He had already devised the test and had expressed it in an essay in 1926; in fact, the test is a direct quote.[19] Incidentally, history repeated itself another fifty years later, when Hoffmann, L.J. criticized the Officious Bystander Test in an extra-judicial paper, as follows:

*"Lord Justice Mackinnon was a witty and cultured man, for many years' president of the Jane Austen Society. His little scene is plainly based upon the contemporary cartoons of Bateman, in which some unfortunate person is always asking a question which causes general astonishment all around him. But I do not imagine Lord Justice Mackinnon ever thought how seriously this little jeud'esprit would be taken, how many times it would be cited, analysed, applied or distinguished in courts all over the world."*[20]

Bowen, L.J. and Mackinnon, L.J. both criticized the decisions of their predecessors; first praising the intellectual merits of the judge in question and then lamenting that the judge did not understand the full import of their words. Much like Mackinnon, L.J. did in Shirlaw, Hoffmann, L.J. acted on his extra-judicial opinion in 2009 when he dismissed the Officious Bystander Test as irrelevant, in Belize Telecom[21], speaking for the Judicial Committee of the Privy Council. He explained that the test carried the danger of barren argument, as the parties who may respond with an "Oh, of course" are as likely to reply with a "Certainly not"; this is especially so since this test refers to the parties, as they were during negotiations, where both

[18] ibid.
[19] Mackinnon, 'Some Aspects of Commercial Law - A Lecture Delivered at the London School of Economics' (OUP 1926) 24; Phang (n 6) 13, J, ibid 7, p13.
[20] Hoffmann LJ, 'Anthropomorphic Justice: The Reasonable Man and His Friends' (1995) 29 Law Teacher 127, 138.
[21] *Belize Telecom* (n 7).

parties would invariably try to protect their competing interests at all times.[22] This makes it probable (almost certain, to my mind) that the suggestion of a term which is specifically onerous to one party would be considered by the officious bystander to be met with a "Certainly not" by the suffering party. This would not meet the requirements of the Shirlaw test since it requires the term to be such that 'they' (i.e. both parties) would answer with 'Oh, of course'"[23] Therefore, this test may only be suited for implication of neutral terms. However, even in case of neutral terms, an officious bystander may not be capable of posing the correct question to the parties, especially in case of complex contracts and disputes.[24] Further, the Officious Bystander Test may not be suited for universal application, since the result of the test is influenced by the formulation of the question posed to the bystander; two different but appropriate questions may elicit different answers from the bystander.[25] Ultimately, Hoffmann, L.J. held that to require the Courts to conjure imagery of the parties and the officious bystander would divert their attention from the objectivity which should inform the process of implication.[26]

I am broadly in agreement with Hoffmann, L.J. especially in case of non-neutral terms. Further, on a purely academic note, I refer to the judgement of Falsaw, J. in *Delhi Cloth & General Mills*,[27](discussed in Part VI of this Article in detail, in exploring the development of the Indian law of implication); this judgement describes Scrutton, L.J.'s decision in *Reigate v. Union Manufacturing Co.*[28](the "**Reigate Case**") as an expression of the Shirlaw principle in "even more homely language".[29] The relevant portion of the Reigate Case is as follows:

*"If it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties what will happen in such a case, they would both have replied. Of course so and so will happen; we did not trouble to say that; it is too clear."*

[22] *Liverpool City Council v Irwin* [1977] AC 239, 258, 266.
[23] cf *Chartbrook* ibid (n 48).
[24] *Ashmore and Others v Corporation of Lloyd's (No 2)* [1992] 2 Lloyd's Rep 620; A *Marcan Shipping (London) Ltd v Polish Steamship Co (The Manifest Lipkowy)* [1998] 2 Lloyd's Rep 138, 142; M&S (n 10) [21] (Neuberger J); Andrew Kramer, 'Implication in fact as an instance of contractual interpretation' (2004) 63(2) CLJ 404.
[25] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24, [10]-[13] (Mason J).
[26] *Belize Telecom* (n 7) 25.
[27] *Delhi Cloth & General Mills Co Ltd v KL Kapur* Co Ltd [1958] AIR 93 (P&H) (Delhi Cloth & General Mills).
[28] (1918) 2 KB 532 (B).
[29] *Delhi Cloth & General Mills* (n 27) 19-20.

On a bare reading, the above paragraph of the Reigate Case simply appears to paraphrase the principles of implication and taken by itself does not add much substance. It appears to combine The Moorcock and Shirlaw principles, by treating the Officious Bystander Test as the practical mode by which the Business Efficacy Test is to be implemented. In doing so, Scrutton, L.J. omitted Mackinnon, L.J.'s pesky officious bystander and replaced him with "someone." Further, Scrutton, L.J.'s someone does not propose a term like the officious bystander does in Shirlaw, but instead asks the parties to answer the question "what will happen in such a case". However, Scrutton, L.J. could perhaps be credited with conceiving the Officious Bystander Test; while the officious bystander is missing in the letter of the Reigate Case, he appears to have made his first appearance in judicial history in spirit.[30] Interestingly, Mackinnon, L.J. was a pupil of Scrutton, L.J. and had close professional ties with him.[31] Mackinnon, L.J. did not refer to, or credit Scrutton, L.J. in Shirlaw with the development of the Officious Bystander Test; though in *Broome v. Pardess Co-operative Society of Orange Growers Ltd*.[32], one year after Shirlaw, Mackinnon, and L.J. applied the Reigate Case instead of referring to his own test in Shirlaw.

## SIGNIFICANT DEVELOPMENTS IN ENGLISH LAW IN THE 21ST CENTURY

### BELIZE TELECOM: IS BEING REASONABLE, REASONABLE ENOUGH?

Belize Telecom is considered by some to be a long overdue rethinking of the implication of terms since The Moorcock;[33] a *tour de force*,[34] a re-definition of the modern law of implied terms.[35] It was predicted that its extensive analysis would be regularly referred to by Courts in deciding cases of implication, which turned out to be true.[36] The crux of this analysis is Hoffmann, L.J.'s restatement of the principle of implication (the "**Belize Principle**"), thus:[37]

[30] *Gardner v Coutts & Company* [1968] 1 WLR 173, 176 (Cross J).
[31] *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927[36], GR Rubin, 'MacKinnon, Sir Frank Douglas (, Oxford Dictionary of National Biography' (OUP 2004).
[32] [1940] 1 All ER 603.
[33] Brandon Kain, 'The Implication of Contractual Terms in the New Millennium', 51 CBLJ 170 (Kain);, Michael Davar, 'The supreme court re-frames the modern law of implied terms' (December 15, 2015) <www.lexology.com/library/detail.aspx?g=a5b370c8-489f-49fc-9dae-0be4fb23c78b> accessed September 2016.
[34] *Spencer v The Secretary of State for Defence* [2012] EWHC 120 (Ch) [50] (Vos LJ).
[35] Davar (n 33).
[36] *Mediterranean Salvage &Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531 (CA) [8]r (Clark LJ).
[37] *Belize Telecom* (n 7) 16; *Delhi Cloth & General Mills* (n 27) 19.

"*There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*"[38]

The Belize Principle replaces the officious bystander with a reasonable addressee who must now answer, not ask, the relevant question.[39] This reasonable addressee is steeped in English jurisprudence; he was once known as the "man on the Clapham omnibus", a phrase coined by Charles Bowen (Bowen, L.J. of The Moorcock, as he later came to be known), acting as a junior counsel in case of The Tichborne Claimant (1871).[40] This phrase was coined in an era of horse-driven omnibus services; these services are long gone and have been replaced by modern public transport, though Hoffmann, L.J. notes that the Courts of common law still hear the ghostly creak of wheels of the omnibus and the crack of its driver's whip.[41]

But who is this man who rides the omnibus? He is an ordinary reasonable man who exists only as a fictional embodiment of the good sense of the judge presiding over the case. The judge becomes the spokesman of this man, representing anthropomorphized justice as the focal point of the Belize Principle.[42]

Hoffmann, L.J. and the Belize Principle make this man read the contract as a whole and in context and then decide whether it is necessary to imply a term into a contract. Instead of the intentions of the parties, this focuses on the perspective of the reasonable addressee who decides whether the term should be implied. On the contrary, MacKinnon, L.J. in Shirlaw required the officious bystander to simply ask the relevant question; the bystander neither answers the question nor is he required to be reasonable. This aspect is left to the parties, who must approve the implied term in unison in reply to the bystander's question, to justify implication. Therefore, in the Belize Principle, there is the anxiousness as to whether the judges may be allowed to improve contracts by imposing reasonable outcomes on the parties, under a smokescreen that suggests party autonomy.[43] Further too, it does not shed light on the rules to be applied in arriving at a decision and therefore, references to The Moorcock or Shirlaw may

[38] ibid (n 30) 21.
[39] *Spencer v The Secretary of State for Defence* [2012] EWHC 120 (Ch) [38] (Vos LJ).
[40] *Mcquire v Western Morning News Company* [1903] 2 KB 109 (CA).
[41] Lord Hoffmann, 'Anthropomorphic Justice: The Reasonable Man and His Friends' (1995) 29 The Law Teacher 127; *McQuire v Western Morning News Company Limited* [1903] 2 KB 100; *Hall v Brooklands Autoracing Club* [1933] 1 KB 205; Mayo Moran, 'The Reasonable Person: A Conceptual Biography in Comparative Perspective' (2010) 14 LCLR 4.
[42] *Davis Contractors Limited v Fareham Urban District Council* [1956] AC 696, 728 (Radcliffe, J).
[43] Catherine Mitchell, 'Obligations in Commercial Contracts: A Matter of Law or Interpretation?' (2012) 65 CLP 455, 474.

be required to complete the process of implication.

It should also be noted that Hoffmann, L.J. admitted that the Belize Principle is open to reformulation. He also observed that the Business Efficacy Test or that the term must go without saying, are not different or additional tests, but they subsume in the Belize Principle.[44] However, Hoffmann, L.J. sought to avoid a strict necessity test because there may be contracts which work perfectly without implication of a term (as such, the term is not necessary and need not be implied). In such cases, the strict necessity test would require a judge to refuse to imply such a term; however, this may contradict a reasonable persons understanding of the contract (even though the term is not necessary).[45] The Belize Principle seeks to provide relief in such cases, as it allows a judge to give effect to what the instrument can be reasonably understood to mean, though this may not give effect to a meaning that is "necessary" or "always" what the contracting parties would have intended.[46]

Hoffmann, L.J. reiterated this principle three months after Belize Telecom, this time speaking for the House of Lords in *Chartbrook Limited v. Persimmon Homes Limited and others*.[47] Notably he also stated *obiter* that an unduly favourable term (to one party), may well be what the contract says. This may not make sense when judged from the perspective of the reasonable addressee, who is an outsider to the contract. However, such a term may not actually be so unreasonable in its true context, for example, if the term was accepted by the suffering party, to leverage a favourable position elsewhere in the contract; but the reasonable addressee is not privy to the negotiations and could not possibly know this, this seems to suggest that the subjective intentions of a party are irrelevant, and that the only thing that matters is what the reasonable addressee understands the contract to mean. Further, the Belize Principle is, to my mind, also open to barren argument[48] as it also requires a subjective review based on a reasonable understanding of the contract. Furthermore, should the judges be allowed to make an efficacious contract more efficacious? The Belize Principle blurs the lines in such cases. Such cases should be contained with reference to The Moorcock, which stated that only minimum efficacy should be secured or that the least onerous term should be implied, without

[44] *Belize Telecom* (n 7) 21-25.
[45] ibid 23-24.
[46] ibid 16.
[47] [2009] UKHL 38 [14].
[48] *Belize Telecom* (n 7) 21-25; *Shirlaw* (n 17) 226.

which honest business could not be carried on.[49]

In this light, a necessity test (which would, in any event, include only a reasonable term, for no Court would exercise the extraordinary power of implication unreasonably) may fare better than a reasonability test.[50] This does not mean that the Courts should impose a one-sided term simply because a judge deems it necessary; such a term should only be implied if it was proved to be in the contemplation of both parties.[51]

Theoretically, the necessity principle could also reconcile Business Efficacy Test and the Officious Bystander Test, since both tests can be considered to implement necessity, albeit at different stages in the life of the contract. While the Business Efficacy Test implements necessity at the time of performance of the contract (as there would be no justification to perform a contract which lacks business efficacy), the Officious Bystander Test implements necessity at the formation of the contract (to prevent the parties from having to include every pedestrian term in the contract).[52] In fact, the Officious Bystander and Business Efficacy tests may be considered to be merely useful practical aids evolved by the Courts to explain the criterion of necessity and to determine whether the single legal test of necessity has been satisfied.[53] Whilst such a necessity test may not be appropriate for interpretation of express terms, it is appropriate for implication; this is because implication requires a higher standard of proof, as it gives effect to rights or obligations that are not expressly stated, instead of interpreting and applying express ones.[54] To put it otherwise, being reasonable is not reasonable enough in matters of implication.

Therefore, to my mind, the Belize Principle should not be followed and Courts should reach beyond the written form of the contract, only if it is necessary (but not if it is merely reasonable) to do so.

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[49] Phang (n 6).
[50] *Liverpool City Council* (n 22); *Reigate v Union Manufacturing Co* [1918] 1 KB 592, 605; *In re Comptoir Commercial Anversois v Power, Son & Co* [1920] 1 KB 868, 899.
[51] *Satya Jain (D) through LRs and Ors v Anis Ahmed Rushdie (D) through LRs and Ors* 2013 [AIR] 434 (SC) [22].
[52] Kain (n 33) 185.
[53] *Society of Lloyd's v John Stewart Clementson* [1995] CLC 117, 132.
[54] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609, (Hoffmann LJ).

## THE MARKS AND SPENCER PRINCIPLE: EMPHASIZING THE NECESSITY OF NECESSITY

Despite people's consideration of Belize Telecom to be a path-breaking review of implication and a *tour de force*,[55] the truth is that it received a mixed response. Some considered it to be an unclear principle, which often gave rise to major issues.[56] Further, while it was regularly referred to by Courts in the U.K., it was not applied consistently; some Courts considered it to encapsulate existing law, whilst others recognized it as a persuasive departure from the existing law.[57] Even a few years later, it was still being absorbed and ingested.[58]

This continued until the UK Supreme Court delivered its decision in M&S, wherein Neuberger, L.J. disregarded the Belize Principle and rightly re-emphasized the importance of necessity.[59] He declared that Hoffmann, L.J.'s observations should be treated as characteristically inspired discussion rather than as an authoritative guidance on the law of implication. He also qualified the Belize Principle, by adding two conditions, thereby infusing the Belize Principle with the necessity principle, *viz*:

> (i) the reasonable reader should be treated as reading the contract at the time it was made; and
>
> (ii) such reader would consider the term (a) so obvious as to go without saying; or (b) to be necessary for business efficacy.

Another significant aspect of M&S was Neuberger, L.J.'s assessment of BP Refinery (Westernport) Pty. Limited v. President, Councilors and Ratepayers of the Shire of Hastings ("**BP Refinery**").[60] Simon, L.J. had in BP Refinery collected five principles of implication in one paragraph, which made it simple and convenient to cite. It set-out five criteria to be considered for implication, which the Court declared may or may not overlap:

> (i) the term must be reasonable and equitable;

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[56] *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2011] EWCA Civ 543 [44]; *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co KG* [2012] EWHC 3104 (Comm) [15].
[57] *Spencer and Anr v The Secretary of State for Defence* [2012] EWHC 120 (Ch)[52] (Vos LJ).
[58] *Stena Line* (n 56) 36.
[59] *M&S* (n 8) 21.
[60] *BP Refinery* (n 16) 40.

(ii) the term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(iii) the term must be so obvious that it goes without saying;

(iv) the term must be capable of clear expression;

(v) the term must not contradict any express term of the contract.

Hoffmann, L.J. did not treat these principles as cumulative, but treated them as different ways of expressing the central idea that the proposed term must spell out what the contract actually means.[61] To my mind, BP Refinery is a simplistic aggregation of principles of implication, which may have unintended consequences. These can, and should, be contained by a nuanced prescription of principles. This seems to be the approach adopted by Neuberger, L.J. in M&S, who clubbed necessity for business efficacy and obviousness together, treating them as alternative requirements.[62] Further, Neuberger, L.J. stressed that implication depends on reference to reasonable people in the position of the parties at the time of contract formation, as opposed to proof of the actual intentions of the parties during negotiations; further too, in detailed commercial contracts, the mere fact that a term appears fair or such that the parties would have agreed to it, would not be sufficient by itself to justify implication.

The net result after M&S, is that BP Refinery's condition (i) cannot be de-linked from conditions (ii) and (iii), which may be satisfied in the alternative. Conditions (iv) and (v) are fairly straightforward and go without saying. To put it simply, for implication in accordance with the M&S principle, a term must be (a) reasonable and equitable; and (b) either (i) obvious; or (ii) necessary for business efficacy.

## IMPLICATION OF TERMS UNDER INDIAN LAW

### TWO CENTURIES OF IMPLICATION: A HISTORICAL PERSPECTIVE

While the Indian Contract Act, 1872 does not contain a positive rule in favour of implication of terms, Section 9 recognizes implied promises; it provides that promises are express when made in words and implied where it is made otherwise than by words.[63] Further, the Act is not

[61] *Belize Telecom* (n 7) 27; *Hickman v Turn and Wave Limited* [2011] NZCA 100, 248.".
[62] *M&S* (n 8) [21]; *McNeill v Gould* [2002] 4 NZConvC 193, 557 [25]-[27].
[63] Law Commission of India, The Indian Contract Act 1872, Report No 13, 18 (September 1958) [33] <http://lawcommissionofindia.nic.in/1-50/Report13.pdf> accessed on 27 September 2017.

intended to be a complete code, which allows the import of common law principles into the Act.[64] For example, The Moorcock was frequently cited by lawyers in Indian Courts in the early 20th century,[65] though it soon developed a poor reputation; it was considered to be an all too convenient last-resort argument for lawyers in cases where support from the written form of the contract was not forthcoming,[66] as Mackinnon, L.J. also observed.[67]

Therefore, Courts had to be careful in exercising the extraordinary power of implication to ensure that implication does not undermine the freedom of contract. To do so, Courts laid down principles circumscribing this power to cases where the implied term does not involve a contradiction or variance of express terms of contracts. It was also clarified that implication could not be used simply to render a contract more attractive in the eyes of reasonable men. Accordingly, implication was only justified if the term was clearly intended or because the term would remedy an obvious oversight. Further, in such cases, only the minimum term necessary to save the contract from a shipwreck could be supplied, and nothing more.[68]Further too, Falsaw, J. in *Delhi Cloth & General Mills* in 1958, observed that implication would be justified if it repairs an intrinsic failure of expression in a contract, which omits to cover an incidental contingency. In such cases, an implied term may be supplied to give effect to business efficacy to the contract and to prevent the design of the parties from being frustrated.[69] He also referred to *Re Comptoir Commercial Anverpois and Power Son & Co.*[70] where Scrutton, L.J. held that neither reasonableness nor the fact that one party would not have made the contract without including the term (had he thought about the matter) would not be sufficient. He stressed that the term must be one which was necessarily intended by the parties to form a part of the contract, though they did not express it because the term was so obvious that it was taken for granted.[71]

Thereafter, both the Business Efficacy Test and the Officious Bystander Test were referred to

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[64] *Irrawaddy Flotilla Co v Bugwandas* 18 Cal 621 (PC); *Satyabrata Ghose v Mugneeram Bangur and Company and Anr* [1954] AIR 44 (SC) [12].
[65] *Delhi Cloth & General Mills* (n 29) [18]; *Lakurka Coal Company Ltd v Jumnadass Bhagwandass* (1916) 33 Ind Cas 838 (Cal)[13], [51]; *The Fort Press Co Ltd v The Municipal Corporation of the City of Bombay* (1919) 21 BOM LR 1014 (Bom)[20], [23]; *Rajkishor Mohanty and Anr v Banabehari Patnaik and Ors* [1951] AIR 291 (Ori) [5]; *Afshar MM Tackiv Dharamsey Tricamdas* (1946) 48 BOM LR 661 [20]; *The State of Maharashtra v SN Dahad and Ors* (1994) 96 BOM LR 315 [10].
[66] *Delhi Cloth & General Mills* (ibid28, para19); ibid (n 6).
[67] *Shirlaw* (n 17).
[68] *Delhi Cloth & General Mills* (n 27) 19.
[69] *Delhi Cloth & General Mills* (n 27) 17.
[70] *Re Comptoir Commercial Anverpois and Power Son & Co* (1920) 1 KB 868.
[71] *Delhi Cloth & General Mills* (n 27) 35.

by Indian Courts and were in some cases, applied together.[72] However, in the late twentieth century, there was a perceived ceiling on the use of The Moorcock and instead, the prevailing tendency was to apply the BP Refinery formulation.[73]

## IMPLICATION IN 21ST CENTURY: SUPREME COURT WEIGHS IN

Indian case law on implication has largely followed English case law, summarized established principles and contextually applied them to the facts of each case. This continued till December 2012, when the Supreme Court pronounced its decision in *Satya Jain (D) through L.Rs. and Ors. v. Anis Ahmed Rushdie (D) through L.Rs. and Ors.* (Satya Jain);[74] in this case, Gogoi, J., speaking for a Division Bench of the Court, noted that The Moorcock is normally invoked to achieve the intended results of the parties and to avoid a failure of consideration that neither party would have intended as reasonable businessmen. In such cases, only the bare minimum term required to achieve this goal should be read into the contract and nothing more.[75] This is because it is for the parties to determine the nature of their liabilities and not judges (it naturally follows that if the contract makes business sense without the term, the term should not be implied). Further too, the implication of an unfair term should not be allowed, where one side is either saddled with, or emancipated from, all the perils of the transaction, excepting those terms which must have been in the contemplation of both parties;[76] to the extent that this allows a one-sided (and consequently, not fair and reasonable) term to be imposed if proved to be in the contemplation of both parties, this takes exception to the M&S principle, which assumes (in passing, and not absolutely or conclusively) that terms which satisfy the other criteria (set out in BP Refinery) would also be fair and reasonable. However, this principle does not take into consideration cases where such term was not contemplated at all by the parties. To my mind, if an unfair term should only be implied if it was contemplated by both parties, only a fair term should be implied if the parties have not contemplated the term at all.

In summation, the Supreme Court ring-fenced the Business Efficacy Test as follows (the "Satya

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[72] *Deviprasad Khandelwal & Sons v The Union of India,* [1969] AIR 163 (Bom) [12]; *Noel Frederick Barwell v John Jackson and Ors* [1948] AIR 146 (All) [65]-[66], [100], [101]; *United India Insurance Company Limited v Manubhai Dharmasinhbhai Gajera and Ors and New India Assurance Company Limited v Consumer Education and Research Society and Ors* [2009] AIR 461 (SC) [47]; Shirlaw (n 19); *Enercon (India) Ltd and Ors vEnercon GMBH and Anr* [2014] AIR 3152 (SC) [85]; *R v Marshall* [1999] 3 SCR 456 [43]; *Aberdeen City Council v Stewart Milne Group Limited (Scotland)* [2011] UKSC 56 [33] (Clarke LJ).
[73] *The State of Maharashtra v SN Dahad and Ors* (1994) 96 Bom LR 315 [10].
[74] *Satya Jain* (n 51).
[75] *The Moorcock* ibid [22].
[76] ibid 48.

Jain Principle"):

"*The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement."*

The Satya Jain Principle links the test to terms which "could have been" clearly intended by the parties. It is not entirely clear whether this would include cases where parties did not contemplate the term at all. In such a case, the Satya Jain Principle can be interpreted to have two meanings:

On one hand, it could be argued that the phrase "could have been" includes cases where the parties who did not contemplate the term at all, would have included such a term had they thought about it. This interpretation would be in line with Delhi Cloth and General Mills, which held that implication of a term which remedies an obvious oversight would be justified in cases where the term was "not clearly intended";[77] in such cases, the term not contemplated is the obvious oversight and implication is the remedy. This suggests that the parties need not have contemplated such a term, but would have done so, or could have done so, and if they did, they would have both agreed to such a term. This would also be in line with my earlier observation that the term should be fair (if not contemplated by both parties); and

On the other hand, it could be argued that "could have been" means the same as "must have been" or "was" i.e. the term must have been actually intended by the parties. The paragraphs of the judgment immediately preceding the Satya Jain Principle suggest this interpretation, as they use language such as "must have been intended at all events", "must have been in the contemplation of both parties" and "the parties must have intended that term to form part of their contract".[78]

## THE RESTATED PRINCIPLE

In view of the interpretive ambiguity in the Satya Jain Principle discussed in Part VI.B above, the Satya Jain Principle should be modified to ensure that the business efficacy principle can be extended to cases where the parties did not contemplate a term at all. Coupled with the

[77] *Delhi Cloth & General Mills* (n 27) 19, 36 (Kapur J).
[78] *Satya Jain* (n 51) 22.

judicial acceptance of implication of terms not clearly intended to remedy an obvious oversight,[79] the Satya Jain Principle may be restated thus (the "Restated Principle"):

"*A term should be implied in a contract, only when it is necessary to give business efficacy to the contract, in cases where the term was clearly intended by the parties at the time of making of the agreement, or would have been clearly intended by the parties, if not contemplated at the time of making of the agreement, and such term remedies an obvious oversight of the parties.*"

In cases falling within the latter half of the Restated Principle, there would be no cause for concern of retrospective judicial over-reach, since a term is only to be supplied to remedy an obvious oversight.

## COMMERCIAL CONTRACTS

Indian Courts have historically treated commercial contracts as instruments to be construed broadly, with the aim being to validate rather than invalidate them.[80] This has been expressed in various ways, such as; one must not be astute to find defects in them or reject them as meaningless;[81] or that the Courts must, as far as possible, uphold a bargain and give efficacy to a commercial transaction; or that the law should not incur the reproach of being the destroyer of bargains, etc.[82] This embodies the words of Cardozo, L.J. of the N.Y. Court of appeals in *Otis F. Wood v. Lucy, Lady Duff-Gordon*,[83] pronounced at the time when Scrutton, L.J. was laying the foundation for the Officious Bystander Test on the other side of the Atlantic Ocean; in this case, Cardozo, L.J. observed that the law has outgrown its earlier primitive formalism when the precise word was the sovereign talisman.[84] It has developed so that every omission is not fatal and the Courts can take a broader view of the words used in a contract. Referring, *inter alia*, to The Moorcock, Cardozo, L.J. on the facts of the case upheld an implied promise. He held that if the whole writing is "instinct with an obligation" though imperfectly expressed,

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[79] *Delhi Cloth & General Mills* (n 27) 19, 36.
[80] *Citibank NA v TLC Marketing* [2008] AIR 118 (SC) [28].
[81] *Dhanrajamal Gobindram v Shamji Kalidas & Co* [1961] AIR 1285 (SC) [22]; *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1958] 1 All ER 725 (HL).
[82] *Coffee Board, Bangalore v Janab Dada Haji Ibrahim Halari* [1966] AIR 118 (Kant) [24]; *Hillas & Co v Acros Ltd* [1932] All ER Rep 494.
[83] *Otis F Wood v Lucy, Lady Duff-Gordon* 222 NY 88 (1917).
[84] Antoine Vey, 'Assessing the Content of Contracts: Implied Terms from a Comparative Perspective' Paper No 26/2011 <http://ssrn.com/abstract=1837545> accessed 15 September 2016; Lord Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2001) 121 LQR 577, 579; *Prenn v Simmonds* [1971] 3 All ER 237 (Wilberforce LJ); *Hindustan Lever Ltd. v Ashok Vishnu Kate and others* [1996] AIR 285 (SC) [41]; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201 (The Antaios).

there is an enforceable promise.[85] Without this promise, the transaction cannot have such business efficacy as both parties must have intended it to have and therefore, the term could be implied. The Supreme Court also adopted such a wide interpretation in *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Company*[86] in relation to a clause in an international commercial contract, which provided for compensation in the event the contractor had to bear any extra costs, due to any change in law. It was argued that a strict interpretation should be taken for the clause, similar to the interpretation that would be applicable if the clause were contained in a contract of indemnity or insurance. However, the Supreme Court did not disturb the wide interpretation adopted by the arbitral tribunal and held it to be within the commercial purpose of the contract.

This wide view would not be appropriate for implication. As discussed above, there is a principled rationale to adopt stricter tests for implication vis-à-vis interpretation;[87] more so in case of detailed and carefully drafted contracts, where even the slightest imbalance can have severe consequences. In such cases, a strict necessity test may be preferred;[88]this is because detailed and elaborate drafting, though not entirely faultless, suggests that the parties have applied their minds to the terms of the contract.[89]Further, easy and understandable language must be interpreted in accordance with its tenor, since the parties have entered into the contract with open eyes, conscious of the merits of the clauses of the contract and their implications.[90]

Given the above, implication of terms in such cases could amount to a destruction of bargains. Therefore, Neuberger, L.J in M&S highlighted that terms should not be implied into commercial contracts, merely because if appears fair or that one considers that the parties would have agreed to it if it had been suggested to them. In another case, Neuberger, L.J. held that where wording is clear, it should be given its natural meaning even if it results in commercial disaster.[91] As such, commercial common sense and attendant circumstances should not be allowed to undermine express language of such contracts. Therefore, parties have to be careful while drafting their contracts, as even the most obvious terms may be refused, if it can

[85] ibid; *McCall Co v Wright* 133 App Div 62; *Moran v Standard Oil Co* 211 N Y 187, 198 , *Otis F Wood v Lucy, Lady Duff-Gordon* (n 86).
[86] *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Company* [2010] AIR 3400 (SC) [25], [35]-[39].
[87] *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 (Diplock LJ).
[88] *Shell UK Ltd v Lostock Garage Ltd* [1977] 1 All ER 481 (Ormrod LJ); *Liverpool City Council* (n 22).
[89] *J Lauritzen AS v Wijsmüller BV* [1989] EWCA Civ 6.
[90] *Kamala Sugar Mills Ltd v Ganga Bishen Bhajan Singh* [1978] AIR 178 (Mad) [19], [20]; *Navnit Lal & Co v Kishan Chand & Co* [1956] AIR 151 (Bom) [8].
[91] *Arnold v Britton and others* [2015] UKCS 36; Satya Jain (n 51) 22.

be shown that the language of the contract is otherwise clear and the contract is otherwise operable. In such cases, the Courts may refuse to read an implied term into the contract, which may at best "lie uneasily beside the express terms of the contract".[92]

## COMMERCIAL CONTRACTS RIDER

The discussion in Part VII.A supports the case for adoption of differential necessity standards for implication of terms in commercial contracts. As Kain puts it, necessity is not a uniform proposition; as while food is necessary for human life, water is more necessary, and neither of these is as necessary as air.[93] Further, as Neuberger, L.J. rightly explained, necessity does not refer to "absolute necessity", but refers to a value judgment in relation to business efficacy.[94] As such, a variegated approach contingent on the commercial sophistication of the parties, the detail of the contract and other relevant factors may be helpful.[95] Accordingly, I propose that the Restated Principle should separately provide for detailed commercial contracts; in such cases, Courts should consider factors such as the detail of the instrument, care taken in drafting the contract and unique complexities, including attendant facts and circumstances, of that particular contract or kind of contracts (the "Commercial Contracts Rider"). This principle can be properly applied to formally negotiated and documented commercial arrangements. On the other end of the spectrum, it can also be applied to contracts which are not thoroughly drafted as they place business convenience above drafting formalities, such as purchase-order style contracts; in such cases, the parties settle key commercial terms in an email or a letter and boiler-plate terms and conditions which may be added later or imported by reference. These boiler-plate clauses are not negotiated to suit the contract and may leave significant gaps in the document which could have been addressed in negotiated document.[96]

Take for example, a carefully drafted and negotiated investment agreement which grants the investor a call-option to acquire equity shares of the promoter at a fixed price upon the occurrence of certain events, such that the investor's shareholding goes up to a maximum of 51%. The agreement provides that the call-option is to be exercised within one year of such event, on certain terms and conditions. However, it does not specify whether the call-option is

[92] *M&S* (n 8) [20]; APJ Priti [1987] 2 Lloyd's Rep 37 (Bingham, LJ).
[93]Kain (n 33); *Liverpool City Council* (n 22).
[94] *M&S* (n 8) 21.
[95]Kain (n 33); *Codelfa Construction Proprietary Ltd v State Rail Authority of New South Wales* [1982] HCA 24 [6] (Mason J).
[96] *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18.

to be exercised in one go or may be exercised by the investor in tranches, reserving the right to call the balance equity until the one year period expires. Let us assume that on the occurrence of such event, the investor calls upon the promoter to sell the required number of shares to the investor such that the investor reaches a shareholding of 26% in the company, within one month of the event; in this situation, does the investor have the right to call the remaining 25% over the next eleven months? Or does the call-option fall away?

Given that this agreement has been carefully drafted and negotiated, a Court tasked with interpreting the call-option using the Commercial Contracts Rider may be unwilling to read an implied term in the agreement which provides that partial exercise of the call-option shall not preclude its further exercise (within the specified time period of one year and up to the limit of 51% equity), unless there are unique complexities, facts or circumstances that attend to the investment agreement or agreements of this nature, which can justify the implication of such a term. If no such factors exist, Courts may be inclined to hold that the call-option once exercised, falls away and that if the parties intended that the call-option can be exercised in tranches, they should have included a term to that effect. Per contra, in cases of standard-form contracts and other contracts drafted to suit business convenience, the Courts may find it easier, and at least not unconscionable, to read such a term into the contract. In such cases, it would be easier to find that there has been a failure of expression by the Parties, allowing the Courts, not to intrude, but to protect the contract, which the parties themselves failed to do.

To my mind, the Restated Principle should be flexible so as to distinguish between the different kinds of commercial contracts and prevent unfair formalist results. At this point, it is worth noting that the High Court of Australia observed (in the context of the Officious Bystander Test), that standard form contracts (such as Government tenders) *ipso facto* suggest that the words of the contract contain the only terms on which the contract maker is prepared to contract.[97] However, to my mind this is counter-intuitive to the nature of standard form contracts which are made for negotiation and business convenience, rather than function as a disclaimer that a party will not accept any term not stated therein.

In this light, the Restated Principle could be better applied if the Commercial Contracts Rider is added to it, which would read as follows:

[97] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24 [13] (Aikin J).

*"A term should be implied in a contract, only when it is necessary to give business efficacy to the contract, only in cases where the term is such that it was clearly intended by the parties at the time of making of the agreement, or would have been clearly intended by the parties, if not contemplated at the time of making of the agreement and such term remedies an obvious oversight of the parties. However, in case of commercial contracts, the Courts may consider factors such as the detail of the instrument, manner of formation, care taken in drafting the contract and unique complexities of that particular contract of kind of contracts, before determining whether or not to imply a term in the contract. However, it should be clear that only the bare minimum or the most limited term must be supplied and nothing more."*[98]

## CONCLUSION

Deconstructing the tests of implication and rebuilding it into the Restated Principle, required a journey through judicial history and the theoretical underpinnings of implication, including illuminating extra-judicial opinion. The result is a principle which would permit implication of terms in a manner which will serve the true purpose of contracts (i.e. to act as a framework of rights and obligations, like a contractual map for the future). Notwithstanding, the Restated Principle would protect contracting parties, from the concern of judicial temptation to imaginatively imply terms. It does so by limiting its application to cases where implication is necessary to give business efficacy to the contract. This is not a rigid test of necessity as, amongst other reasons, what is necessary for one contract may not be necessary for another. Accordingly, the Restated Principle includes the Commercial Contracts Rider that promotes certainty of interpretation in carefully drafted and detailed commercial contracts, but allows interpretative flexibility in contracts that are not so well drafted .If implication is not possible even after application of the Restated Principle to a disputed contract, the loss should lie where it falls, even if it is unreasonable for one party. With the exception of flawless contracts, this contractual gamble is always inextricably linked to the freedom of contract.

[98] Satya Jain (n 51) 22; *Delhi Cloth & General Mills* (n 27) 19.

# IMPLEMENTATION OF FOREIGN AWARDS IN INDIA, UK AND USA

* *RAGHUVEER SINGH MEENA*

## INTRODUCTION

In the area of trade and commerce, invariably relief sought and granted from judges and arbitrators is in some form of monetary payments. With international trade involving a number of currencies, it is but natural that disputes relating to international trade, will include issues relating to the currencies involved.[1] When any relief or judgment is made in favour of a party, it must be in monetary terms, if damages or compensation is involved. Monetary expression must be in some currency. Accordingly, judgments and awards, indicating relief, do so in currency.[2]

Due to the international nature of dispute settlement, currency expressions may be alien to the place where the judgments or awards are to be enforced.[3] These and other issues are discussed in this paper with an emphasis on a comparative position by taking the case of three countries namely, India, United States (hereinafter US) and United Kingdom (United Kingdom).

## JUDGMENTS IN FOREIGN CURRENCY

### OVERVIEW

A judgement rendered at home or abroad in a foreign currency throws up several problems. An important problem is the reference point for the rate of exchange. Somewhere along the way, a sum expressed in a foreign currency judgement may require conversion into the home currency.[4] When the money of amount differs from the money of payment, it is necessary to

* Student, National Law School of India University.
[1] F Mann, *The Legal Aspect of Money* (7th edn, OUP 2012) 120.
[2] ibid 121.
[3] Paul A Samuelson et al, *Economics* (16th edn, The McGraw-Hill Companies 1998) 45.
[4] ibid 48.

ensure that the rates of exchange do not cause injustice in a conversion from one 'money' to another.[5]

It can be shown through an illustration; one can assume that an Indian seller and an American buyer enter into a contract for the supply of some item, worth $100,000. The American buyer breaches this contract and does not pay the sum.[6] Now, the Indian seller is entitled to claim $100,000, but various options are possible in expressing the same in Indian currency.[7]Assuming that the rupee depreciates gradually vis-à-vis the dollar then,

| | Rate of Exchange | Sum that can be claimed |
|---|---|---|
| Contract Date | 1$= Rs.60 | $100,000= Rs. 60,00,000 |
| Breach Date | 1$= Rs.65 | $100,000= Rs. 65,00,000 |
| Judgment Date | 1$= Rs.70 | $100,000= Rs. 70,00,000 |
| Payment Date | 1$= Rs.75 | $100,000= Rs. 75,00,000 |

From the above table, one can discern that the date on which the $100,000 sum is converted into Indian rupees is of crucial importance for the buyer, as he may obtain either a far greater sum than he is entitled to if the earliest date, the breach date is followed or he could perhaps obtain at the current rate, a sum truly representative of the dollar claim.[8] Assuming if the rupee were to appreciate against the dollar then,

| | Rate of Exchange | Sum that can be claimed |
|---|---|---|
| Contract Date | 1$= Rs.75 | $100,000= Rs. 75,00,000 |
| Breach Date | 1$= Rs.70 | $100,000= Rs. 70,00,000 |
| Judgment Date | 1$= Rs.68 | $100,000= Rs. 68,00,000 |
| Payment Date | 1$= Rs.65 | $100,000= Rs. 65,00,000 |

[5] Mann (n 1) 98.
[6] Mann (n 1) 125.
[7] Paul (n 3) 78.
[8] Paul (n 3) 79.

Here, the Indian seller would favour conversion at the earliest date, the contract date since that would give him a great advantage.[9]

## STATUTORY POSITION IN INDIA

The law on foreign currency obligations in India is very scanty. It is considered in two judgments of the Supreme Court, which have attempted to lay down the principles.[10] There exist no direct statutory provisions on the point and it would be appropriate to refer to the few sections in the Foreign Exchange Management Act (hereinafter FEMA) for guidance.[11]

The Code of Civil Procedure (hereinafter CPC) is silent on the point, but there are general provisions dealing with enforcement of foreign judgment that perhaps could be applied in a foreign currency judgment, provided it is a foreign one.[12] The CPC clarifies that a foreign judgment shall be decisive with regard to any matter directly decided upon the same parties or between parties under whom they or any of them claim litigating under the same title.[13] The bar in case of foreign currency judgments being enforced is that it will result in breach of Indian Law.[14] Hence, it is essential to examine whether a foreign judgment expressed in a foreign currency will violate the relevant Indian law i.e. FEMA.[15]

## POSITION IN ENGLAND

The law in England relating to foreign currency judgments has undergone change since 1960.[16] In that year, a rule of three hundred and fifty years vintage, has affirmed, that stated English Court has no power to decide the cases where the payment of claim is in foreign currency hence to resolve such issues in England, a foreign currency debt must be converted into sterling with reference to the rate of exchange prevailing on the date when the debt was payable.[17] The modern foundations of this rule are discernible in *Manners v. Pearson*[18], wherein it was held that courts of England had no jurisdiction to order payment of money except in the currency of

[9] Mann (n 1) 108.
[10] The Foreign Exchange Management Act 1999.
[11] Vaughan Black, *Foreign Currency Claims in the conflict of Laws* vol 2 (Hart 2010) 167.
[12] The Code of Civil Procedure 1908.
[13] James Grandolfo et al, 'India' [2010] 44(01) The International Lawyer 663, 680.
[14] The Foreign Exchange Management Act 1999 s 3(b); *Forasol v ONGC* AIR 1984 SC 24.
[15] The Foreign Exchange Management Act 1999 s 2(m).
[16] Roger Bowles et al, 'Judgments in Foreign Currencies: An Economist's View' [1976] 39(02) MLR 196, 201.
[17] *Woodhouse AC v Nigerian Produce Marketing* [1972] AC 741 (HC).
[18] *Manners v Pearson* [1898] 1 Ch 581 (CA).

England.[19] This was called the home currency rule. Besides, it was also held that the date of breach of the contract was the appropriate time for determining the exchange rate for conversion.[20]

The pronouncement in the *Tomkinson v. First Pennsylvania Banking & Trust* (hereinafter *Havana Case*[21]) was different from earlier precedents that had struck to the breach date-home currency rule since the injured party had actually benefitted from them in those cases.[22] However, in the *Havana Case*, the pound lost its value and consequently the injured creditor had to be content with receiving an iniquitous sum. This was criticised as unjust.[23]

Interestingly enough, after the decision in *Havana*, a series of statutory changes were effected that allowed for conversion of the judgment sum on the date of judgment instead of the breach date.[24] They included conversion in cases involving carriage of goods by air. Besides, in respect of carriage of goods by railroad and rail, conversion could take pace upon the date of payment. Thus, parliament itself intervened to remove sanctity attached to this rule.[25]

Meanwhile in *Beswick v. Beswick*[26], the House of Lords held that to make money payment, House of Lords could order a specific performance. This was sufficient to allow for extending by analogy specific performance of a contract to make a foreign money payment.[27]

**Miliangos Case**

The *Miliangos case*[28], which proved to be a turning point in the law relating to foreign currency judgments, arose under interesting circumstances before the House of Lords.[29] It essentially concerned an action brought by a Swiss against an English company claiming a certain sum of Swiss Franc due to him for the price of polyester sold and delivered to the English Company under a written contract.[30] The court in England that demanded adherence to the home currency-breach date rule was probably known to the plaintiff, for he originally asked for

[19] ibid.
[20] Black (n 11) 189.
[21] *Tomkinson v First Pennsylvania Banking & Trust* [1960] 2 All ER 332.
[22] ibid.
[23] ibid.
[24] Black (n 11) 119.
[25] Black (n 11) 120.
[26] *Beswick v Beswick* [1973] 3 All ER 498.
[27] ibid.
[28] *Miliangos v George Frank Textiles* [1975] 3 All ER 801 (HL).
[29] ibid.
[30] ibid.

satisfaction of his claim in sterling. However, upon the judgment in *Schorsch Meier G.M. B.H. v. Hennin*[31], the claim of the plaintiff was amended asking for the amount to be paid in Swiss francs as an alternative prayer. The trial court refused to grant this new prayer and decreed the amount in sterling. The Court of Appeal reversed the trial court's ruling and granted the claim in terms of Swiss francs. The English company preferred on appeal to the House of Lords.[32]

In the House of Lords, the majority abrogated the longstanding home currency rule and recognized that English Court was entitled to grant judgment in terms of foreign currency but qualified this to a situation where the sum of payment as well as the money of amount was foreign and the contract was governed by foreign law.[33] Thus, a practice direction of the House of Lords was invoked to depart from the old rule, for a new and more satisfactory rule to emerge.[34]

**Post Miliangos Era**

The principles in *Miliangos* were extended to other situations, as a claim based on damages for tests and for breach of contract.[35] In two connected appeals, the House of Lords extended the *Miliangos* principle of allowing claims in foreign currency beyond the mere action for a sum due to other claim.[36] The *Miliangos* rule that the money of payment as well as the money of amount be foreign and that the contrast be governed by foreign law was dispensed with in later cases. The *Owners of M.V. Eleftherotria v. the Owners of M.V. Despina R.*[37] went further in demonstrating the wisdom of moving away from the sterling judgment and breach date rules. *Miliangos* and, its progeny have recognised that, while the mechanical sterling judgment and breach date rules may have achieved just results when the sterling was a strong world currency, this foundation for the rules disappeared with the advent of floating currencies, a development made possible through the judicial mind.[38]

[31] *Schorsch Meier GM BH v Hennin* [1975] 1 All ER 152.
[32] *Miliangos Case* [1975] 3 All ER 801 (HL).
[33] Cheshire et al, *Private International Law* (14th edn, OUP 2009) 225.
[34] Black (n 11) 136.
[35] Ross P Buckley, 'The Bankruptcy of Nations: An Idea Whose Time Has Come' [2009] 43(03) The International Lawyer 1189, 1216.
[36] ibid 1192.
[37] *Owners of MV Eleftherotria v Owners of MV Despina R* [1979] 1 AC 685.
[38] ibid.

## INDIAN CASE LAWS

### Forasol v. Oil & Natural Gas Corporation.[39]

In India, the issue of foreign currency conversion came for the first time before SC in the case of *Forasol* for the enforcement of foreign currency claims.[40] There was a contract entered into by Forasol, a foreign company and Oil & Natural Gas Corporation (hereinafter ONGC), a Government of India undertaking. Dispute arose between the parties when certain terms and conditions of the contract were not followed and subsequently the matter was taken to arbitration as per the arbitration clause under the contract.[41] The matter was governed under Indian Arbitration Act, 1940. The award by the court was in French franc but the issue was about converting the same into Indian rupees so that claim can be settled.[42] Now, there were different dates of conversion before the court, such as the date when the action was commenced, or the one when the court gave the final order or the date when the order of the court was executed.[43]

Faced with these difficulties, the judgment in *Forasol* proceeded to choose the date of judgment as the appropriate date for converting the sum expressed into Indian Rupees as this was the latter date and was beset with the least difficulties.[44] In relation to arbitration, the date when the award is expressed through a decree would be the relevant time to calculate the sum in Indian rupees.[45]

***Renusagar Power Co. Ltd v. General Electric Co***[46]: The subject matter was an arbitral award that had been rendered in which the sum payable was expressed in foreign currency.[47] It was however first contended that the ruling in *Forasol* applied to only arbitral awards governed by the Indian Arbitration Act, 1940 and not to Foreign Awards falling within the realm of Foreign

[39] *Forasol v ONGC* AIR 1984 SC 24.
[40] ibid.
[41] ibid.
[42] ibid.
[43] ibid.
[44] ibid.
[45] Cheshire (n 33) 156.
[46] *Renusagar Power Co Ltd v General Electric Co* AIR 1994 SC 860.
[47] *Union of India v AL Rallia Ram* AIR 1963 SC 1685.

Awards (Recognition and Enforcement) Act, 1961.[48] The contention was in the negative, stating that no such selective application of the decision in *Forasol* could be made.[49]

The contention that the matter of conversion of foreign currency is a matter substance and is governed by proper law of the contract was also rejected using various authorities in English Law and Private International Law.[50] The reconsideration of *Forasol* that was urged in favour of a date of payment rather than a date of judgment was not accepted by the SC, due to the difficulties apparent in doing as pointed out in the *Forasol* judgment.[51]

**POSITION IN USA**

The American legal system approached the currency-of-judgment problem in the same way as the English courts did, and the cases that have come before its judges have presented problem similar to those faced by the English counterparts.[52] Yet the position to which the US arrived at differs from the English one in a number of ways.[53]

The United States adheres to the strict rule of home currency-breach date that has been a virtually unquestioned assumption that the U.S. courts can render judgment only in U.S. currency, supported by judgments and commentators.[54] The American judge, Justice Holmes, in two opinions considered that in case judgments rendered abroad where expressed in foreign currency then they must necessarily be converted into U.S. currency by following the Date of Breach. However, the federal courts also seem to follow the practice that in case the obligation payable or the cause of action arose in foreign jurisdiction, the exchange rate existing on the date of judgment will apply.[55]

The US courts sometimes follows the federal rule that alternates between the dates of payment; otherwise, they follow the Breach Rule uniformly regardless of the place of payment.[56] However, confronted with the fact that even the mighty dollar is subject to the possibility of violent fluctuations, the law in America seems to undergo change from the rigid position of

[48] *Oil and Natural Gas Commission v Offshore Enterprises* AIR 1993 Bom 217.
[49] *State of Haryana v M/S SL Arora & Company* (2010)2 SCR 297.
[50] *Shin-Etsu Chemical Co Ltd v M/S Aksh Optifibre Ltd* AIR 2005 SC 5048.
[51] *RM Investments & Trading Co v Boeing Co* AIR 1994 SC 1136.
[52] A Dicey et al, *Conflict of Laws* (15th edn, Sweet & Maxwell 2016) 122.
[53] Cheshire (n 33) 175.
[54] Vikram Raghavan, 'Foreign Currency Judgments: Need for a Proper Legal Regime' [1998] 10 National Law School Journal 61, 81.
[55] Black (n 11) 106.
[56] Jennifer Freeman, 'Judgments in Foreign Currency: A Little Known Change in New York Law' [1989] 23(03) The International Lawyer 737, 753.

home currency-breach date.[57] The trend in America thus seems to be changing in favour of a judgment date and for recognition of judgments and awards rendered in foreign currency.[58]

## CONCLUSION

It would be pertinent to suggest the incorporation of the judgment of the Supreme Court on foreign currency into the relevant statute. For this purpose, whole series of amendments to various acts are required. Especially against the background of incomplete capacity for private parties to reduce the existing uncertainty through contractual provisions, the room for some jurisdictions to modify their current approach to the currency-of-judgment problem is obvious.

The UK and various American states have enacted legislation based on the Uniform Foreign-Money Claims Act (hereinafter UFMC), and have adopted systems that conduce a greater certainty. The UFMC Act goes furthest in this regard, it provides clear standards for determining the mandatory proper money of a claim and reserves the inherently uncertain feeling-the-loss test for that limited class of cases where its primary rules cannot apply.

The greater problem is that no amount of certainty achieved within any jurisdiction will eliminate the difficulties that exist in the cross-border arena, including international commercial arbitration. Until international action addresses that, traders, litigants and their legal advisors will have to do their best to cope with the confusing situation described in this paper.

[57] Cheshire (n 33) 198.
[58] Cheshire (n 33) 199.

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