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FROM THE DESK OF THE VICE-CHANCELLOR

Everything that we do every day happens because it has become a sense of habit. From waking up in the morning to going to sleep at night, everything happens because it serves a purpose. This journal, which is seeing its eighth year in the sunlight, also serves the same purpose it has been serving for all these years: to gather legal opinions and consolidate them for the readers and provide a platform for the authors' contributions in the field of law. From one year to the next, it has gone through the same rigorous work and the same critically keen eyes of the students who review, edit and help publish this journal. It has become a habit.

The journey we have undertaken to reach to the position in which we are today has been a bittersweet one. With ups and downs in the machinery of toil, we have widened our scope and influenced the readers. We have increased our patronage drastically through the years. RMLNLU Law Review has grown from a small peer-reviewed journal to a successful compendium of legal opinions which touch sensitive issues with curiously fearless fingers. All of this has been made possible by the unfettered enthusiasm of the authors, thirst for knowledge of the readers and the diligence and hard work of the editors.

As we publish the Eighth Edition of RMLNLU Law Review this year, I hope that this enthusiasm and hard work increases abundantly to take this journal to astonishingly new heights. In the end, I wish the Journal Committee hearty congratulations on another new and successful edition of this journal and may they achieve more remarkable feats in the future.

Prof. (Dr.) Sanjay Singh
Vice Chancellor,
Dr. Ram Manohar Lohiya National Law University

EDITORIAL

Being a patron of law makes one look at the new developments in the world from a legal point of view. The ideas and thought processes applied by different people make it easier to choose the unique entries which pique the interest of the editors and the readers alike. It is often quite difficult to filter the news rather than to absorb it. An innocent onlooker might have a totally separate opinion of an event as compared to a person who has seen many summers and is adept in handling situations. A legal eye makes it easier to question things and not just accept them as to what they are. This jurisprudential aspect of law is what separates legal scholars from common folk.

That being said, it is also not necessary to accept tall-tales just for the sake of questioning things. Free will should be put to use, but not so much. A reader while taking in a wisp of the writers' masterpiece must sense that the articles are carefully thought-through and well-crafted pieces of their mind and a critique of the society. Opinions might differ from time to time, may go in one direction for a certain month and a completely opposite direction in the next. However, amidst all the zig-zagging of contentions, it is important to note that each and every single one of these opinions matter, after all, one vote may make all the difference. Therefore, although everything must be given importance to, it must be taken with a grain of salt.

This finally brings us to the opinions, theses, writings, musings, and contentions of various authors throughout the country whose entries will help make the Eighth Edition of RMLNLU Law Review a success. The diverse research of these authors in their respective fields of interests has helped them reach the stage of publication. This dedication on both their part and the editing teams' needs to be celebrated through this edition of Law Review.

In the article titled '*Envisioning the Emerging Facade of Corporate Governance in India in the Light of Insolvency and Bankruptcy Code, 2016*', *Drishmeet Buttar* and *Abhinandan Jain Shivhare* illuminate the paramount features and effects of the Code on corporate governance. The article is a sine qua non for anyone who aspires an insight into the realm of corporate governance, providing an analysed aftermath of the Insolvency and Bankruptcy Code, forecasting impacts, and proposing innovative suggestions for the same.

Arbitration in Intellectual Property disputes, although a very intriguing innovation, is legally a very uncertain and vague arena. *Arpit Shivhare* in the article '*Arbitration or No Arbitration: Exploring the Legality of Arbitration in Intellectual Property Disputes*' offers a very engaging insight regarding arbitration in Intellectual Property disputes and analyses different possible approaches on the same. This article endorses ingenious neoteric recommendations to make the existing legal framework better-equipped to cope with the challenges that arbitration of Intellectual Property disputes offers.

People rarely pause to reflect on the fact that their entire life now operates online and during this, multiple sites acquire their data as they click away on all the policy contracts they encounter. In her article, '*Move Beyond Consent*', *Arunima Bishnoi* expresses that ignorance comes handy to us all when we want to avail the desired services at a moment's notice online. She believes that it is the need of the hour to assess and look deeply into these contracts of our virtual lives. This article takes us through the intricacies of the policies which are provided to us and the nature of the consent which we give.

ICJ's role in the enforcement of its own cases is a dicey affair and hence Jadhav's case acquires much importance. In the wake of the same, *Pradyuman Kaistha*, in his article titled '*Jadhav and the ICJ: The Enforceability Conundrum*', looks at the Kulbhushan Jadhav case between India and Pakistan pending at the International Court of Justice and proposes numerous changes at an institutional level. In addition to this, he highlights the problem of enforcement that permeates across all these judgements. The article distinguishes the Jadhav Case from the previous rulings of the court and argues for an enhancement of the ICJ's role in the enforcement of its own decisions.

Srijan Jha in the article, '*Indian Energy Law: Incautious of the Environment?*', aims to draw a link between the ever increasing growth of Energy needs and the still developing Energy Laws and the limited Web of Environment Laws. The paper seems to achieve a poise between the two fields of law and attempts to comment upon the intersection of the two laws- Energy Law and Environmental Law. The paper studies various domain specific acts and how they influence or impact Environment protection.

The last article in the volume is titled '*Transfer and Transparency'*. In their article, *Srijita Jana* and *Vikas Kumar Bairagi* have made an attempt to draw the reader's attention in the aspects relating to appointment and transfer of judges. A critical remark has been made on the opaqueness

that the appointment process carries. The paper comments on how attempts have been made to open up the process of transfers, but still, lacunas persist. The authors emphatically focus on keeping up the judicial independence and its sanctity.

We hope that the readers of the journal find the articles as interesting and helpful as the editing team did.

May this enthusiasm and zeal of looking through the glasses of law never cease to surprise the readers and give them what they are looking for.

Happy Reading!

ENVISIONING THE EMERGING FACADE OF CORPORATE GOVERNANCE IN INDIA IN THE LIGHT OF INSOLVENCY AND BANKRUPTCY CODE, 2016

- *ABHINANDAN JAIN & DRISHMEET BUTTAR*[*]

PROLOGUE

The existence of corporate governance is, in this fast pacing corporate eon, a requisite of assured success in maintaining financial stability in the business, amongst other imperative parameters. On the other hand, the use of credit mechanism is also extensive and pervasive in all the sectors of the economy. As of 2015, the insolvency resolution in India took 4.3 years on an average, which was higher when compared to United Kingdom (1 year), United States of America (1.5 years), and South Africa (2 years).[1] Ranking 136th out of 189 countries in the World Bank Index on the ease of resolving insolvency,[2] the alarmed Indian corporate system now seeks redemption with the enactment of the Insolvency and Bankruptcy Code of 2016. The coexistence of effectual corporate governance and an effectual code of insolvency and bankruptcy is, although, an ideal–case scenario, yet attainable. In an attempt to assess the same, it is crucial to have an overview of the following:

[*] Students, Army Institute of Law, Mohali.

[1] The World Bank, 'Time to resolve Insolvency (years)' (2016) <https://data.worldbank.org/indicator/IC.ISV.DURS> accessed 13 September 2017.

[2] World Bank Group, *Doing Business 2016: Measuring Regulatory Quality and Efficiency* 208 (13th edn, World Bank 2016).

WHAT IS CORPORATE GOVERNANCE: MEANING, HISTORY AND IMPLICATION

"*Corporate Governance is the blood that fills the veins of transparent corporate disclosure and high quality accounting practices. It is the muscle that moves a viable and accessible financial reporting structure.*"

- *Kumara Mangalam Birla Committee Report on Corporate Governance, 2000*

The indispensability of corporate governance in the contemporary corporate scenario is irrefutable. In common parlance, it refers to a system which is devised for effective management and control of the companies. Defied to be an end, corporate governance is referred to as a means for persistent maintenance of 'economic efficiency, sustainable growth, and financial stability',[3] defined as a system by which companies are directed and controlled, the report of the Cadbury Committee in 1992, further expounded that the underlying principles for the same are 'openness, integrity, and accountability'.[4] It was, however, only after the global financial crisis of 2007-2008 that the urge for corporate governance gained momentum. The Financial Crisis Inquiry Commission in its report averred that the crisis was avoidable and concluded, "dramatic failures of corporate governance and risk management at many systemically important financial institutions were the key cause of this crisis."[5]

In the context of the Indian corporate culture, the inadequacy of provisions relating to corporate governance under the Companies Act, 1956, triggered SEBI to constitute a series of committees namely, Kumar Mangalam Birla Committee in 2000, Narayana Murthy Committee in 2003 and Adi Godrej Committee in 2012.[6] The entailment of provisions for corporate governance in India under the Companies Act, 2013, SEBI listing regulations and clause 49 of listing agreement, are thus accredited to the deliberations by these committees and recommendations thereof. So much so, that SEBI has, at present, set up a committee under the Chairmanship of Uday Kotak, Executive

[3] Organisation for Economic Co-operation and Development, *G20/OECD Principles of Corporate Governance* (OECD 2015).
[4] Adrian Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance* (1992).
[5] The Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* (US Government Printing Office 2011) xviii.
[6] Aarati Krishnan, 'All you Wanted to know about corporate governance' *The Hindu Business Line* (21 August 2017) 1.

Vice Chairman and Managing Director of Kotak Mahindra Bank, so as to heighten the level and standard of corporate governance of the listed companies in India.[7]

DELINEATING 'INSOLVENCY' AND 'BANKRUPTCY'

Insolvency, in simpler terms, is a state of financial difficulty where a company squarely fails to run its business at the current pace. With a two-fold test –'cash flow' test where it is unable to pay debts, and the 'balance sheet' test where the liabilities exceed the realizable assets, insolvency is dissimilar from bankruptcy.[8] Bankruptcy, having originated from the Latin term *bancus ruptus*,[9] is defined as a statutory procedure by which the insolvent debtor obtains financial relief and undergoes a judicial reorganization or liquidation of the debtor's assets for the benefit of creditors.[10] Deciphering the meek line of differentiation between 'insolvency' and 'bankruptcy', it can be indisputably averred that while insolvency is a state of business, bankruptcy is the declaration and adjudication of that state by the court of law, involving a legal process. Irrespective of the uncoordinated appearance of insolvency and bankruptcy, the fundamental relation between the two is significant as it defines a bankrupt and the point of initiation of solvency and bankruptcy legislative framework in India owes its genesis to English laws, as also reasoned by the absence of any indigenous laws prior to the British era.[11] Sections 23 and 24 of the Government of India Act, 1800 were the earliest insolvency related provisions in Indian legislative machinery through which insolvency jurisdiction was conferred on Bombay, Calcutta, and Madras.[12] However, the Presidency Towns Insolvency Act, 1909 and Provisional Insolvency Act, 1920 were two imperative enactments that dealt with personal insolvency and had analogous provisions, with the only difference in the extent of territorial jurisdiction. While the former was applicable to only the presidency towns, the latter applied to the whole of India.

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[7] KR Srivats, 'SEBI forms committee on corporate governance' *The Hindu Business Line* (New Delhi, 4 June 2017).
[8] Robert J Stearn, Jr and Cory D Kandestin, 'Delaware's Solvency Test: What Is It and Does It Make Sense? A Comparison of Solvency Tests under The Bankruptcy Code and Delaware Law' (2011) 36 Delaware Journal of Corporate Law 165.
[9] Louis Edward Levinthal, 'The Early History of English Bankruptcy' (1919) 67 University of Pennsylvania Law Review 1, 2.
[10] Bryan A Garner, *Black's Law Dictionary* (9th edn, 2009) 867.
[11] Mulla, *The Law of Insolvency in India* (2nd edn, N M Tripathi 1958) 1-2.
[12] Law Commission of India, *Report on Insolvency Laws* (Law Com No 26, 1964) paras 2-3.

The outright change in the facet of this branch of law post-independence is perceptible. It is a subject matter of Concurrent List of the Constitution of India in its 9th Entry, thus enabling both state and centre to enact laws on the same. Under the Companies Act, 1956/2013, Part VI A, VII & Section 391, embodied the insolvency and bankruptcy provisions.[13] This act, which left the terms 'insolvency' and 'bankruptcy' undefined, squarely failed in dealing with cases pertinent to the same, consuming between 3 to 15 years for winding up the company.[14] In pursuance of the recommendations of the T. Tiwari Committee, set up by Reserve Bank of India (hereinafter RBI) in 1981, the Parliament enacted Sick Industrial Companies (Special Provisions) Act, 1985, (hereinafter SICA), which provided for creation of the Board of Industrial and Financial Reconstruction (hereinafter BIFR).[15] Out of the total 5800 cases reported to BIFR between 1987 and 2014, the rehabilitation plan was implemented in only 9% of them, thus highlighting the stark failure of the Act of 1983.[16] The same was followed by the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter RDDBFI), enacted in furtherance of the recommendations of the High Level Committee on the Financial System (Narasimham Committee I, 1991). RDDBFI provided for the establishment of Debt Recovery Tribunal (hereinafter DRT) and Debt Recovery Appellate Tribunal (hereinafter DRAT). The disappointing performance of DRTs and DRATs and subsequent recommendations of the Narasimham Committee II, 1998 led to the enactment of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (hereinafter SARFAESI) Act in 2002. The declining recovery rates from 61% in 2008 to 21.9% in 2013 assert the worsening performance of the SARFAESI Act, 2002.[17]

After more than a decade of SARFAESI Act having come into force, the insolvency bankruptcy laws have now been consolidated as a separate comprehensive code in the form of IBC (as also

[13] Ernst & Young LLP, 'The Insolvency and Bankruptcy Code, 2016: An Overview' (Ernst & Young LLP, July 2016) <http://www.ey.com/Publication/vwLUAssets/ey-the-insolvency-and-bankruptcy-code-2016-an-overview/%24FILE/ey-the-insolvency-and-bankruptcy-code-2016-an-overview.pdf> accessed 12 October 2017.
[14] Rajeswari Sengupta, Anjali Sharma, Susan Thomas, 'Evolution of the insolvency framework for non-financial firms in India' (2016) Indira Gandhi Institute of Development Research Working Paper No. 2016-018, 12 <http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf> accessed 15 October 2017.
[15] Board of Industrial and Financial Reconstruction, 'Genesis of SICA, 1985<http://bifr.nic.in/genisis.htm> accessed 12 October 2017.
[16] Rajeswari Sengupta, Anjali Sharma, Susan Thomas, 'Evolution of the insolvency framework for non-financial firms in India' (2016) Indira Gandhi Institute of Development Research Working Paper No 2016-018, 8 <http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf> accessed 15 October 2017.
[17] Reserve Bank of India*, Report on Trends and Progress of Banking in India* (2008-2013).

recommended by the NL Mitra Committee, 2001).[18] It has amended 11 laws including Companies Act, 2013, DRT Act, 1993 and SARFAESI Act, 2002.[19]

DECODING THE CODE: SALIENT FEATURES OF INSOLVENCY AND BANKRUPTCY CODE, 2016

In an attempt to consolidate the laws relating to insolvency and bankruptcy, the IBC was passed by the Parliament and eventually received Presidential assent on 28th May, 2016.[20] Developing an institutionally sound framework to assist corporates, limited liability partnerships, partnership firms, individuals and other body corporates to overcome the state of insolvency, this code seeks to reform the existing fragmented system. The hereinafter deliberates upon the salient features of IBC pertaining to corporate debtors:

TWO-FOLD INSOLVENCY PROCESS FOR CORPORATE DEBTORS

With a default worth Rs. 100,000 to initiate an insolvency process for corporate debtors, the code of 2016 envisages two stages under the same *viz.* Insolvency Resolution Process and Liquidation. Ordinarily, while the former involves the assessment of the viability of the debtor's business for continued existence and scope of revival, the latter is resorted to on failure of the Insolvency Resolution Process.[21]

The Insolvency Resolution Process can be initiated at the National Company Law Tribunal (hereinafter NCLT), by either a creditor, financial or operational or voluntarily by the defaulting corporate debtor.[22] The admission of application is followed by an order of moratorium, a public announcement of the initiation of corporate insolvency resolution process, calling for the submission of claims and appointment of an interim resolution professional in accordance with

[18] Reserve Bank of India*, Report of Dr. N L Mitra Committee on Bankruptcy Laws* (2001) 8.
[19] 'Legislative Brief on the Insolvency and Bankruptcy Code, 2016' (*PRS Legislative Research*, 5 May 2016) <http://www.prsindia.org/administrator/uploads/media/Bankruptcy/Legislative%20Brief-%20Bankruptcy%20code.pdf> accessed 14 October 2017.
[20] Samvad Partners, 'India: Insolvency and Bankruptcy Code' (*Mondaq,* 12 September 2017) <http://www.mondaq.com/india/x/627706/Insolvency+Bankruptcy/Insolvency+And+Bankruptcy+Code> accessed 15 October 2017.
[21] 'The Insolvency and Bankruptcy Code, 2016 - Key Highlights' (*Trilegal*, 16 May 2016) <http://www.trilegal.com/index.php/publications/update/the-insolvency-and-bankruptcy-code-2016-key-highlights> accessed 13 October 2017.
[22] The Insolvency and Bankruptcy Code 2016, s 6.

sections 14, 15 and 16 of the code.[23] During the moratorium period, the debtor is barred from disposing of its assets out of the ordinary course. In furtherance of the same, a creditors committee is constituted by the resolution professionals, endowed with sweeping decision making powers for the purpose of submission of a cogent and effective revival, or to call it so, resolution plan.

In the event of non-receipt of a resolution plan within the requisite period of time or non-compliance of requirements entailed in section 31 of the code, the Adjudicating Authority is empowered to pass an order of liquidation.[24] The Insolvency Resolution Professional may act as the liquidator and shall discharge all the functions of Board of Directors, forming an estate of the assets, and consolidating, verifying, admitting and determining the value of creditors' claims.[25]

INSTITUTIONAL INFRASTRUCTURE FOR INSOLVENCY PROCESS FOR CORPORATE DEBTORS

INSOLVENCY RESOLUTION PROFESSIONALS (IRPS)

Appointed to perform the corporate insolvency resolution process, IRPs (including interim resolution professionals) are conferred with the powers of the board of directors or the partners for the effective management of the corporate debtor.[26] The going concern of the same, as provided for in the code, shall be the preservation of the value of the property of the corporate debtor in addition to management of its operations.[27] Not only do they run the business of the defaulting corporate debtor, but verify the claims of the creditors and constitute creditors committee. Also, they discharge the functions of the liquidator, unless replaced.[28] Mamta Binani, former president of Institute of Company Secretaries of India (hereinafter ICSI), was appointed as the first-ever IRP under the new regime for Synergies-Dooray.[29]

[23] The Insolvency and Bankruptcy Code 2016, s 13.
[24] The Insolvency and Bankruptcy Code 2016, s 33(1).
[25] The Insolvency and Bankruptcy Code 2016, s 36.
[26] The Insolvency and Bankruptcy Code 2016, s 17(1).
[27] The Insolvency and Bankruptcy Code 2016, s 20(1).
[28] The Insolvency and Bankruptcy Code 2016, s 34(1).
[29] *Synergies Dooray Automative Limited v Edelweiss Asset Reconstruction Company Limited and Others* [2017] CP No 1/IBC/HDB/2017 (NCLT Hyderabad Bench).

INFORMATION UTILITIES (IUS)

The creation of multiple IUs to collect and store financial information related to a debtor, as contained and contemplated in the code, the same can be instrumental in activating the resolution process and be also produced as evidence at various stages of the process.[30] Chapter V of Part IV of the code contains provisions with respect to registration, governing body, core services and obligations of IUs, besides providing for the procedure for submission of financial information. Very recently, National e-Governance Services Ltd., a government entity, has received the in-principle approval for establishing an IU in India- the first under IBC.[31]

THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

Supervising the insolvency proceeding and maintaining a check on other actors under the code *viz.* IRPs, IAs and IUs, IBBI is often addressed as the regulator of the system created by the code. While Chapter I of Part IV of the code entitled 'The Insolvency and Bankruptcy Board of India' encompasses the provisions relating to the establishment, constitution and meetings of IBBI, including the powers of the chairman, removal of members etc.; Chapter II is a meticulous draft on the powers of the same.

ADJUDICATING AUTHORITIES

- NCLT
- National Company Law Administrative Tribunal (hereinafter NCLAT), to be approached within 30 days from the date of receipt of order of NCLT
- Supreme Court of India, to be approached within 45 days from the date of receipt of the order of NCLAT.

The first insolvency resolution order under this code was pronounced by NCLT in the matter of Synergies-Dooray Automotive Ltd on 14.08.2017. With an aggregate claim amount against

[30] 'Legislative Brief on the Insolvency and Bankruptcy Code, 2016' (*PRS Legislative Research*, 5 May 2016) <http://www.prsindia.org/administrator/uploads/media/Bankruptcy/Legislative%20Brief-%20Bankruptcy%20code.pdf> accessed 14 October 2017.

[31] Ashish Rukhaiyar, 'NeSL becomes India's first Information Utility under Insolvency & Bankruptcy Code' *The Hindu* (New Delhi, 16 June 2017) <http://www.thehindu.com/business/markets/neslbecomesindias-first-information-utility-underinsolvency-bankruptcy-code/article19089468.ece> accessed 15 October 2017.

Dooray from financial creditors standing at Rs. 972 crores and the cost of the proposed scheme at Rs. 54 crores, the resolution plan was approved by NCLT on 02.08.2017.[32]

TIME BOUND AND 'FAST TRACK' CORPORATE INSOLVENCY RESOLUTION PROCESS

An incompetent, onerous, and time-consuming procedure may eventually constrain a firm to liquidate on account of mounting financial distress, also tying the resources for a longer time.[33]A fast-paced process, on the contrary, may protect the value of the assets of the firm and improve its chance for an eventually successful turnaround.[34] Time-bound insolvency resolution is perhaps the quintessence of IBC. From ascertainment of the existence of a default by the corporate debtor within fourteen days of the receipt of the application[35] to completion of the process within a period of one hundred and eighty days (extendable to 90 days for only one time with the consent of 75% of creditors) from the date of admission of the application,[36] IBC ensures expeditious execution of every requirement at every step. The appointment of an IRP, for instance, shall be made within fourteen days from the insolvency commencement date.[37] The code has also embraced the concept of Fast Track Insolvency Resolution Process under Chapter IV. It provides for completion of the entire process within 90 days, with only a single extension of 45 days.[38]

PRIORITY OF CLAIMS

Section 53 of the Code enlists an order in which the proceeds from the sale of liquidation assets of the body corporate shall be distributed. Paid ahead of all dues, first-hand priority is assigned to the costs of Insolvency resolution process and that of liquidation, thus also, incentivizing the profession. The same is followed by the claims of secured creditors and workmen dues up to 24 months. Immediately below are the salaries/dues of other employees' up to 12 months, followed by, financial debts of unsecured creditors; ranking fourth in the order of priority. Succeeding the

[32] *Synergies Dooray Automative Limited v Edelweiss Asset Reconstruction Company Limited and Others* [2017] CP No 1/IBC/HDB/2017 (NCLT Hyderabad Bench).
[33] Lee, Seung-Hyun, Mike Peng, and Jay Barney, 'Bankruptcy Law and Entrepreneurship Development: A Real Options Perspective' (2007) 32(1) Academy of Management Review 257, 264.
[34] ibid.
[35] The Insolvency and Bankruptcy Code 2016, s 7(4).
[36] The Insolvency and Bankruptcy Code 2016, ss 12(1) and 12(3).
[37] The Insolvency and Bankruptcy Code 2016, s 16(1).
[38] The Insolvency and Bankruptcy Code 2016, s 56.

same and ranking on the same pedestal are Government dues (up to 2 years) and payments to secured creditors for any unpaid amounts following enforcement of their security interest. Sixth, in order of priority are generalized as remaining debts and dues, and the rest cater to the claims of Preference shareholders, followed by Equity shareholders or partners in the end.

ANALYZING THE AFTERMATH OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 ON STAKEHOLDERS OF CORPORATE GOVERNANCE

"*Effective debt monitoring and collection play a crucial role in corporate governance in market economies and require adequate information, creditor incentives, and an appropriate legal framework.*"

\- *Cheryl W. Gray*

Unreasonable, as it is, to expect all the businesses to succeed in their venture, it is typically usual for some businesses to collapse, vitalizing the need to focus on corrective measures to be taken in such tumultuous times. Such measures are accounted to unswervingly affect the stakeholders of corporate governance. Including not just shareholders and directors or the management, but also the creditors, suppliers, customers, employees and various other groups,[39] the code is a portrayal of the emerging façade of corporate governance, involving these stakeholders. Recapitulating that the tenacity of bankruptcy laws lies in resolving conflicts among a firm's stakeholders,[40] the hereinafter elucidation is a detailed account of the same, individually assessing the impact of the Code on the stakeholders of corporate governance in India:

CREDITOR-DRIVEN APPROACH

Without any whit of doubt, creditors assume an indispensable role in the corporate governance and in view of the same, the present code is undeniably creditor oriented. The indispensability of cooperation of the creditors is universally accredited, since in exclusion of the same, the distressed

[39] Tarek Roshdy Gebba, 'Corporate Governance Mechanisms Adopted by UAE National Commercial Banks' (2015) 5 Journal of Applied Finance and Banking 23, 27.
[40] T H Jackson, *The logic and Limits of Bankruptcy Law* (Harvard University Press 1986).

firms would be dismantled through an anarchic creditors' run, which eventually would undermine the debtor's recovery value.[41] OCED, too, acknowledges the indispensability of insolvency laws in enforcing creditor's rights in its Principles of Corporate Governance.[42]

Expunging the meek line of difference between secured and unsecured creditors, this code confers upon all the creditors, whether secured or unsecured, an opportunity of time bound resolution process, thus attempting to exalt the position of unsecured financial creditors (such as bond holders) in respect of secured financial creditors. Ensuring that the resolution process is initiated as early as possible, the same under the code commences immediately after first signs of financial stress become visible.

Since the interpretation of the consequences of creditor control depends crucially on the subsequent impact of creditor intervention on borrower performance,[43] the code incorporates 'Creditor in Possession Approach', whereby the board of directors are suspended and replaced by creditor approved resolution professional so as to manage the Company. Astonishingly expeditious, the insolvency resolution process period has been limited to one hundred and eighty days, however, it can further be extended but not beyond a period of ninety days.[44] So much so, that a liquidation mechanism has been laid down, which is to be supervised by the insolvency professional acting in the capacity of liquidators, excluding even an iota of the likelihood of procrastination in the procedure by the company management.[45]

BACK-SEATED BOARD OF DIRECTORS AND SHARE-HOLDERS

The classic-corporate-scenario entails the coexistence of a manager-shareholder and a dominant creditor, effectually functioning with the expertise of the manager and the permission of the creditor.[46] Accountable for the verification of financial reliability, of compliance with laws and

[41] Régis Blazy, Joël Petey and Laurent Weill, 'Can Bankruptcy Codes Create Value? Evidence from Creditors' Recoveries in France, Germany, and the UK' (Annual Meeting, Chicago, March 2013).
[42] Organization for Economic Co-operation and Development, *OECD Principles of Corporate Governance* (2004) 11.
[43] Greg Nini, Amir Sufi and David C Smith, 'Creditor Control Rights, Corporate Governance, and Firm Value' (*Social Science Research Network*, 11 December 2011) <http://dx.doi.org/10.2139/ssrn.1344302> accessed 12 October 2017.
[44] The Insolvency and Bankruptcy Code 2016, ss 12(1) and 12(3).
[45] The Insolvency and Bankruptcy Code 2016, s 5(18).
[46] B Adler, 'A Theory of Corporate Insolvency' [1997] New York University Law Review 343, 375.

regulations and the reduction of information asymmetry between shareholders and managers,[47] the board of directors is in all certainty, an imperative entity of corporate governance. A vehement piece of argument, thus dictates, that portion of the company or firm must be protected and greater protection shall be accorded to shareholders, or else they may undertake absurd steps to protect their company or firm.[48]

Although the Code embodies a reorganization process, so as to preserve the value of shareholder's and managerial interest in the company's assets, yet the underlying inclination towards creditors is predominantly overriding. Section 7 of the Code, for instance, empowers the financial creditor to file an application for initiation of the insolvency process and by virtue of Rule 4(4), the same has to be forwarded to the debtor as well, with the object of giving the corporate debtor an adequate notice. However, no provision exists whereby the debtor can make his representation in pursuance of the notice received by him under such situation.

Another technical glitch prevalent is pertaining to section 7(4), wherein the yardstick to be qualified for admission or rejection of an application is extremely feeble, as all that has to be ascertained by the adjudicating authority is the existence of any default on the part of the debtor. In such situation, a possibility crops up where the creditor's right to file an application under the code would straight away arise, even if there had been a delay of a single day on the side of the debtor. Furthermore, the IRP is to be appointed by none other than the committee of creditors, which but naturally raises a presumption of biasness. Consider a situation, where there is a viable revival plan formulated, but the creditor is adamant on being reimbursed expeditiously, the creditor's committee might reject the plan which indisputably would work against the object of the Code, i.e., to maximize the value of assets. Astoundingly, as regards the distribution of the proceeds arising out of the liquidation of the company or individual or partnership firm is concerned, the preference shareholder & equity shareholders occupy the bottom two positions respectively, after everyone else's claim has been settled.[49]

[47] C Hill and G Jones, *Strategic Management Essentials* (3rd edn, South-Western College Pub 2011).
[48] Cirmizi, Klapper and Uttamchandani, 'The Challenges of Bankruptcy Reforms' (2012) 27(2) World Bank Research Observer 185, 190.
[49] The Insolvency and Bankruptcy Code 2016, s 54.

PARTLY HEEDED EMPLOYEES AND WORKMEN

A necessitated recipient of the protection accorded by insolvency laws, particularly in businesses deriving their value from the goodwill created by the skills and services of employees,[50] they are one of the focal stakeholders of corporate governance. The same stands reaffirmed by Principle C 12.4 of the World Bank's Principles and Guidelines for Effective Insolvency and Creditor/Debtor Regime, stating, 'Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors'.[51] Unfortunately, the repercussions of the collapse of mega-corporations are shattering for their employees, owing to legislative dearth. Depriving them of two square meals a day, the catastrophic collapse of Enron, for instance, left over 4500 staff unemployed, and with uncertain ability to access entitlements owed to them under their work contracts.[52]

Speaking of the Code of 2016, provisions have been carved out by the same which are favourable for the workmen of the company under the process of insolvency, wherein Workmen's dues & debts due to secured creditors have been placed on the same footing in respect of order of priority of payment of debts, immediately followed by wages and outstanding dues to the employees (besides workmen). While the former is in the order of priority graded at second, the latter is at the third number.[53] Nevertheless, the code omitted to deal with the post-insolvency harm, immediately connected with the hitherto employees of the organization, such as job losses in consequence to insolvency. Though the primary objective is to protect the interest of the creditor, but at the same time, the state is under an obligation to safeguard the interest of the employees as well.

FORECASTING THE RESULT OF INSOLVENCY AND BANKRUPTCY CODE, 2016 ON THE YARDSTICK OF 'EASE OF DOING BUSINESS'

In order to strengthen the economic partnership and magnetize investments, the business environment of any country assumes a pivotal role which is highly dependent upon the legislation and policies of the incumbent government. In this context, the 'ease of doing business index'

[50] Department of Economic Affairs, *Interim Report of the Bankruptcy Law Reform Committee* (2015) 36.
[51] The World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* 25 (The Wold Bank 2016).
[52] Gordon W Johnson, *Insolvency and Social Protection: Employee Entitlements in The Event of Employer Insolvency* 1 (OECD 2006).
[53] The Insolvency and Bankruptcy Code 2016, s 54.

requires special mention as the instant index has been developed and is published by the World Bank, which primarily seeks to accord ranking to countries by taking into account certain parameters, out of which, resolving insolvency is one. The direct outcome of a higher rank in the 'ease of doing business index' is indicative of the fact that the regulatory environment is more favourable and conducive to the initiation and operation of the local businesses in comparison to the countries under-ranked. For determination of ranking, an extensive survey is conducted by the 'Doing Business' team and the drafted questionnaire principally focuses on measuring the regulations having a direct impact on the businesses, while due importance is also granted to other general conditions, such as, nation's immediacy to large-sized markets, rate of inflation or tax payment mechanism etc.[54] Presently, in respect of afore-mentioned index, India ranks miserably low at 130 among 189 economies of the World, and to add to its woes, in terms of resolving insolvency it holds the 136th position.[55]

Of late, incessant efforts have been put by the Indian govt. to escalate their ranking and improve business environment via introduction of certain economic reforms such as, The Central Goods & Services Act, 2017,[56] Start-up Plan, Insolvency & Bankruptcy Code, 2016 etc.[57] M. S. Sahoo, Chairman of the Insolvency and Bankruptcy Board of India, at a National Seminar asserted that the new law in the coming future is intended to place the debt markets in an equally vibrant position as that of the equity markets with ample liquidity and enhanced risk management. Besides improving the 'ease of doing business' ranking, it is bound to promote entrepreneurship and discharge more money for developmental projects, he said. At the National Conference organized by ASSOCHAM, the Karnataka Law Minister T. B. Jayachandra specifically stated that the code would act as a strong assisting tool in the insolvency of the corporate houses in a judicious manner to capitalize on the value of their assets.

Moreover, the time bound resolution for insolvency will lead to a steep decline in the number of defaulters, ensure improved recovery and work for better availability of finance for projects

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[54] 'Definition of 'Ease of Doing Business'' (*The Economic Times)* <http://economictimes.indiatimes.com/definition/ease-of-doing-business> accessed 12 October 2017.
[55] World Bank Group, *Doing Business 2016: Measuring Regulatory Quality and Efficiency* 208 (13th edn, World Bank 2016).
[56] 'GST to facilitate ease of doing business: EU' *The Economic Times* (New Delhi, 6 October 2017) <http://economictimes.indiatimes.com/news/economy/policy/gst-to-facilitate-ease-of-doing-business-eu/articleshow/60974576.cms> accessed 14 October 2017.
[57] 'Insolvency Code to improve ease of doing business' *The Hindu Business Line* (Mumbai, 19 December 2016) 1.

involving momentous risks besides offering the efficient and advanced quality of services. Therefore, the Act principally aims at providing an environment that augments smoother time bound-settlement scheme of insolvency, permits quicker turnaround of businesses and help maintain a proper database of successional defaulters. Mamta Binani, former president of ICSI stated that within a period of five years, IBC has the potentiality to unlock Rs. 25,000 crore of capital blocked in dispute at multi-fold levels. It is being expected that IBC will at least take two years in order to showcase an improvement in the rankings in respect of ease of doing business index.[58] The code will help generate developer confidence, eliminate the confusions created by the prevalent judicial framework, assist in developing credit and bond market and help in addressing the Non-performing asset situation.[59] Also, given the fact that there is clarity on the insolvency framework to be resorted to, the probability of investors investing in stressed/distressed situations will increase in a multi-fold manner.

AN ANALYTICAL INTERNATIONAL APPRAISAL

On the ease of doing business index, in context of resolving insolvency, while UK & China are ranked at 13 & 28 respectively, USA is deservingly positioned at 5th rank. Owing its legal genesis to English Legal System, Singapore ranks at 29th position in the aforementioned Index. The indispensability of insolvency laws in almost every country is thus unquestionable, as the vacuum of the same would make it practically inconceivable for any stakeholder to successfully engage in a business in any capacity. In light of the same, the tabular representation attached herewith is a comparative analysis of the insolvency and bankruptcy law in other jurisdictions:

SR. NO.	PARTICULARS	INDIA	CHINA	BRAZIL	USA	UK	SINGAPORE
	Legislation	Insolvency and Bankrup	Enterprise Bankruptcy Law, 2006	The Brazilian	Bankruptcy Reform Act, 1978	The Insolven	Companies (Amend

[58] 'Insolvency Code to Improve Ease of Doing Business' *The Hindu Business Line* (Mumbai, 19 December 2016) 1.
[59] Ernst & Young Global Limited, 'Interpreting the Code: Corporate Insolvency in India' (2017) <www.ey.com/Publication/vwLUAssets/ey-interpreting-the-insolvency-and-bankruptcy-code/$FILE/ey-interpreting-the-insolvency-and-bankruptcy-code.pdf> accessed on 1 September 2017.

		tcy Code, 2016		Business Insolvency (Amendment) Act, 2014		cy Act, 1986	ment) Act, 2017
	Requisite default amount to initiate the process	Rs. 1 Lakh	Bankruptcy petition must satisfy both the cash flow test and the balance sheet test.	-	Court petition by debtor or three creditors holding non-contingent, undisputed claims aggregating at least $12,300 more than the value of any collateral.	GBP 750	S$ 10000
3.	Creditor or debtor driven approach?	Creditor	Creditor	Debtor	Creditor	Creditor	Creditor
4.	Is IP entitled to protection under the law?	Yes	-	-	Yes	Yes	Yes

5.	What is the time-span of the moratorium period?	180 days	Limited but not definite.	Entire period until the plan is ratified	Applies unless leave of court is given.	Entire period until the plan is ratified	Entire period until the plan is ratified
6.	Is formulation of the committee of creditor's obligatory?	Yes	No		Yes	No	No
7.	Have any specialized courts been constituted to deal with insolvency?	Yes	Special divisions have been set up in lower-level courts.	Yes	Yes	No	No

PROPOSALS AND CONCLUDING REMARKS

The IBC code has been retrofitted to overcome the contemporary challenges ensuing from the insolvency and bankruptcy proceedings under preceding laws, nevertheless, certain significant rules & changes have been overlooked which assume momentous magnitude in refining the existing code & the same have been elucidated upon hereunder as suggestions:

1. DRTs are already overtaxed with voluminous work and are reeling under a backlog of cases. Keeping the same in view, vesting in DRTs the jurisdiction to handle the personal insolvency resolutions is expected to adversely affect the speedy disposal of cases in this respect. Therefore, this responsibility should be entrusted to the NCLT bench dealing with the pertinent case.

2. The need of the hour is to regulate the regulator. In a nutshell, IPs shall be trained personnel, timely monitored by IBBC. Furthermore, the existing lacuna of the inadequacy of NCLT benches (which are eleven in no.), judges and technical staff shall be effectively fixed.

3. As afore-depicted as well, the Code is profoundly in the interest of creditors, thereby depriving the debtors of a level playing field. In respect of the revival of the company, the committee of creditors solely has been entrusted with the responsibility of accepting or rejecting a revival plan of the debtor company. For the revitalization of the company participation of all the stakeholders suitably is imperative in order to make it conducive to the business environment of the economy.

4. An extremely high threshold limit has been fixed, i.e., 75% of creditor's committee must approve the plan for the sale of a business under Bankruptcy Code, especially, in comparison to the SARFAESI Act which requires endorsement of only 60 % of secured creditors; and the instant code in addition to it makes no distinction between a secured creditor and an unsecured creditor inasmuch as voting rights in the committee is concerned.

5. Reticent on 'cross-border insolvency', IBC, has failed to lay down a mechanism for resolving the case of a debtor with assets located, or creditors residing overseas.

6. Besides payment of workmen dues, IBC shall also inculcate provisions aiming at restoration of employees of collapsed corporate debtors, so as to check mass unemployment and ensure effective utilization of human resources.

In conclusion, on the basis of post-detailed analysis it can unequivocally be asserted that active participation and involvement of all the key stakeholders is tremendously vital - and in what manner they engage and play their role in ensuring the efficacious and intended functioning of the code would be a fundamental question for the success of IBC.

ARBITRATION OR NO ARBITRATION: EXPLORING THE LEGALITY OF ARBITRATION IN INTELLECTUAL PROPERTY DISPUTES

- *ARPIT SHIVHARE*[*]
-

INTRODUCTION

'When will mankind be convinced and agree to settle their difficulties by arbitration?'[1]

- *Benjamin Franklin*

If Benjamin Franklin had been alive, he would have got the answer in one single word - 'NOW'. With increasing commercialisation and privatisation, arbitration as a mode of settling disputes is becoming popular all over the world. Arbitration has become the preferred way of settling disputes due to its party-oriented approach and economic and speedy disposal of cases. However, not all disputes fall within the realm of arbitration. Some disputes have been specifically reserved to be decided by the Courts alone,[2] for which the concept of arbitrability has been evolved. The arbitrability of a matter has been recognized in New York convention in the form of *'subject matter of the difference capable of settlement by arbitration'*.[3] However, which matters are incapable of being decided by arbitration have remained uncertain. This has led some to remark that the attempt to draw up a list containing the common factors which determine inarbitrability was bound to fail, and has failed.[4]

Arbitrability of Intellectual Property (hereinafter IP) disputes has never been equivocally accepted throughout the world. IP rights are territorial in nature, and are granted by the State. The protection these rights enjoy is subject to local laws of the country granting those rights. Thus, the extent to which arbitration can penetrate in IP disputes varies significantly from country to country.

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[*] Student, National Law Institute University, Bhopal.
[1] Benjamin Franklin, *The Private Correspondence of Benjamin Franklin* (3rd edn, Russell 1818) 132
[2] David Sutton, *Russell on Arbitration* (22nd edn, Sweet & Maxwell 2003) 2.
[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention).
[4] Mustill and Boyd, *Commercial Arbitration* (2nd edn, LexisNexis 2001) 71.

The resistance to the use of arbitration in resolving IP disputes is based on several grounds; the oldest being the perceived intrusion in '*exclusive sovereign authority'*. Since Intellectual Property Rights (hereinafter IPR) are granted by the State, it is argued that only the State has the power to decide on the validity, enforceability and infringement of these rights. An arbitrator, being appointed by private parties, could not rule on the validity of these rights granted by the State. Another argument against arbitration of IP disputes is that it affects the rights of third parties. The IPR holder not only has the right to exploit IPR by herself, but she can allow the enjoyment of these rights to others through license, joint ventures etc. Since, any ruling of an arbitrator may impinge upon the rights of a large number of stakeholders that may not be party to the dispute; arbitration of IP disputes may deny the contractual nature of arbitration. Lastly, the ground of public policy, as has been recognized in New York convention,[5] is used in some countries against the arbitration of IP disputes.

Some factors that determine the odds of arbitration in IP disputes are also located within the IPR regime. The use of arbitration in IP rights that require registration, such as patents and trademarks, is less likely than use of arbitration in Copyright, which does not require registration for its enforcement. This paper intends to examine all the above-mentioned arguments against arbitration of IP disputes, with a general overview of the position in this regard in different jurisdictions, before examining the position in India.

ARBITRATION IN IP DISPUTES: PREFERRED WAY OF DISPUTE RESOLUTION?

In this era, IPR have made their mark across the globe. The time has gone when their cousins from the corporeal family enjoyed superiority over them. With the increasing use of new technologies, need for continuous innovation, and advantages of exclusivity, IPR not only feature in this commercial world but are considered as valuable assets of the business. Not surprisingly, the growing use and importance of IPR have increased IP disputes as a by-product.

With some IP disputes oriented advantages of arbitration, arbitration not only has an edge over conventional litigation but also has left it behind in some countries in terms of resolving IP

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) art V(2)(b).

disputes. IPR are not only granted to be exploited in national boundaries, but they have a global reach as they often involve multinational parties and trans-border transactions. The infringement of IPR can take place simultaneously in multiple countries. When such cross-border claims occur, it is not feasible to institute multiple suits in different jurisdictions because of economic and legal issues. In such matters, arbitration provides more legible and economic option of resolving the disputes by ruling out the problem of differences in local laws and curbing the cost of multiple litigations.

Resolving IP disputes often require subject-specific technical expertise, which judges of conventional courts may lack. Arbitration of IP disputes permits the appointment of arbitrators who may be well equipped to deal with these matters with ease. Moreover, IP disputes may contain case sensitive information; as in the case of trade secrets, which may require a very high amount of confidentiality, which can hardly be ensured by conventional courts but can certainly be accommodated through arbitration.

Further, in this global arena of IPR world, various multinational players are contesting or defending IP matters and related suits. There is always an apprehension of Courts being biased in favour of local parties as can be seen in several patent litigations.[6] Arbitration provides a dispute resolution mechanism free from these biases. Lastly, since infringement in case of IP matters is generally of a continuous nature, arbitration can provide a speedy remedy and thus, can prevent the prospective losses. These above mentioned intrinsic features of arbitration give a stimulus to the IPR community for preferring arbitration to litigation.

POINTS OF CONTENTION: CHALLENGING THE ARBITRABILITY OF IP DISPUTES

The roadmap towards universal acceptance of arbitration as the mode of settling IP disputes is not without barriers. Although arbitration has been accepted as a mode of settling IP disputes in some countries, the arbitrability of these disputes has been challenged every now and then, in one country or another. The main arguments that are used to resist arbitration of IP disputes can be summarised as follows:

[6] Daniel Klerman, 'Rethinking Personal Jurisdiction' (2014) 6 Oxford Journal of Legal Analysis 245.

STATE'S EXCLUSIVE AUTHORITY

The argument of State's exclusive authority to deal with the enforcement, recognition, and validation of IPR never went out of the picture. This argument is based on the territorial nature of IPR, i.e., it is the State in a particular territory that grants a person these rights for certain period. However, the distinction between registered and non-registered IPR may be noted in this context. With the exception of very few countries, matters concerning the infringement of Copyright, which do not require registration, are arbitrable. However, with extra caution, this distinction should not be equated with arbitrable and inarbitrable IPR, as doing this would mean dividing the entire IPR regime into arbitrable and inarbitrable rights, which is too broad a demarcation to make. Instead, the test should be of arbitral awards' impact, i.e., whether it is *inter partes* or *ergaomnes*.

Nonetheless, arbitrability of IP disputes is most problematic with respect to rights that confer a *monopoly* and require the intervention of the State to grant it, such as trademarks and patents.[7] It has been argued that since the bargain for grant of these rights is between the State and right-holder, an arbitrator appointed by the consent of the parties cannot not rule on the validity of these rights. It is said that since the State grants these rights, only the State has the authority to rule on the validity of these rights. The middle path put forward by Courts and legislations of some of the countries is that the arbitrator can rule on the issues of infringement of these rights, but cannot not decide the validity of these rights, as it would fall within the exclusive domain of the State. However, following this path is not as simple as it may seem. The validity or ownership of a patent or trademark often arises, as a preliminary question or as a defence, in the context of disputes on infringement.[8]Then, deciding on the validity of patent or trademark may become *sine qua non* to decide upon the issue of infringement. In such cases, "*there is no legal obstacle that bars an arbitration tribunal to rule on the validity of a patent, as a preliminary matter*".[9] However, the conclusion of the award will operate solely *inter partes*, since only a national Court with proper jurisdiction can invalidate a monopoly granted in the form of patent or trademark.[10]

[7] Loukas A Mistelis and Stavros LBrekoulakis, *Arbitrability: International & Comparative Perspective* (Kluwer Law International 2009) 52.
[8] ibid.
[9] Interim Award in Case No 6097 (1989) ICC Bulletin, October 1993, 79.
[10] ibid.

This argument of State's exclusive authority to deal with issues of IPR no longer enjoys as much popularity as it once did. There is a gradual shift in States' attitude towards respecting party autonomy over State's exclusivity. Consequently, resistance to arbitration of IP disputes on this ground has somehow fainted.

AFFECTING RIGHTS OF THIRD PARTY

Arbitration is *contractual* and *consensual* in nature and determines the rights and liabilities of parties to the contract. Thus, by its very nature, it is being done in respect of a right *in personem*. Arbitration cannot bind the third party since it is not a party to the arbitration. Therefore, more or less, it is universally accepted that it cannot be done in respect of a right *in rem*. However, disputes relating to subordinate rights *in personem* arising from rights *in rem* have always been considered to be arbitrable.

IPR are in nature of right *in rem* i.e. they can be enforced against the world. Resistance to use arbitration as a mode of settling IP disputes comes in the form of the argument that it will bind the third party that has not consented to arbitration. However, disputes concerning the performance or termination of contracts relating to IPR involving third parties are clearly arbitrable, provided that the existence or validity of the rights themselves are not at issue.[11] To allow the arbitration of questions of grant or validity of IPR challenge the contractual nature of arbitration, since a private arbitrator is not authorised to dictate legal effects *ergaomnes*.[12]

A solution to this issue can be in the form of restricting the effect of the arbitral award between the parties i.e. giving it *inter partes* effect only. Courts and legislations of some countries have adopted this view by specifically providing that the award in IP disputes bind only parties to the disputes. This approach guards against the intrusion by arbitration into the rights of the third party and thus, sanctifying the contractual nature of arbitration.

[11] P Fouchard, E Gaillard and B Goldman, *International Commercial Arbitration* (Kluwer Law International 1999) 352.
[12] Christopher John Aeschlimann, 'The Arbitrability of Patent Controversies' (1962) 44 Journal of Patent and Trademark Office Society 662.

AGAINST PUBLIC POLICY

Public policy becomes a hindrance in some countries when it comes to use arbitration in IP disputes. However, what constitutes public policy for that matter has always remained uncertain and has been the subject matter of evolving jurisprudence. New York Convention recognizes public policy as a ground against enforcement and recognition of the arbitral award.[13] The ambit of public policy may vary from country to country, depending upon the socio-legal conditions of that country. By and large, the above mentioned two grounds of State's exclusive authority and affecting the rights of third party, may themselves be considered as part of resistance to arbitration in IP disputes on the ground of public policy. However, this ground also has different dimensions in terms of IP disputes.

Arbitral awards are not published and persons who are not a party to the dispute seldom come to know about the proceedings or the outcome of the arbitration. This may jeopardize the interest of the public at large, who may have an interest in the outcome of these disputes. In cases where the validity of an IPR, like patent, is challenged and a particular patent is held to be invalid, then, due to the unavailability of information regarding the award, public may still be under the impression of its validity and this may have serious repercussions on public interest by hampering research in that area. Further, there may be instances of false claims motivated by business interests, which may require going into the motive of the parties, which can be assessed properly by the Courts alone having proficiency in dealing with these matters.

Confidentiality, being a lucrative feature of arbitration, has to be balanced against public interest, and the capacity of the arbitrator appointed by private parties, to balance these two may be doubted. However, some states, like USA, have made it compulsory to register the arbitral award with the tribunal,[14] which may, to some extent, provide an answer to this problem.

[13] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) art V (2)(b).
[14] 35 US Code, s 294.

ARBITRATION OF IP DISPUTES: A GLOBAL SCENARIO

Globally, with the exception of some countries, IPR issues such as infringement, violation, or transfer of patents and copyright are more likely to be arbitrable.[15] On the basis of the report of the International Chambers of Commerce (hereinafter ICC),[16] countries, in this respect, can be broadly categorized into four types: countries wholly denying arbitrability to intellectual property disputes (conservative approach); countries granting full arbitrability (liberal approach); countries qualifying arbitrability on public policy grounds, and restricting the effect of arbitral award (mixed approach); and countries where the question remains uncertain and has not been addressed either in legislation or by judicial authority (unclear approach). The first three approaches are briefly discussed below, as they provide practical examples of how countries have dealt with this thorny issue.

CONSERVATIVE APPROACH

This category has a dearth of countries within it and fortunately, it is the smallest category. Examples of this approach can be *South Africa*, and *Israel,* prior to 1993.[17] South Africa explicitly bars the arbitration of patent-related disputes[18] and it is commonly understood there that IP disputes are not arbitrable. Prior to a 1993 judgement,[19] Israel followed the same approach of denying arbitration of IP disputes.

LIBERAL APPROACH

On the other end of the spectrum, we have USA and Switzerland that allow the arbitration of all IP disputes. In the U.S., explicit legislation permits the arbitration of disputes *'relating to patent validity or infringement.'*[20] However, the award '*shall be binding between the parties to the arbitration, but shall have no force or effect on any other person*.'[21] The Supreme Court of USA

[15] Harsh Sethi and Arpan Kr Gupta, *International Commercial Arbitration & Its Indian Perspective* (Universal Publications 2011) 188.
[16] Final Report on IP Disputes and Arbitration (Document No 420/364), Bulletin of the ICC International Court of Arbitration, Vol 9 NO- 1 Pp 37 et seq.
[17] Sophie Lamb and Alejandro Garcia, 'Arbitration of Intellectual Property Disputes' (*Two Birds,* 18 December 2007) <http://www.twobirds.com/en/news/articles/2007/arbitration-ip-disputes> accessed 13 October 2016
[18] Patents Act 1978 (South Africa) art 18(1).
[19] *Golan Work of Art Ltd v Bercho Gold Jewellery Ltd* Tel Aviv District Court Civil Case 1524/93.
[20] 35 US Codes 294.
[21] 35 US Codes 294 (c).

also held that any issue concerning the arbitrability of a dispute should be resolved in favour of arbitration.[22] US Courts have also allowed the arbitration in *'complex copyright disputes'* including issues of validity, infringement, and ownership.[23]Altogether, the Swiss law displays the most liberal position. Rights that are subject to registration are also arbitrable. All aspects of patent rights can be arbitrated, even their validity and their removal from the registry.[24]

MIXED APPROACH

The ground of public policy is more or less followed by several countries, though in varying degrees and form. Public Policy considerations in the realm of arbitration have their roots in the New York Convention,[25] though the exact content of public policy has always remained a point of contention. *France*[26] and *Italy*[27] have the *ordre public* bar that means restricting the power of arbitrator on the ground of public policy. France also embraces the concept of an international *ordre public* and has different international arbitration rules. International arbitral awards will be recognized and enforced inFrance unless such recognitionand enforcement is '*manifestly contrary to international public policy*'.[28] Italy, on the other hand, has given special powers to public prosecutor to intervene in trademark or patent validity cases by both Trademark Law and the Law on Patents.[29] Enforcement of arbitration award in *India* can be denied on the ground of public policy.[30] The Supreme Court in India has defined public policy as a fundamental policy of Indian law, the interest of the country and justice and morality.[31] The same Court has ruled that an award would be contrary to public policy if it is 'patently illegal'.[32] However, even after these judgements, the exact scope of public policy in India is unclear, and jurisprudence on this point is still evolving.

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[22] *Moses H Cone Memorial Hospital v Mercury Constructions Corp* 460 US 1 (1983) 24.
[23] *McMahan Sec Cov Forum Capital Markets* 35 F 3d 82.
[24] M Blessing, 'Arbitrability of Intellectual Property Disputes' (1996) 12(2) Arbitration International 200.
[25] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) art V (2)(b).
[26] French Civil Code 2004, art 2060.
[27] *Scheck Enterprises AG v Soc Del Grandes Marques* Cass 15 September 1977 No 3989.
[28] William Grantham, 'The Arbitrability of International Intellectual Property Disputes' (1996) 14 Berkeley Journal of International Law 173.
[29] ibid.
[30] The Arbitration and Conciliation Act 1996, s 34(2)(b)(ii).
[31] *Renusagar Power Co Ltd v General Electronic Co* AIR 1994 SC 860.
[32] *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705.

In UK[33] and Germany[34], it is generally understood that IP disputes are arbitrable but the award will only bind the parties to the arbitration i.e. it will have *inter parties* effect only. *Canada* follows the same approach. Copyright disputes in Canada are arbitrable after the judgement of the Supreme Court,[35] as long as they are not intended to bind third parties. Similarly, Ontario's Superior Court of Justice held patent disputes to be arbitrable.[36] Some countries like Italy, Spain, France and Japan follow the middle path of allowing the arbitration of infringement of patent disputes but do not allow the arbitration of issues involving the validity of a patent.[37]

POSITION IN INDIA AFTER THE EROS JUDGEMENT: SETTLING DUST IN MUDDY WATERS?

In its quest of becoming a business giant in this world of globalization and considering the rising popularity of arbitration as a mode of settling disputes, India has to develop itself as a global arbitration hub. The condition of dispute resolution in India was not very pleasant. The Indian Supreme Court observed that arbitration in India has made '*lawyers laugh and legal philosophers weep'*.[38] With the advent of a new arbitration act in 1996,[39] India tried to become more arbitration-friendly by creating this Act on the lines of the Model Law on Arbitration of the UNICITRAL[40]. Further, after giving effect to Section 89 of CPC[41] in the year 2002,[42] India has promoted the arbitration, as a mode of settling disputes outside the Courts. However, these efforts are not sufficient to make India an arbitration-friendly country on the map of the world. In most developed countries, arbitration of commercial disputes is the rule while litigation is the exception. In India,

[33] Mustill and Boyd, *Commercial Arbitration* (2nd edn, LexisNexis 2001) 73.
[34] PSclossan, *Das Recht Der Internationalen Privatenschiedsgerichsbarkeit* (2nd edn, Mohr Siebeck 1989) 232
[35] *Desputeaux v Éditions Chouette (1987) Inc* (2003) SCC 17.
[36] University of Toronto *et al* v *John N* Harbinson *Limited* (2006) 46 CPR (4th) 175 (Ontario Superior Court of Justice).
[37] Sophie Lamb and Alejandro Garcia, 'Arbitration of Intellectual Property Disputes' (*Two Birds*, 18 December 2007) <www.twobirds.com/en/news/articles/2007/arbitration-ip-disputes> accessed 13 October 2016.
[38] *Guru Nanak Foundation v Ratan Singh and Sons* AIR 1981 SC 2075 (2076).
[39] The Arbitration and Conciliation Act 1996.
[40] UNCITRAL Model Law on International Commercial Arbitration 1985.
[41] Code of Civil Procedure1908, s 44.
[42] Code of Civil Procedure (Amendment) Act 1999, s 7.

the situation is just the reverse.[43] Nonetheless, with the encouragement of arbitration in recent times, one can look towards the future of arbitration in India with optimism.

The arbitral award can be set aside in India if the subject matter of the dispute is not capable of settlement by arbitration.[44] However, what subject matters are inarbitrable is a point of contention. The Supreme Court laid down that every civil or commercial dispute, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication.[45] The arbitration of a dispute in India can be denied on the ground of deciding the rights of the third party and being against the public policy.

Nothing has been laid down by the laws of India with respect to arbitrability of IP disputes. Thus, this has been subjected to differing interpretations of national courts in cases where the arbitrability of IP disputes have been challenged. However, Courts in India are more often in favour of resolving IP disputes expeditiously. Supreme Court of India has observed that matters relating to trademarks, copyrights and patents should be finally decided expeditiously by the Court.[46] In another case[47], Supreme Court expressed grave concern over the pending suits relating to the matters of patents, trademarks and copyrights for many years and called it a very unsatisfactory state of affairs. In one case,[48] Delhi High Court in a matter relating to IP dispute, adopted a process known as early neutral evaluation on the lines of alternate dispute resolution and advocated the inclusion of such procedures. This attitude of the Courts shows the pitiful condition of litigation relating to IP disputes in India and the eagerness of the Indian Courts to get rid of it.

IPR, by their nature, have their genesis in bargaining with the State and are universally considered rights *in rem*; India is not an exception. Generally, all disputes relating to rights *in personem* are considered amenable to arbitration; and all disputes relating to rights *in rem* are considered to be

[43] Justice RS Bachawat, *Law of Arbitration & Conciliation* (Anirudh Wadhwa and Anirudh Krishnan eds, LexisNexis 2010) xxiii.
[44]The Arbitration and Conciliation Act1996, s 34(2)(b)(i).
[45] *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532.
[46] *Shree Vardhman Rice & Gen Mills v Amar Singh Chawalwala* (2009) 10 SCC 257.
[47] *Bajaj Auto Ltd v TVS Motor Company Ltd* (2009) 9 SCC 797.
[48] *Bawa Masala Co v Bawa Masala Co Pvt Ltd* AIR 2007 Delhi 284.

inarbitrable.[49] The basic premise of resistance against using arbitration in IP disputes rests on this *ergaomnes* effect of arbitral award in matters related to IPR.

The ICC working group on IPR has listed India in the group of countries who do not allow arbitration for the settlement of IP disputes.[50] However, this does not represent the true picture of arbitration of IP disputes in the country. Now, the Courts in India may take a pro-arbitration stance in view of the growing popularity of arbitration.

The recent judgement of Bombay High Court in *Eros International Media Limited v Telemax Links India Pvt Ltd*[51] has tried to settle down the controversy relating to arbitration of IP disputes. Dealing with the matter related to copyright infringement, the Court allowed the application of the defendant to refer the dispute to arbitration in accordance with the terms of the contract. The Court followed the 'rights test' laid down by Supreme Court in *Booz Allen case*[52] and differentiated between rights in rem and subordinate rights *in personem* arising from rights in rem.[53] The Court upheld the reasoning that disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.[54] The Court observed that it would be a broad proposition to say that no action under the Trade Marks Act or the Copyright Act can ever be referred to arbitration.[55] In this case, the Court not only followed 'rights test' but also evolved a 'remedies test' i.e. what remedies arbitrator is capable of awarding. Since, the remedies sought in this case were permanent injunctions and damages, the Court ruled that the arbitrator is well capable of awarding these remedies.

The other question that came up before the Court was of denying the exclusive jurisdiction of the District Court in case of copyright infringement. The Court ruled that Section 62 of Copyright Act[56] and section 134 of Trademark Act[57] do not oust the jurisdiction of the arbitral panel. These sections do not themselves define arbitrability or non-arbitrability and for that, we must have

[49] *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532.
[50] WIPO, '*Worldwide Forum on the Arbitration of Intellectual Property Disputes*' (American Arbitration Association 1994) 104; Harsh Sethi and Arpan Kr Gupta, *International Commercial Arbitration & Its Indian Perspective* (Universal Publication 2011) 188.
[51] Notice of Motion No 886 of 2013 in Suit No 331 of 2013 (Bombay High Court).
[52] *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532.
[53] ibid.
[54] ibid.
[55] *Eros International Media Limited v Telemax Links India Pvt Ltd* Suit No 331 of 2013 (Bombay High Court).
[56] Copyright Act 1957, s 62.
[57] Trademark Act 1999, s 134.

regard to the nature of the claim that is made.[58] The Court also upheld the Sukanya Holdings Case[59] by denying the principle of severability of dispute.[60]

Although the judgement of the Bombay High Court did not specifically rule on disputes related to IPR other than copyright, it can be inferred from the reasoning of the Court that arbitration of disputes relating to the infringement of patent or trademark may also be arbitrated. However, nothing can be said with certainty about the arbitration of validity of Patent and Trademark claims. Nonetheless, this judgement is a step forward in making India more arbitration-friendly and in particular, to resolve IP disputes in an expeditious manner through arbitration. This judgement can also be seen as a positive sign for upholding the parties' autonomy.

CONCLUSION & RECOMMENDATIONS

The arbitrability of IP disputes has been challenged and will continue to be challenged until all the countries adopt a strong pro-arbitration stance. The grounds of challenge to arbitrability of IP matters cannot be discarded altogether; however, banning arbitration of all IPR related matters would not do any good; certainly not in this globalized and commercialised world where even general business events like mergers & acquisitions, joint ventures etc. involve dealing in IPR and have an arbitration clause as the mode of settling disputes. Closing the doors for arbitration in these matters would mean taking a step backwards in the field of dispute resolution, by denying an efficacious out of Court remedy like arbitration. The dangers of an arbitration invasion cannot be ruled out, but the advantages of arbitration tilt the balance in favour of a pro-arbitration approach.

The unclear stance of India towards the arbitration of IP disputes reflects the unsatisfactory condition of arbitration in India and is a hindrance in the Indian aspiration of becoming a global arbitration hub. Considering the speed of disposal of cases due to overburdening of Courts, and pledge of India to uphold the sanctity of IPR, a strong and clearer pro-arbitration stance of India in cases of IP disputes may cater to the needs and aspirations of the country. The judgement in Eros case is a welcome step and has shown some rays of hopes in a rather gloomy atmosphere.

[58] *Eros International Media Limited v Telemax Links India Pvt Ltd* Suit No 331 of 2013 (Bombay High Court).
[59] *Sukanya Holdings Pvt Ltd v Jayesh H Pandya* 2003 (5) SCC 531.
[60] *Eros International Media Limited v Telemax Links India Pvt Ltd* Suit No 331 of 2013 (Bombay High Court).

The path towards becoming a global arbitration hub is a long one, but every long journey starts with one small step.

RECOMMENDATIONS

Certain recommendations could be as follows:

1. In countries where arbitration of patent or trademark validity is allowed, or may be allowed in future, provisions regarding the registration of arbitral award should be made in order to protect the interest of the public.
2. If arbitrator rules on the validity of the IPR in order to determine the issue of infringement, such award on the validity should be restricted for deciding that particular case, and should not impact the validity of IPR as such.
3. With regard to India in particular and other countries in general where the law on the point is not clear, amendments in requisite legislations should be made, in order to clear the doubts in the minds of persons who may agree to settle their disputes through arbitration.

With its more flexible and business-oriented approach, and its ability to resolve disputes in lesser time than Courts; by all logical means, the benefits of arbitration in IP disputes cannot be denied, not even by those who oppose it. What we need is to think through the limits of arbitrability, and to genuinely assess the efficacy of arbitration in IP matters. The increasing IP disputes, on both national and international level, pose a challenge to the existing legal framework to cope up with them, and with all its promising results so far, arbitration can possibly be our answer to these challenges posed to the IP regime.

LET'S MOVE BEYOND CONSENT

- *ARUNIMA BISHNOI*[*]

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INTRODUCTION

On August 24, 2017, a nine judge bench of the Hon'ble Supreme Court of India finally upheld the 'Right to Privacy' as a fundamental right, after 67 years of the Constitution's coming into force. It was rightly hailed as a landmark judgment[1] by the privacy enthusiasts and laymen alike. However, in a world of internet, where we 'agree' to hundreds of 'terms and conditions' on a daily basis, without a second thought, the whole idea of privacy stands on a shaky ground. In the process of providing us goods and services, our personal data is being increasingly collected by online service providers, which is further processed and transmitted to third parties and aggregated in the ways that are much beyond our imagination. What we post on social media, which clothes we buy, where we order our food from, when we book our cabs, how much we spend, is all tracked, analysed and correlated to generate more details about our personality and personal lives.[2] Though we can rightfully prevent the government from entering our proverbial castles now, the danger of our sensitive information being misused by the growing number of private e-commerce entities still looms large.

In a welcome move, the central government has set up a panel under the guidance of former Supreme Court judge, Justice B.N. Srikrishna, to suggest a draft of data protection bill to control the actions of non-state parties as well.[3] The bill is expected to have 'user consent' its mainstay[4] as recommended by the nine judges' bench as well as the 'Justice AP Shah Committee Report'[5] framed

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[1] *Justice KS Puttaswamy (Retd) v Union of India* (2017) SCC OnLine SC 996.

[2] Komal Gupta, 'Consent and Privacy Protection' (*Live Mint*, 10 August 2017) <www.livemint.com/Politics/Le4uhieRgGa5PgFiKWH5nM/Why-consent-is-important-in-ensuring-privacy-protection.html> accessed 11 October 2017.

[3] 'Justice Krishna to Head Expert Group on Data Protection Framework for India' (*Press Information Bureau*, 1 August 2017) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=169420> accessed 10 October 2017.

[4] Pankaj Mishra, 'India's Draft Data Protection to Hinge on User Consent; Will be Ready Only Next Year' (*Factor Daily*, 28 August 2017) <https://factordaily.com/india-data-protection-srikrishna-committee/> accessed 12 October 2017.

[5] Planning Commission, '*Report of the Group of Experts on Privacy*' (2012).

on the basis of privacy principles adopted throughout the world. According to the consent-based model of data protection (already a smallpart of the Information Technology Act 2000 and its rules),[6] consent of the data subject is required by the data controller to collect, process and use such data for the specified purpose, which ultimately protects it from any consequential liability. On the surface it seems just like the principle behind any other commercial contract, but there is a catch. The problem with consent as a prerequisite for online data collection is, that it's almost never an informed consent, nor even free in many cases and as a result, it has become a mere formality undertaken by the data controllers to safeguard themselves from liabilities, rather than a tool to actively protect the users.

There are many alternative mechanisms that can be deployed in place of consent, and that are already being used effectively by other existing legal regimes. It is the right time for the appointed panel to move beyond 'consent' as the major tool of data protection, and look for some other means that can appropriately replace consent, or, at the least, can be used to supplement it, keeping in mind the socio-economic circumstances of our country.

ORIGINS OF CONSENT IN DATA PROTECTION

To understand the reason behind the importance held by consent, it is essential to know the origins of consent in the field of privacy and data protection. One of the most important factors behind the relevance of consent, seems to be the fact, that data protection has its root in the protection of private property. Many academicians too, acknowledge the relationship between privacy and private property.

History shows that the early parameters of the right to privacy were set in cases involving unconventional property claims in the 18th-century England.[7] In one of the foremost cases, *Pope v. Curl*,[8] a bookseller named Curl obtained and published personal letters written by well-known literary figures without their consent. One of the authors, Alexander Pope, sued Curl, and sought

[6] The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011.
[7] Mary Chlopecki, 'The Property Rights Origins of Privacy Rights' (*Foundation of Economic Education*, 1 August 1992) <https://fee.org/articles/the-property-rights-origins-of-privacy-rights> accessed 17 October 2017.
[8] *Pope v Curl* [1741] 2 ATK 342.

to have the book removed from the market. The judge upheld the privacy of Pope's letters because the author of a letter has a property right over his words.

In fact, the popular maxim coined by the English jurist, Sir Edward Coke, which is, 'a man's house is his castle',[9] is one of the most significant expressions which highlight's the importance of consent. The 'Castle Doctrine' implies that consent is necessary for preserving property, or else, nobody would be justified in preventing trespass. Similarly, the doctrine of *volenti non fit injuria*, or 'to one who consents, no injury is done', is another articulation of the role of consent in protecting private property. With time, as personal data started to be recognised as part of one's private property,[10] so did consent become an important aspect of privacy protection.

CONSENT UNDER THE INDIAN LAW

Unlike the European Union, India has no legislation focusing exclusively on data protection. The legislative framework regarding the issue of data protection is currently viewed under the lens of the Information Technology Act (hereinafter IT Act),[11] which also applies to other aspects of online regulations, such as e-commerce and cyber-crime. Prior to 2011, the IT Act did not deal with data protection extensively and there were no guidelines on the standard security practices to be adopted by the businesses collecting data online. However, after the European Union enacted stringent laws on data protection, the Indian Government also felt the need for the same, and as a result, a new set of rules called the 'Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011' were framed. It contains the following major requirements regarding user consent and related issues

PRIVACY POLICY

Rule 4 requires every data controller dealing with sensitive personal data or information (hereinafter SPDI) to publish a privacy policy on its website. The policy must show the type of

[9] Adrienne W Fawcett, 'Q: Who Said: 'A Man's Home Is His Castle'?' (*Chicago Tribune*, 14 September 1997) <http://articles.chicagotribune.com/1997-09-14/news/9709140446_1_castle-home-sir-edward-coke> accessed 17 October 2017.
[10] Rohan George, 'Are we Throwing our Data Protection Regime under the Bus?' (*The Centre for Internet and Society*, 29 August 2015) <https://cis-india.org/internet-governance/blog/are-we-throwing-our-data-protection-regimes-under-the-bus> accessed 17 October 2017.
[11] The Information Technology Act 2000.

information collected, the purpose of collecting the information, the procedure of disclosing the information, and the reasonable security practices adopted to safeguard the information.

CONSENT AND NOTIFICATION

Rule 5 requires a data controller to only collect SPDI after obtaining the prior consent of the data subject in writing through a letter, fax or e-mail. Before collecting the information, the business must give the data subject to the option of not providing such information. Further, a user can even withdraw his consent given earlier. In such scenarios, the business has the option to stop providing goods and services for which the information was sought.

DISCLOSURE

According to Rule 6, disclosure of SPDI to a third party is only possible if:

- the data subject has agreed to it through a contract;
- it is necessary to fulfil a legal obligation; or
- the data subject has granted prior permission.

TRANSFER

Rule 7 mandates that a data controller can transfer SPDI to a third party, whether in India or overseas, only if it ensures the same level of protection as that provided under the Indian law. Further, SPDI can only be transferred if it is necessary for the performance of a lawful contract with the data subject, or if the data subject has consented to the transfer.

All the aforementioned rules clearly show that consent is the major and foremost principle governing data protection regulations in India. The security practices required to be adopted by businesses revolve around the pillar of consent. User consent is a pre-requisite for all the transactions involving data - be it collection, disclosure or transfer.

PROBLEMS WITH CONSENT

When the Consent Model was developed, there was an insignificant growth of the Internet, and the entities that collected data were limited. As a result, data could be put to very few uses other than the purpose which it was collected for. After being collected, data used to remain in that

organisation itself and was rarely transferred to third parties. It was easier for data subjects to know the details of the data collected and the use which it was being put to. Therefore, it enabled them to make rational choices and give an informed consent for collection and use of data. Analysed in the backdrop of this context, the Consent Model was feasible and adequate.

Fast-forwarding to the current time, unfortunately, that is no longer the case. With data now being collected every time we 'sign up' on a platform, order goods, or pay bills online, it is next to impossible to make a rational choice of allowing someone to use our personal data.

There are numerous issues plaguing the Consent Model, some of which have been analysed below:

LONG AND COMPLEX PRIVACY NOTICES

"*Free consent involves a knowing understanding of what one is doing in a context in which it is actually possible to do otherwise, and an affirmative action in doing something, rather than a mere passive acquiescence in accepting something.*"

- *Professor Margaret Jane Radin*[12]

But when privacy notices put up by businesses are nothing short of long and complex legal documents drafted by lawyers, full of jargons incomprehensible to a layman, the consent is hardly free or informed. Erik Sherman reviewed about twenty privacy notices put up by e-commerce entities and pointed out that on the first reading, majority of the policies can be understood only by people of a grade level of 15 or above.[13] Although it is not illegal to draft extensive and complex policies, the fact that according to one assessment, a person will at least take 76 working days to evaluate all the privacy policies he/ she has assented to,[14] this should be a serious concern. The major reason behind such complicated terms of use policies is that business organisations want to cover every minute detail possible so that they are absolved of all the liabilities which may be imposed on them in future.[15]

[12] Margaret Jane Radin, 'Humans, Computers, and Binding Commitment' (2000) 75 ILJ 1125 <www.repository.law.indiana.edu/ilj/vol75/iss4/1/> accessed 11 October 2017.
[13] Erik Sherman, 'Privacy Policies are Great - for PhDs' (*CBS News*, 4 September 2008) <www.cbsnews.com/news/privacy-policies-are-great-for-phds/> accessed 12 October 2017.
[14] Alex Hudson, 'Is Small Print in Online Contracts Enforceable?' (*BBC News*, 6 June 2013) <www.bbc.com/news/technology-22772321> accessed 12 October 2017.
[15] Omer Tene and Jules Polonetsky, 'Big Data for All: Privacy and User Control in the Age of Analytics' (2013) 11 NJTIP 239 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149364> accessed 10 October 2017.

GROWTH OF INTERNET AND EXPANSION OF E-COMMERCE ENTITIES

During the nascent stage of internet, when the data collectors were limited, the user could make an informed decision of providing his consent based upon the purpose of data collection. Now, with the advent of the Internet of Things, consent is required at every second step the user takes online. When people have to make a huge number of choices, they are bound to ignore the privacy notices and simply go by the default option to 'agree' with them.[16] Such mandatory requirements not only put a substantial obligation on the users but also on the companies seeking consent several times a day[17].

DIMINISHING SCREEN SPACES

When IBM launched the first personal computer in the 1980s, it would not have possibly imagined that one day a 5' screen device would replace it. While the Internet of Things is expanding rapidly, the screens are getting smaller from Personal Computers to Laptops to Smartphones. As the mobile phone interfaces are getting constrained, it is becoming all the more difficult to read and understand privacy notices. In fact, most users do not even read through these several pages long notices on smaller screens.[18] Further, the gen-next equipment such as connected wearable devices (like smart-watches, fitness wristbands, etc.) make sure that privacy notices go absolutely unnoticed. They usually have little or no interface that readily permits choices.

BINARY NATURE OF CONSENT

Another issue plaguing the Consent Model is the binary nature of consent.[19] What is meant by the 'binary nature' is, that a data user has only two choices at his disposal - he can either assent to the lengthy privacy policies, or forego the desired service. This reduces the effectiveness of consent as a powerful tool in the hands of the user to protect his data. When the privacy architects were

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[16] Amber Sinha and Scott Mason, 'A Critique of Consent in Information Privacy' (*The Centre for Internet and Society*, 11 January 2016) <https://cis-india.org/internet-governance/blog/a-critique-of-consent-in-information-privacy> accessed 12 October 2017.
[17] Natasha Singer, 'Mapping, and Sharing, the Consumer Genome' (*The New York Times*, 16 June 2012) <www.nytimes.com/2012/06/17/technology/acxiom-the-quiet-giant-of-consumer-database-marketing.html?pagewanted=all&_r=0> accessed 13 October 2017.
[18] Amber Sinha and Scott Mason (n 16).
[19] Daniel J Solove, 'Privacy Self-Management and the Consent Dilemma' (2013) 186 HLR 1880 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171018> accessed 14 October 2017.

incessantly toiling day and night to empower individuals to control their data, they had not envisioned this binary choice, which would defeat the very tool designed to protect data.[20] In such a scenario, privacy notices are usually viewed as obstacles that need to be overcome to access the services. On top of that, consent is required in real time, which leads to users ignoring the privacy notices.[21] As a result, users unknowingly agree to terms and conditions which are unfair to them and prejudicial to their interests.

FALSE ASSUMPTIONS ABOUT THE ROLE OF PRIVACY NOTICES

Research has shown that when people see the phrase 'privacy policy', they tend to assume that the company has proper safeguards in place to ensure the safe handling and protection of their data.[22] Professor Joseph Turow has demonstrated how the use of the term 'privacy policy' leads users to a false assumption that a website which specifically highlights a privacy policy will refrain from sharing their personal data.[23] That's nothing short of a utopian scenario, while the reality is totally different. It is a matter of common knowledge that privacy policies are only meant to protect companies from liabilities, and not to guarantee privacy to users.[24] Data processors can simply shrug off their responsibility by taking advantage of the agreed terms and conditions by the user.

LACK OF AWARENESS ABOUT THE CONSEQUENCES OF CONSENT OR SECONDARY USES OF DATA

In today's interconnected ecosystem of Big Data, ordinary users as well as data collectors often have no idea about what is happening to the data after it is uploaded online.[25] Due to the uncertain and speculative nature of data, the information provided by users transcends the boundaries of 'purpose limitation', and is used for many other purposes apart from what it is collected for. This

[20] Fred Cate and Mayer-Schönberger, 'Notice and Consent in a World of Big Data' (*Tech Policy*, 26 November 2012) <www.techpolicy.com/NoticeConsent-inWorldBigData.aspx> accessed 14 October 2017.
[21] Daniel J Solove (n 19).
[22] Chris Hoofnagle and Jennifer King, 'What Californians Understand about Privacy Online' (*SSRN*, 3 September 2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1262130> accessed 14 October 2017.
[23] Joseph Turrow, 'The Trade-off Fallacy', (June 2015) <www.asc.upenn.edu/sites/default/files/TradeoffFallacy_1.pdf> accessed 14 October 2017.
[24] Omer Tene and Jules Polonetsky (n 15).
[25] Jonathan Obar, 'Big Data and the Phantom Public: Walter Lippmann and the Fallacy of Data Privacy Self-Management' (*SSRN*, 20 August 2015) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239188> accessed 15 October 2017.

is because the real value of data comes not from its primary purpose but from its secondary uses.[26] The data provided by users may be aggregated with the data disclosed by them in the past to reveal an otherwise obscure information about their character and personal lives, which can turn out to be overly intrusive. However, users have hardly any knowledge about these secondary uses at the time of giving consent, which prevents them from making an informed choice.[27] As observed by De Zwart and others, 'the idea of consent becomes unworkable in an environment where it is not known, even by the people collecting and selling data, what will happen to the data'.[28]

IMPRACTICAL TO OPT-OUT

Earlier, users had a tool to guard themselves against the consequences of giving personal data by opting-out of certain services. It is an important principle of data protection, that, choice of the user is paramount, when it comes to matters involving his personal data. Just as the user has the choice to give consent for the collection of data, he also has the choice to 'opt-out' of data collection (e.g. by stopping the use of a service). However, this concept is being undermined as internet based services are expanding at a rapid pace, and data is being collected in real-time. Opting-out of data collection is becoming increasingly impractical due to the omnipresence of data collection sites.[29] When a user has lost count of the websites where he has provided his personal information, it is next to impossible for him to opt out. Further, so many companies mandatorily require the user to provide data in order to avail their services. This leaves the user with no choice of opting out.

BURDEN ON COMPANIES

The principle of consent is not only disadvantageous to the data users but also to the business entities seeking consent. The responsibility of obtaining consent comes as an additional burden at a time when companies are already withstanding the worst of various legal regulations in the name of 'compliance'. While on the one hand e-commerce entities are focused on improving user

[26] Omer Tene, Jules Polonetsky (n 15).
[27] Daniel J Solove, 'Privacy Self-Management and the Consent Dilemma' (2013) 186 HLR 1880 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171018> accessed 14 October 2017.
[28] Rohan George, 'Are we Throwing our Data Protection Regime under the Bus?' (*The Centre for Internet and Society*, 29 August 2015) < https://cis-india.org/internet-governance/blog/are-we-throwing-our-data-protection-regimes-under-the-bus> accessed 15 October 2017.
[29] Janet Vertesi, 'My Experiment Opting Out of Big Data Made Me Look Like a Criminal' (*TIME*, 1 May 2014) <http://time.com/83200/privacy-internet-big-data-opt-out/> accessed 15 October 2017.

experience and ensuring that it is as smooth as possible, on the other hand they are obligated to obtain consent of those very users. It is an extremely difficult job to harmonise the two, as obtaining consent on every stage can lead to quite an unpleasant experience for the user. On top of that, companies are expected to garner consent from disinterested customers by explaining their policies on extremely small screens.[30] Considering all this, it is quite obvious for businesses to seek consent for all possible uses, thus giving rise to long and complicated privacy policies.

ALTERNATIVES TO CONSENT

From the aforementioned drawbacks, one can easily see that the current emphasis on consent in data protection seems to be ineffective against illegitimate processing of data in a Big Data context. Not only do uninformed individuals give consent, but also, emphasising on consent may ruin the very purpose of data protection.

It is time to look elsewhere and 'move beyond consent'. Some of the possible alternatives to consent have been analysed below**.**

RIGHTS MODEL[31]

Any plausible alternative to the Consent Model must make sure that data controllers are held accountable for the harm that they cause to the users, irrespective of whether they obtain prior consent or not. One such alternative is the 'Rights Model', which ensures that the data subjects are not denied the rights over their data, and the data controllers are made liable for any harm to privacy. The model is based upon the following three principles:

ACCOUNTABILITY

Business entities must be held responsible for the data they collect. In addition, if a wrongful loss is caused to the data subject because of processing of data by the collector, the latter must be held accountable for that. The liability must be enforced regardless of any consent given by the subject.

[30] Omer Tene and Jules Polonetsky (n 15).
[31] Rahul Matthan, 'Beyond Consent: A New Paradigm for Data Protection' (*Takshashila Institution*, 20 July 2017) <http://takshashila.org.in/takshashila-policy-research/discussion-document-beyond-consent-new-paradigm-data-protection/> accessed 15 October 2017.

AUTONOMY

Ideally, according to this model, data providers should have complete autonomy over their data. However, since, in the current era of the Internet of Things, it is impossible to prevent collection of data, data subjects should at least have the authority to restrain the ways in which their data is processed.

SECURITY

Data collectors are under an obligation to ensure the security of data at all times. They must be held liable for security breach of data even if it does not result into a loss for the data subject.

LEGITIMATE-INTEREST PROCESSING[32]

European privacy laws provide numerous alternatives to consent such as performance of a contract, vital interest of the individuals/public, exercise of official authority, and, most importantly, legitimate interests of the data controller or a third party, provided that rights and freedoms of the individuals are not compromised. 'Legitimate-interest processing' allows the company to process data without consent if there is a rightful and genuine interest of the company or a third party or society in general, in the processing of that data. However, the interest must be real and not too vague. For example, fraud protection, information and network security, improving and marketing products and services, etc., some of which may already be a part of legal compliance. It helps in providing flexibility to businesses to face technological and organisational changes, while requiring them to be proactive and alleviate unfavourable impacts on individuals as they process data.

FOCUS ON RISK AND IMPACT ON INDIVIDUALS[33]

The need to assess and address risks and negative impacts on data subjects is increasingly becoming a legal obligation in various countries. Ranging from formal data privacy impact assessments to deciding relevant security measures, risk is an important consideration while

[32] Information Commissioner's Office UK, 'Guide to Data Protection' (7 July 2017) < https://ico.org.uk/for-organisations/guide-to-data-protection/conditions-for-processing/> accessed 16 October 2017.
[33] Bojana Bellamy and Markus Heyder, 'Empowering Individuals Beyond Consent' (*IAPP*, 2 July 2015) <https://iapp.org/news/a/empowering-individuals-beyond-consent/> accessed 16 October 2017.

organisations implement their privacy programs. This leads to better protection for individuals, especially in the cases where consent is neither required nor probable.

INDIVIDUALS' RIGHTS TO ACCESS AND CORRECTION[34]

Individuals should have the right to access their data and be able to correct it whenever required. It is an essential element of user control that forms an integral part of many privacy regimes. The principle of 'access and correction' also goes on to prove how transparent the functioning of the organisation is.

FAIR PROCESSING[35]

Though, many equate fair processing with providing privacy notices to data subjects, but it goes much beyond that. Fair processing requires the organisations to consider factors such as, whether individuals reasonably expected the proposed use of data, whether processing of data may lead to drawing inferences about individuals, whether individuals were misinformed about the use of their data, what would be the effect of processing on the individuals, etc. These practices help in focusing on the data subjects and protecting them from negative impacts.

STICKY PRIVACY POLICIES[36]

Another alternative for consent is the implementation of a sticky privacy policies regime. This refers to 'machine-readable policies that can stick to data to define allowed usage and obligations as it travels across multiple parties, enabling users to improve control over their personal information'. It mitigates the risk of unforeseeable uses of data because users would not only consent to give data but also to how it would be used afterwards.

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[34] Pranesh Prakash, 'Privacy Laws: Alternatives to Consent' (*Live Mint*, 11 August 2017) <www.livemint.com/Technology/6Bsa8NyF99ZMLb3txybx1J/Privacy-laws-Alternatives-to-consent.html> accessed 16 October 2017.

[35] Information Commissioner's Office UK, 'Big Data, Artificial Intelligence, Machine Learning and Data Protection' (2014) < https://ico.org.uk/media/for-organisations/documents/2013559/big-data-ai-ml-and-data-protection.pdf> accessed 16 October 2017.

[36] Rohan George, 'Are we Throwing our Data Protection Regime under the Bus?' (*The Centre for Internet and Society*, 29 August 2015) <https://cis-india.org/internet-governance/blog/are-we-throwing-our-data-protection-regimes-under-the-bus> accessed 15 October 2017.

RIGHT AGAINST UNFAIR DENIAL OF SERVICE[37]

Many businesses indulge in the unfair practice of requiring individuals to share data as a precondition for the provision of services. Everybody should have the right against this denial of services by business entities on the ground of refusing to provide data that is not even essential but only incidental to the provision of services.

CONCLUSION

Though privacy has been upheld as a fundamental right, at a time when more and more people are being connected to the internet and are extensively sharing their personal information for availing services online, it is high time for the Indian government to build a powerful data protection regime. There are many countries to look up to, but care must be taken to not commit the same mistakes made by them, that is, over reliance on the principle of consent.

Consent had been an effective means of protecting privacy and personal data during the emergence of internet. However, in the current era of the Internet of Things and Big Data, consent has not only lost its adequacy, but has also become counter-productive to the very goals of privacy and data protection. As already noted, the long and complex privacy notices provided by businesses produce anything but truly informed consent. Instead

of benefitting the users, privacy agreements are mainly drafted for protecting data controllers from unforeseen liabilities. Further, ordinary, uninformed users have hardly any idea about the secondary uses of their data after it is collected, and even if they are made aware of it, opting out of data collection has become nearly impossible. Thus, an overly narrow focus on the necessity of consent deviates our attention from more crucial issues, such as how the data collected is used, modified, shared and repurposed by the data brokers and third parties.

In the backdrop of this context, it is imperative to look for alternatives to consent, or at least for methods that can supplement the 'Consent Model' and make it more effective. The 'Rights Model' seems to be the most suitable and efficacious alternative, wherein data controllers are held liable

[37] Amber Sinha, 'Rethinking National Privacy Principles' (*The Centre for Internet and Society*, 11 September 2017) <https://cis-india.org/internet-governance/files/rethinking-privacy-principles/view> accessed 16 October 2017.

for all the harms caused to the users regardless of any consent given by them. Companies must be required to consider the risks to data subjects while designing their privacy programs. Not only should there be obligations on data controllers, but also the users should also be provided with rights which ensure a 'meaningful control' over their own data. They must have the right to access and correct their data whenever required, as well as, the right against unfair denial of services for not providing data.

Many privacy regimes, such as the European Union, English and Canadian, have already started exploring and implementing these new models of data protection. India is fortunate for having initiated the formulation of its data protection law at a time when it can take cue from these countries and provide its citizens a powerful tool against illegitimate uses of their data.

JADHAV AND THE ICJ: THE ENFORCEABILITY CONUNDRUM

- *PRADYUMAN KAISTHA*[*]

INTRODUCTION

On 8 May 2017, India instituted proceedings against Pakistan before the International Court of Justice (ICJ) for its failure to comply with obligations under the Vienna Convention on Consular Relations, 1963 (VCCR).[1] India bases its claim on the conviction of an Indian national, Kulbhushan Jadhav, who was sentenced to death by the Field General Court Martial in Pakistan without being granted consular access. The Military Court found that Jadhav had been involved in sabotage and espionage activities in Baluchistan in the capacity of an Indian government agent.[2] India, on the other hand, contended that Jadhav, having retired from Indian Navy, was kidnapped from Iran, where he was carrying out business activities.[3]

Upon acquiring knowledge of Jadhav's conviction, India allegedly demanded consular access, which was denied by Pakistan.[4] India claimed that this constituted a violation of Article 36 of the VCCR and Jadhav's sentence be immediately suspended and the decision of the Military Court annulled.[5] India also submitted a request for the indication of provisional measures demanding that Pakistan should take all measures to ensure that Jadhav is not executed pending the final decision of the proceedings.[6] The court unanimously granted the request.[7] In doing so, the *prima facie* jurisdiction of the Court was traced from Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963 (Optional Protocol) which allows for bringing disputes concerning the application and

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[1] 'International Court of Justice Press Release' [2017] <http://www.icj-cij.org/files/case-related/168/19420.pdf> accessed 16 October 2017.

[2] 'Inter Services Public Relations Pakistan Press Release' (10 April 2017) <http://www.ispr.gov.pk/front/t-press_release.asp?id=3906&print=1#pr_link3906> accessed 16 October 2017.

[3] *Jadhav Case* (*India v Pakistan*) 'Request for Indication of Provisional Measures' [2017] <http://www.icj-cij.org/files/case-related/168/19424.pdf> accessed 15 October 2017.

[4] ibid [6].

[5] ibid [9].

[6] *Jadhav Case* (*India v Pakistan*) 'Provisional Measures' [2017] <http://www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf> accessed 15 October 2017 [5].

[7] ibid [61].

interpretation of the VCCR before the ICJ. The court did not consider the 2008 Agreement on Consular Access between the two states to expressly limit jurisdiction under Article 36(1) of its Statute.[8] Further, the ICJ did not consider the 'national security' reservation made by Pakistan to its declarations under Article 36(2) to bar the court's jurisdiction under Article 36(1).[9] As on date, the judgment on merits has not been rendered in this case. Therefore, it is incumbent to look at previous judgments of the ICJ dealing with similar issues to understand the *Jadhav Case* better.

ICJ ON CONSULAR ASSISTANCE

Article 36(1) (a) of the VCCR provides freedom of communication and access between consular officers and nationals of the officers' state. Subparagraph (b) obligates the authorities of the arresting state to inform the consular post of the detainee's statements about the arrest or detention if so requested by the detainee. Importantly, the authorities are obligated to inform the detainee of this right. Subparagraph (c) grants consular officers a right to visit a national of their state who is in prison, custody or detention and to arrange for their legal representation. This article has come for interpretation before the ICJ thrice before the *Jadhav Case*: in the *Case Concerning the Vienna Convention on Consular Relations* between Paraguay and the USA,[10] the *LaGrand Case* between Germany and the USA[11], and the *Avena and Other Mexican Nationals Case* between Mexico and the USA.[12]

CASE CONCERNING VIENNA CONVENTION ON CONSULAR RELATIONS (PARAGUAY V. USA)

In 1998, Paraguay instituted proceedings against the USA for violating Article 36(1) (b) by sentencing a Paraguayan national, Angel Breard, to death without informing him of his right to consular access. Paraguay withdrew the proceedings before the case could be decided on merits. However, the court did allow provisional measures in this case stating that the USA '*should take all measures at its disposal to ensure that Breard is not executed pending a final decision.*'[13] Following the order of provisional measures, the case reached the Supreme Court of the US in

[8] ibid [33].
[9] ibid [26].
[10] *Case Concerning the Vienna Convention on Consular Relations* (*Paraguay v United States of America*) 'Provisional Measures' [1998] ICJ Rep 248.
[11] *LaGrand Case* (*Germany v United States of America*) [2001] ICJ Rep 466.
[12] *Case Concerning Avena and other Mexican Nationals* (*Mexico v United States of America)* [2004] ICJ Rep 12.
[13] *Paraguay* (n 10) [41].

Breard v. Greene.[14] The Supreme Court refused to stay the execution invoking the domestic rule of 'procedural default' that prevents defendants from raising new issues before federal courts in *habeas corpus* proceedings unless cause and prejudice is shown. Consequently, Breard was executed in violation of the ICJ's order.

LAGRAND CASE (GERMANY V. USA)

Two German brothers, Karl LaGrand and Walter LaGrand, convicted of murder, robbery and kidnapping, were sentenced to death in the US. In proceedings before the ICJ, the US admitted that it had failed to inform the brothers of their right to inform the consular post of their arrest and detention under Article 36(1)(b). Karl was executed and the date for Walter's execution was fixed for another day. One day prior to his execution, Germany filed an application for provisional measures before the ICJ. Using identical language as used in *Paraguay v. the USA*, the Court granted the said measures. Following this, Germany filed proceedings before the US Supreme Court to seek enforcement of the ICJ's order and prevent Walter's execution. The US Department of Justice in a letter addressed to the Supreme Court took the stance that the orders of provisional measures have no binding effect.[15] Yet again, the court did not consider the order of the ICJ to be binding and dismissed the proceedings and as a result, they executed Walter LaGrand.[16]

On merits, the ICJ concluded that there was a violation of Article 36. The court also held that the provisional measures granted under Article 41 of the statute of the ICJ are binding and the US had violated the same.[17] Insofar as the remedies are concerned, this case needs to be distinguished from *Jadhav.* In *LaGrand*, the restitution was impossible since the brothers had already been executed. Therefore, Germany argued for guarantees of non-repetition, which the court deemed to have been met through America's good faith actions to spread awareness about consular notification.[18]

The court did not mandate all future convictions in violation of the obligation conferred by Article 36 to be struck down and allowed the US to choose the means of review, thereby granting it sufficient 'margin of appreciation'. 'Margin of appreciation' refers to the latitude a state enjoys,

[14] *Breard v Greene* 37 ILM 824.
[15] *LaGrand* (n 11) [94].
[16] ibid [33].
[17] *LaGrand* (n 11) [128].
[18] ibid [118].

in evaluating factual situations while applying international obligations.[19] In granting this margin, the court held that if the German nationals ar sentenced to severe penalties without their right under Article 36(1) being respected, the US '*by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.*'[20] The court took a forward-looking approach to delineate a precedent for conduct in future.

This approach of the court may be distinguished with its attitude towards the rule of procedural default. The court held that the rule *per se* did not violate Article 36; it only held that its particular application in *LaGrand* was incorrect.[21] Here, the court should have taken a stronger stance to assert that although the rule itself is valid, any application *in the future* where the consequence is a denial of review and reconsideration would be invalid. This would have been the corollary of the court's forward-looking holding to ensure review and reconsideration in all future cases and the established international law principle that domestic law cannot justify a violation of any international obligation.[22]

AVENA AND OTHER MEXICAN NATIONALS (MEXICO V. USA)

This case was concerned with the denial of consular access to 54 Mexican nationals sentenced to death in the USA. The ICJ granted provisional measures staying the imminent execution of three Mexican nationals.[23] The order on preliminary objections in this case differed from the previous two cases only insofar as it used the word 'shall' instead of 'should' in the operative part.[24] The US complied with the provisional measures in this case.

On merits, the court seems to have exactly followed *LaGrand.* It came to a finding that the US had acted against the obligations under Article 36. The fact that the defendants were still alive when the case on merits came to be heard distinguishes this from *LaGrand* and likens it with *Jadhav*.

[19] Yutaka Arai-Takahashi, '*The Margin of Appreciation Doctrine and the Principle of Proportionality In The Jurisprudence Of The ECHR'* [Intersentia 2002] 2.
[20] *LaGrand* (n 11) [128].
[21] ibid [125].
[22] International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/83 art 32.
[23] *Case Concerning Avena and other Mexican Nationals* (*Mexico v United States of America*) 'Provisional Measures' [2003] ICJ Rep 77 [59].
[24] ibid.

This influenced how the claim of reparation was constructed and the Indian Application in *Jadhav* has emulated this construction. Mexico demanded *restitution in integrum* and annulment of the convictions.[25] The court refused to grant these remedies and reiterated the *LaGrand* dictum: the US Court ought to grant a review and reconsideration giving full weight to the violation of the VCCR with a view to determine whether actual prejudice was caused due to non-compliance.[26] Therefore, the ICJ again granted the US the same 'margin of appreciation' that it did in *LaGrand.*

CONSEQUENCES OF THE JUDGMENT

Following *Avena,* the US withdrew from the Optional Protocol, which had been the source of the Court's jurisdiction. There were two domestic cases following *Avena,* which evince the problem of enforceability. The first was *Sanchez-Llamas v. Oregon*[27] dealing with a Mexican national who had been denied consular access. The Supreme Court, yet again, invoked the 'procedural default' rule to prevent reliance on rights under the VCCR. It also observed ICJ's decision did not bind it. Another case that came before the Supreme Court was *Medellin v. Texas,*[28] which involved a person whose claim had directly been presented before the ICJ. The court reiterated that the ICJ decision was not directly enforceable federal law and would not override limitations on the filing of *habeas corpus* petitions. The court stated that the obligations emanating from ICJ decisions only bind the political branches of the state.

Following this judgment, Mexico invoked Article 60 of the ICJ Statute that allows states to request for interpretation of its own judgments in case there is a dispute regarding its meaning and scope. Prior to the judgment on the request of interpretation, the court allowed provisional measures while the final judgment on the interpretation was pending. Medellin, who was explicitly named in the Provisional Order, was executed in blatant violation thereof. US argued that there was no dispute between the parties since they concurred that granting a review and reconsideration was an obligation of result, leaving the means open to the US.[29] Mexico claimed that there was a dispute since the US had failed to enforce this result in its domestic legal order.[30] The court stated that,

[25] Avena (n 12) [116].
[26] ibid [121].
[27] 548 US 331 (2006).
[28] 552 US 491 (2008).
[29] *Case Concerning Avena and other Mexican Nationals* (*Mexico v United States of America*) 'Merits' [2009] ICJ Rep 3 [14].
[30] ibid [24].

regardless of whether there is a dispute or not, Mexico's request did not pertain to an interpretation of the meaning and scope of the *Avena* judgment, but rather the general question of the effects of the judgments of the court on the domestic legal orders of state parties.[31] On this basis, the request for interpretation was declined.[32]

JADHAV: A CONTINUATION OR A DEVIATION

In this part, the author undertakes to highlight certain reasons that could influence the court in *Jadhav* to deviate from its previous judgments, where it only ordered a review, to take a stronger stand and consider the annulment of Jadhav's conviction. *Jadhav*, like the other consular access cases, does not involve complex facts. There are official communications between India and Pakistan where India has demanded consular access but was explicitly denied by Pakistan.[33] Therefore, the decision is very likely to be rendered in India's favour. This paper proceeds on the assumption that this would happen and seeks to look into the aspect as to how the court could then deal with the question of remedies.

Pakistan's domestic law allows the remedy to be tailored the way it was done in *LaGrand* and *Avena* by allowing Pakistan to reconsider and review the conviction of Jadhav. A seventeen-judge bench of the court stated that an order passed by the military court would be subject to judicial review on certain grounds.[34] At the same time, it is also possible for the court to deviate from its jurisprudence, annul the conviction, and order a *de novo* trial. The Pakistan Army Act also permits this possibility, which allows for annulment of the proceedings of the Military Court on the ground that they were illegal or unjust.[35] Therefore, there is no rule, like the procedural default rule, that could create any legal barriers to the enforcement of ICJ's decision.

The author advocates the latter approach, of the ICJ considering the annulment of Jadhav's conviction, which is more assertive and does not involve the ICJ showing diffidence towards national authorities. In the past, the ICJ has taken a powerful stance, illustratively in the *Legal Construction of Wall in Occupied Palestine Case.* The court, in that case, found the construction

[31] ibid [45].
[32] ibid [44].
[33] *Jadhav Case* (n 3) [33].
[34] *District Bar Association, Rawalpindi v Federation of Pakistan* PLD 2015 SC 401 [73].
[35] Pakistan Army Act 1952, s 132.

of the wall to violate international law and ordered immediate cessation, the return of seized immovable property, dismantling of parts of the wall, and repeal of legislative and regulatory acts pertaining to the construction.[36] In contrast, prior to the judgment of the ICJ, the Israeli Supreme Court had taken a deferent approach on the same facts and granted the Israeli authorities discretion with regard to planning an alternate route for the wall.[37]

Nevertheless, there still have to be some cogent reasons for the court to deviate from the remedy prescribed in *LaGrand* and *Avena.* It is pertinent to mention that precedents do not bind the ICJ[38] although it seeks to maintain jurisprudential consistency.[39] It is also a cardinal principle of international law that reparations must '*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*'[40] Therefore, by definition, reparations entail a fact-specific inquiry and the context of violation of a legal obligation would have implications on the reparations granted.[41] Therefore, it is incorrect to presume that the remedy in *Jadhav* ought to be a replication of the remedy in *LaGrand* and *Avena.*

There are certain differences between *Jadhav* and the previous judgments of the court. In both *LaGrand* and *Avena*, the court sought to grant the US a 'margin of appreciation' in terms of the remedy prescribed. The margin of appreciation is inevitable in international law. However, its application should be limited to treaties, which like legislations tend to prescribe general conduct for acts that have not yet occurred. On the other hand, judicial decisions are retrospective and responsive and hence should prescribe precise conduct. Granting a margin of appreciation in a remedy where none exists in the treaty, tends to obliterate the boundaries of legality and perpetuates normative ambiguity, thereby permitting states to avoid inconvenient international obligations, while still claiming compliance.[42] Objective and precise orders would make any non-compliance apparent. In situations of manifest non-compliance, pressure from the international

[36] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [151]-[153].
[37] *Beit Sourik Village v Government of Israel* HCJ 2056/04 [80], [85].
[38] Statute of the International Court of Justice 1945 art 38(1)(d)(ICJ Statute).
[39] Hersch Lauterpacht, *Development of International Law by the International Court* [OUP 1958] 14.
[40] *Factory at Chorzów* (*Germany v Poland*) [1928] PCIJ Rep Series A No 17 [47].
[41] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries Thereto' [2001] A/CN 4/SER A/2001/Add 1 94.
[42] Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 EJIL 907, 909.

community is easier to elicit and the reputation costs are more tangible.[43] Further, a state may engage in undertaking counter-measures more easily in situations where non-compliance is clear and would be reluctant to do so when it is uncertain whether the state is complying with its obligations or not.

In *LaGrand*, Germany did not claim restitution as a form of reparation since the two brothers had already been executed. Therefore, when the court ordered the US to engage in review and reconsideration, it was exceeding a traditional judicial role and prescribing measures to be taken in the future if a situation of denial of the rights to consular access arose. Since the court could not have possibly examined the facts of situations that had not occurred, it ended up granting the US a margin of appreciation to examine future cases. In *Avena*, although Mexico claimed *restitution in integrum*, the sheer number of cases of convictions that the court was dealing with, made it impossible for it to engage in a dedicated factual inquiry for every person sentenced to execution. The court hence had to leave discretion with the US authorities to examine the cases. In contrast, in the *Jadhav Case*, India has claimed restitution in a case involving just one person. This makes it possible for the court to undertake a detailed factual inquiry and not grant Pakistan the margin of appreciation that it had previously granted to the US.

Further, the nature of the rights in question affects the remedy.[44] The Inter-American Court of Human Rights has read the right to consular access to be a human right and a minimum guarantee, a denial of which would render proceedings arbitrary.[45] Germany and Mexico raised the argument that the right to consular access is a human right in *LaGrand* and *Avena* but the court deemed the question irrelevant. However, this argument is pertinent since recognition as a human right could imply that a denial of consular access *per se* renders the conviction unlawful and the additional inquiry of actual prejudice would become redundant. This argument can hold more value given its context in the *Jadhav case.* The trial of a citizen is being conducted by a Military Court, a practice that has been considered to be immensely problematic.[46] Further, the military courts of Pakistan

[43] Heather Jones, 'Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua' (2012) 12 Chi-Kent J, Int'l L57, 60.
[44] Draft Articles of ILC (n 41) 96.
[45] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion) OC-16/99 [122], [141].
[46] Human Rights Committee, 'General Comment No. 32: Right to equality before courts and tribunals and to fair trial' [2007] CCPR/C/GC/32 [22].

are infamous for their clandestine operation and secretive internal functioning.[47] There is often no access to the proceedings granted to the accused's family members or even the legal counsel.[48] These facts if brought to the court's notice could have a bearing on the remedy granted by the court.

ENFORCEMENT: THE COURT'S ROLE

The author has already indicated facts that might influence the court in the *Jadhav case* to deviate from its previous judgments and undertake a more proactive role. In this part, the author builds upon the same theme of conceptualizing the ICJ as a stronger institution to undertake a more assertive role in the enforcement of its own decisions. The author has explored the important provisions of the Statute, which might enable a higher level of participation of the ICJ in the enforcement of its own decisions.

The three cases that have come before the ICJ prior to *Jadhav* exemplify the problem of non-compliance, at one stage or another. The US Supreme Court disregarded the provisional measures given by the ICJ in Paraguay v. USA[49]. The ICJ accorded a similar treatment to provisional measures in *LaGrand*[50]. Following *Avena*, non-compliance was clear when Medellin was executed in direct violation of the order on provisional measures prior to the judgment on request for interpretation.[51] Under Article 94(2) of the UN Charter, the Security Council may make recommendations or undertake measures to give effect to the judgments of the ICJ, if requested. The politics of the Security Council has rendered reliance on this power redundant. It was invoked for the only time in *Nicaragua Case* where the draft resolution was vetoed by the US.[52] All the cases referred to in this piece, had the US as the respondent and hence non-compliance may be attributed to its status as a powerful permanent member of the Security Council. However, the

[47] Maria Kari, 'No Sunset for Pakistan's Secret Military Courts' [2017] <http://thediplomat.com/2017/04/no-sunset-for-pakistans-secret-military-courts/> accessed 16 October 2017.
[48] ibid.
[49] *Case Concerning the Vienna Convention on Consular Relations* (*Paraguay v United States of America*) 'Provisional Measures' [1998] ICJ Rep 248.
[50] *LaGrand Case* (*Germany v United States of America*) [2001] ICJ Rep 466.
[51] *Case Concerning Avena and other Mexican Nationals* (*Mexico v United States of America*) 'Provisional Measures' [2003] ICJ Rep 77 [59].
[52] United Nations Security Council Resolution (1990) 2785th meeting UN Doc S/PV2718.

problem of enforceability is more entrenched and pervasive. Illustratively, states like Uganda,[53] Nigeria[54] and Iceland[55] have refused to comply with the decisions of the court in the past. However, in none of these cases has the Security Council undertaken to enforce the judgments of the ICJ. Thus, in the absence of an external body enforcing the decisions of the court, it becomes incumbent for the court to play a key role in the enforcement of its own decisions. This deviates from the traditional understanding of the role of the judiciary in national legal systems. Although the Court's statute is silent on the provisions of enforcement, nothing disallows the court from partaking in the enforcement of its own decisions.[56]

Reisman proposed amendments to the Statute to allow states to re-apply unilaterally to the Court for a declaration of non-compliance.[57] This would serve as a reminder to a defaulting state from a body on a higher pedestal, in an otherwise horizontal structure of international law. Reiteration of the binding nature of decisions and acknowledgement of non-compliance have important implications in international law.[58] Given the cumbersome amendment procedure, the court should read its pre-existing powers more expansively.[59] Under international law, subsequent practice plays a role in the interpretation of any treaty, like the Statute of the ICJ.[60] The ICJ may develop its own practice to expand its powers over a period under the Statute. A parallel can be drawn with the veto power of the Security Council, which has been read into Article 27(3) of the Charter despite the text of the Article not providing for it and such a reading not being originally intended by the drafters.[61]

One such provision is Article 61(3) of the Statute, where the court requires compliance with its decision before an application for revision of the decision is entertained.[62] Here, reference may be made to the Andean Court, which has jurisdiction over five South American states. Its statute has

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[53] *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) 'Provisional Measures' [2000] ICJ Rep 111.
[54] *Land and Maritime Boundary* (*Cameroon/ Nigeria: Equatorial Guinea intervening*) 'Merits' [2002] ICJ Rep 303.
[55] *Fisheries Jurisdiction* (*United Kingdom v Iceland*) [1974] ICJ Rep 3.
[56] Mutlaq Al-Qahtani, *The Role of the International Court of Justice in the Enforcement of Its Judicial Decisions* [2002] 15 Leiden J Int'l L 781, 803.
[57] William Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale University Press 1971) 671.
[58] Nagendra Singh, *The Role and Record of International Court of Justice* (Springer 1989) 124.
[59] UN Charter art 108.
[60] Vienna Convention on the Law of Treaties 1980 1155 UNTS 331 art 31(3)(b).
[61] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2000) 195.
[62] ICJ Statute art 61(3).

specific powers of dealing with non-compliance and in situations of non-compliance, it may restrict the benefits that the country can obtain from the Cartagena Agreement.[63] The ICJ could similarly restrict the party that fails to comply with its decision from invoking benefits of the treaty that the state had violated in the first place.

Another provision under which the court could expand its power is Article 60, which empowers it to interpret its own judgments. The ICJ can utilize its interpretation powers under Article 60 to make declarations of non-compliance. The potential of such usage has been seen in the Special Agreement between Benin and Niger which allowed either party to seize the court pursuant to Article 60, in case of a difficulty in implementation of its decision.[64]

Another recent example comes from the 2012 judgment in the *Territorial and Maritime Dispute* between Nicaragua and Colombia where the court determined the maritime boundary delimiting between the states.[65] In 2013, Nicaragua filed an application for the alleged violations of sovereign rights and maritime spaces, as demarcated by the 2012 judgment. Colombia raised objections to the jurisdiction of the court, *inter alia,* on the ground that Nicaragua seeks to obtain enforcement of the 2012 decision through the ICJ, by circumventing the Security Council's prerogative. The court rejected Colombia's objection and admitted the application. Interestingly, as an alternate source of jurisdiction, Nicaragua invoked the inherent power of the court to pronounce on the actions required by its own judgments. The court refrained from dealing with this issue since it traced its jurisdiction through a treaty.[66] This leaves open possibilities for the court to read in this inherent power.

Therefore, the recent jurisprudence of the court does permit the possibility of adopting a more assertive role. Any expansion of the ICJ's power has to be gradual. *Jadhav* - although does not require the court to interpret Article 60 or 61 - serves an opportunity for the court to take a small step towards assuming the role of a strong judicial body. Any substantial change has to come through a culmination of such small steps so that the court can eventually elicit deference, command compliance and secure respect.

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[63] Treaty Creating the Court of Justice of the Cartagena Agreement 1979 18 ILM 1203 art 27.
[64] Special Agreement between Benin and Niger 2002 art 7(3).
[65] *Territorial and Maritime Dispute* (*Nicaragua v Colombia*) 'Merits' [2012] ICJ Rep 624 [142].
[66] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v Colombia*) 'Preliminary Objections' 2016 <http://www.icj-cij.org/files/case-related/155/155-20160317-JUD-01-00-EN.pdf> accessed 16 October 2017.

INDIAN ENERGY LAW: INCAUTIOUS OF THE ENVIRONMENT?

- *SRIJAN JHA*[*]

INTRODUCTION

"*The relationship between the importance of building a society with dignity of life and national economic development which will result in people living in a clean and green environment without pollution, having prosperity without poverty, peace without fear of war and a happy place to live for all citizens of nation.*"

- *Dr. APJ Abdul Kalam*[1]

The paper discusses the interface of the present Environment law with the ever-growing energy law in India. Environment law today predominantly consists of the Air Act[2], Water Act[3], Environmental Protection Act[4] (umbrella legislation) and the Forest Act[5]. The Energy law regime in India is deeply characterized by the Electricity Act[6]. The Electricity Act, 2003 opens the door to immense possibilities in unleashing competition and trading, but at the same time opens a new area of policy risk, which it is supposed to mitigate. The act has an enabling framework to introduce competition in generation, and privatization in distribution, but work in terms of addressing transition issues remain undone.[7] Both streams of law lay emphasis upon having a future that can sustain at the present conditions, if not better and certainly not worse. Environment law puts it forward in terms of pre-existing norms and energy law speaks of the same in terms of what has been produced and transmitted and what is to further entail.

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[1] Dr APJ Abdul Kalam, 'Evolution of a Happy Society' (2011) 4(3) NUJS L Rev 339.

[2] The Air (Prevention and Control of Pollution) Act 1981.

[3] The Water (Prevention and Control of Pollution) Act 1974.

[4] The Environment (Protection) Act 1986.

[5] The Indian Forest Act 1927.

[6] The Electricity Act 2003.

[7] V Ranganathan, 'Electricity Act 2003 Moving to a Competitive Environment' (*Economic and Political Weekly*, 15 May 2004) <www.epw.in/system/files/pdf/2004_39/20/Electricity_Act_2003.pdf> accessed 6 October 2017.

What we are talking about is the nature and application of energy production and effects it has on the environment, with reference to renewable energy and sustainable development. The next point of discussion that emerges is of overlap of the two laws, *i.e.* environmental concerns raised by energy production.

Lastly, this paper seeks to justify and provide plausible solutions to the dearth of legislation in this field and a humble advice for the procurement and establishing of a statutory framework in keeping with this goal.

INDIAN EFFORTS

"*There is no life without light.*"

- *SR Krishnamurthy Iyer*[8]

In 2014, governments around the world spent more than five trillion dollars on energy subsidies,[9] primarily, for fossil fuels. In the last two decades, the development of environmental jurisprudence in India has led to the establishment of the fact that the right to a clean environment is a fundamental right for us, and therefore its sanctity is unquestionable.[10] Energy law has been described as the allocation of rights and duties concerning the exploitation of energy resources between individuals and the government, and between governments and between States.[11] Traditionally produced in the brownish hue, energy is swiftly shifting to a greener shade.

ENERGY

"*The average cost of power generation compares quite favourably with new coal/thermal/gas based projects and captive diesel gensets. While in future the cost of renewable energy sources might decline, the cost of conventional energy law sources is bound to rise up.*"[12]

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[8] S R Krishnamurthy Iyer, *Law relating to Electricity in India* (3rd edn, Universal Law Publishing 2016) 8.
[9] 'How Large Are Global Energy Subsidies?' (2015) *Int'l Monetary Fund Working Paper No. 15/105* <www.imf.org/external/ pubs/ft/wp/2015/wp15105.pdf> accessed 6 October 2017; Heather Payne, 'Incenting Green Technology: The Myth of Market-Based Commercialisation of No and Low-Carbon Electricity Sources' (2017) <www.nyuelj.org/wp-content/uploads/2016/09/Payne_ready_for_printer_1.pdf> accessed 6 October 2017.
[10] C M Abraham, *Environmental Jurisprudence in India* (Kluwer Law International 2009).
[11] Adrian J Bradbrook, 'Energy Law as an Academic Discipline' (1996) 14(2) JERL 193, 194.
[12] Letter from Ministry of Non-Conventional Energy Sources, New Delhi to different States' secretariats (7 September 1993); *A P Transco v Sai Renewable Power* (2011) 11 SCC 34.

Energy comprises of primary, secondary and subsidiary sources, and hence energy should not be restricted to the primary sources only. Electricity, though a secondary source, is easily harnessed and is the most important source of energy, being the most legislated upon one as well.[13] Light is life and clean energy development can provide a valid ground for generation of income in the International arena.[14]

In the 1990s, global environmental problems, amongst other nations came to be highlighted worldwide. Nearly 60% of all Carbon Dioxide emissions that account for great portion of greenhouse gasses are originating from energy consumption.[15] International Energy Agency projections reveal that about 90% of the primary energy production in future would come from transitioning and developing countries as against 60% in the last three decades.[16] This happens because many developing and least-developed nations are well endowed with natural resources. The point here is that energy is necessary and it consumes resources, either which are a part of nature or whose synthesis is harmful for the nature. Therefore, either way, there is bound to be some adverse effect on the ecosystem. Now the question that arises is, whether the environment is worth risking in order to establish a better future, and if yes, then to what extent?

GENERAL JURISPRUDENCE BEHIND SUSTAINABLE DEVELOPMENT

Sustainable Development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[17] In a popular CNG related litigation entitled *MC Mehta v Union of India*[18] the Supreme Court laid down the essential features of sustainable development, suited for India, they were; (a) the precautionary principle and (b) the polluter pays principle. The precautionary principle says that the authority should anticipate what

[13] Rosemary Lyster and Adrian Bradbrook, *Energy law and Environment* (1st edn, Cambridge University Press 2006).
[14] The Kyoto Protocol Mechanisms, *International Emissions Trading Clean Development Mechanism Joint Implementation* (United Nations Framework Convention on Climate Change) <https://cdm.unfccc.int/about/cdm_kpm.pdf> accessed 12 September 2017.
[15] Parag Diwan and A C Khered, *Energy Law and Policy* (1st edn, Pentagon Energy Press 2009) 42.
[16] 'World Energy Outlook' (International Energy Agency, 2006) <http://www.worldenergyoutlook.org/media/weowebsite/2008-1994/WEO2006.pdf> accessed 12 September 2017.
[17] Brundtland Commission, *Our Common Future* (Oxford University Press 1987) 8.
[18] *MC Mehta v Union of India* (2002) 4 SCC 356.

needs to be done and what can be done and act accordingly, and the polluter pays principle states that once the previous principle has been overridden then the polluter shall be the one paying.[19]

Also known as the *Shriram Gas Leakage Case*[20], it raised an enormous question on the practice and liability of big houses that are carrying out actions related to the public welfare. Though this case had the question of hazardous commodities' disposal and the question of absolute liability it attracts answered, this case is relevant in our scenario for the reason that it involved the question relating to something intrinsically related to public, just as is the case of energy producing entities. Enquiry of the same can be done under the following principles: **State action principle**
Under this principle if the body doing the particular work is involved in doing a work which also happens to fall under public policy, then the principle we have borrowed from the US jurisprudence will come into picture and the polluter will have to pay.

ABSOLUTE LIABILITY

The rule in *Rylands v Fletcher*[21] provides that a person who for his own purpose brings to his own land something so dangerous that is likely to injure the surroundings he/she is liable for compensation. The rule was considered to be inapplicable in today's economy.

DEEP POCKET THEORY

The amount of compensation must co-relate to the financial capacity of the polluter and quantum of damage. In present day's context the term 'sustainable development' has grown more in the direction of 'sustainable' than in the direction of 'development'. The Electricity Act provides an open access to the transmission at the outset and in distribution in phases. It gives freedom for captive generation and multiple distribution licenses in a supply area. It provides recognition of trading as an independent activity. So, the construction of the jurisprudence of energy law shall not be in absence of environment law. Aiming to consolidate the renewable energy sector and give it an institutional structure, the Union government has drafted the National Renewable Energy Bill, 2015. After it is passed by the Parliament it would enable a National Renewable Energy Policy, Renewable Energy Corporation of India, an advisory group and a committee on the same. Through

[19] Gurdip Singh and Amrita Bahri, *Environmental Law* (2nd edn, EBC 2016) 70, 71.
[20] *MC Mehta v Union of India* (1986) 2 SCC 176.
[21] *Rylands v Fletcher* [1868] UKHL 1.

a separate law, MNRE would get freedom to execute projects and not depend on other ministries and departments for necessary clearances, said officials. The law comes at a time when the government has announced scaling up of renewable power generation to 1.75 lakh GW by 2022 – out of which solar power alone is envisaged at 100 GW.

APPLICABILITY ON THE SAME PARALLEL

Much like the build of Intellectual Property law and Competition Law, which are joined by the final objective of consumer satisfaction[22], Energy law and Environment law shall be read in accordance for the very reason of their utility towards a sustainable future. The moment we merge the concepts of energy law and environment law into one and think about it in the terms of its utility according to the sociological school of law, the most obvious choice that comes to mind is that of renewable energy. The direction of renewable energy is not only progressive, but also beneficial.

RENEWABLE ENERGY

The RERC has enacted 2007 and 2010 Regulations [Rajasthan Electricity Regulatory Commission (Renewable Energy Obligation) Regulations, 2007 and Rajasthan Electricity Regulatory Commission (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010)] requiring the Captive Power Plants and Open Access Consumers to purchase a minimum quantum of Energy from Renewable Energy Sources in order to effectuate the provisions of the Constitution of India, the Electricity Act and the National Environment policy, since the energy generated from renewable source is pollution free. The right to live with healthy life is guaranteed under Article 21 of the Constitution of India. The object of imposing renewable energy obligation is protection of environment as much as possible in larger public interest.[23]

[22] Planning Commission of India, 'Consumer Protection and Competition Policy' <http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11vl-ch11.pdf> accessed 17 September 2017.
[23] *Hindustan Zinc Ltd v Rajasthan Electricity Board* (2015) 12 SCC 611 para 45; *Subhash Kumar v State of Bihar* (1991) 1 SCC 598.

A draft resolution by the name of National Renewable Energy Bill, 2015[24] has been compiled. The Bill seeks to familiarize the sense of 'energy' that carries the connotation of yesteryears and mold it into new spheres, and the purpose of this proposed act is to promote the production of energy through the use of renewable energy sources in accordance with climate, environment and macroeconomic considerations. This Act shall in particular contribute to ensuring fulfilment of national and international objectives on increasing the proportion of energy produced through the use of renewable energy sources.[25] It mandates a national policy for renewable energy, which shall come within 6 months of the Act coming into force.[26]

Integrated Energy Resource planning (IERP) is a strategic plan for securing reliable and cost-effective energy resources. The plan is an exhaustive, research-based examination of potential risks and opportunities in procuring future energy supplies. Such a planning exercise will examine all available energy-resource options, including supply side as well as demand side options and evaluate all resources to maximise energy, environmental, and economic security[27]

The terms 'energy' and 'power' have no wide legal connotation attached to them, courtesy their absence from the Black's Law Dictionary, yet in the common parlance, both these words can be used interchangeably.

The definition of 'power' as provided by the Factories Act, 1948 is very restrictive, and does not take any such power which is not mechanically transmitted or is produced by human or other organic means.[28] Considering the source of the authority, we can also say that this definition presumes that 'power' and in turn 'energy' can arise only from a place of the same genus as 'factory', hence leaving the greater lot of renewable energy sources to no avail under its ambit. On the other hand, the Electricity act provides for the definitions of 'electricity'[29] which is only

[24] 'National Renewable Energy Draft' <http://mnre.gov.in/file-manager/UserFiles/draft-rea-2015.pdf> accessed 6 October 2017.
[25] Ministry of New and Renewable Energy, 'National Renewable Energy Act 2005' <www.indiaenvironmentportal.org.in/content/414501/national-renewable-energy-act-2015/> accessed 3 October 2017.
[26] National Renewable Energy Bill 2015, s 15(1).
[27] National Renewable Energy Bill 2015.
[28] Factories Act 1948, s 2(g).
[29] Electricity Act 2003, s 2(23).

electrical energy and no other. This definition again leaves the likes of biogas, solar energy and tidal energy till a great extent.

A separate creation was done in the direction of renewable energy in the form of a different executive head of the government in the year 1992. Earlier the same was known by the name of Ministry of Non-Conventional Energy. The Ministry of New and Renewable Energy (MNRE) is the nodal Ministry of the Government of India for all matters relating to new and renewable energy. The broad aim of the Ministry is to develop and deploy new and renewable energy for supplementing the energy requirements of the country.[30] Following are the different types of new and renewable energies available to us, and their analysis on the fronts of development of laws, technology and effects on society:

SOLAR ENERGY

"*Solar Energy, like salvation is free. Buying equipment for the same is more like payback.*"[31]

Development of Solar Cities Programme is an initiative by MNRE, which would aim at developing more than 60 solar cities during the 12th Five Year Plan period. The proposed programme on 'Development of Solar Cities' would support/encourage Urban Local Bodies to prepare a Road Map to guide their cities in becoming 'renewable energy cities' or 'solar cities' or 'eco/green cities'. The programme aims to consolidate all the efforts of the Ministry in the Urban Sector and address the energy problem of the urban areas in a holistic manner.[32] The Goal of the program is to promote the use of Renewable Energy in Urban Areas by providing support to the Municipal Corporations for preparation and implementation of a Road Map to develop their cities as Solar Cities. The objective of the programme is to oversee the implementation of sustainable energy options through public - private partnerships.[33]

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[30] 'Introduction' (The Ministry of New and Renewable Energy) <http://mnre.gov.in/mission-and-vision-2/mission-and-vision/> accessed 3 October 2017.

[31] 'Sun Through the Centuries: A Brief History of Solar Energy' (*Solterra*, 12 February 2015) <www.solterra.com/sun-through-the-centuries-a-brief-history-of-solar-energy/> accessed 3 September 2017.

[32] 'Clean Energy Solutions Center: Assisting Countries with Clean Energy Policies' (National Renewable Energy Laboratory, September 2013) <www.nrel.gov/docs/fy13osti/60277.pdf> accessed 14 October 2017.

[33] Naresh, 'Programmes' (*Vikaspedia,* 28 July 2014) <http://vikaspedia.in/energy/policy-support/renewable-energy-1/programmes#section-21> accessed 11 September 2017.

We are blessed with Solar Energy in abundance at no cost. The solar radiation incident on the surface of the earth can be conveniently utilised for the benefit of human society. One of the popular devices that harnesses the solar energy is solar hot water system.[34]

BIOENERGY/BIOGAS

Biogas is an established yet novel concept of energy production. The concept of fixing atmospheric Carbon Dioxide by planting trees on a very large scale has attracted much attention. There is little doubt that halting of deforestation and the replanting of large areas of trees would bring many environmental benefits, but absorption of Carbon Dioxide by a new forest plantation is a once and for all measure 'buying time' by fixing atmospheric Carbon Dioxide while the trees mature taking 40-60 years.[35] A molecule of methane of biogas, is 30 times more effective than a carbon dioxide molecule in trapping earth's radiated heat.[36]

The Indian authorities have also taken into account the utility of the same in the village community. Indian government provides subsidy in the sphere of biogas generation. The plants that are purchased can be purchased in the subsidy brackets of Rs 60,000[37], Rs 52,500 and Rs 45,000 depending upon the capacity of the biogas plant.[38]

HYDROELECTRICITY

A surprising fact of the same nature is that the primary purpose/benefit of 5% of dams in USA is 'recreation'[39] and Hydroelectricity amounts to only 2%.[40]

India is blessed with immense amount of hydroelectric potential and ranks 5th in terms of exploitable hydro-potential on global scenario, and has a better perspective towards

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[34] 'Solar Water Heating Systems' (The Ministry of New and Renewable Energy) <http://mnre.gov.in/file-manager/UserFiles/brief_swhs.pdf> accessed 13 September 2017.
[35] Godfrey Boyle, *Renewable Energy: Power for a Sustainable Future* (2nd edn, Oxford University Press 2006) 137.
[36] ibid.
[37] *Ramji Patel v Nagrik Upbhokta Marg Darshak Manch* [2000] 3 SCC 29.
[38] Naresh, 'Programmes' (*Vikaspedia,* 28 July 2014) <http://vikaspedia.in/energy/policy-support/renewable-energy-1/programmes#section-21> accessed 16 September 2017.
[39] 'Role of Dams' (International Commission on Large Dams) <http://www.icold-cigb.net/GB/dams/role_of_dams.asp> accessed 23 September 2017.
[40] 'Hydroelectric Power' *Dictionary of American History* (*Encyclopedia.com)* <http://www.encyclopedia.com/science-and-technology/computers-and-electrical-engineering/electrical-engineering/hydroelectric> accessed on 23 September 2017.

hydroelectricity. As per an assessment made by CEA, India is endowed with economically exploitable hydropower potential to the tune of 1,48,700 MW of installed capacity.[41]

Now is the time to come to the aspects of environmental harms that hydroelectricity causes. Unlike few other renewable sources of energy, the ecological damage per unit produced is probably greater for hydroelectricity than for any other energy source.[42]

Building a hydroelectric project takes a few years, changes the surrounding geography and disturbs the biological balance. It is self-explanatory that the same ends up distorting the natural river routes. No silt in the previous agricultural areas is another one of the problems.

REQUISITE OF THE GREENER FORM

"*Energy is allowed to influence income growth indirectly by capital accumulation through input substitution*."[43]

It is of utmost importance and urgency to have an alternate greener source of energy; we must move on to the requirement of why does it also need to be renewable. When we talk about environment conservation, we mean to say that there must be (1) sustainable development and (2) leaving the environment undisturbed until the extent possible. Therefore, once we start talking about conservation, we end up focusing on both the points in a quasi-negative way. If we conserve a resource for its use in upcoming times, we do not cut down on the effective use of the resource, but rather use it in the future and hence pollute further in the future. Therefore in the present we live in an environment cleaner than the one we would have had (had we used the resources), and hence it is closer to sustainable development.

[41] 'India Hydro Energy' (Energy Alternatives India) <http://www.eai.in/ref/ae/hyd/hyd.html> accessed 1 October 2017.
[42] 'Sociopolitical Effects of Energy Use and Policy, Committee on Nuclear and Alternative Energy Systems, Risk and Impact Panel, Reports to the Sociopolitical Effects Resource Group' (Washington DC: National Academy of Sciences 1979).
[43] Filippo Lechthaler, *Economic growth and Energy Use During Different Stages of Development: An Empirical Analysis Environment and Development Economics* (Oxford University Press 2017) vol 22, 26, 50.

MOVING AWAY FROM CONVENTIONAL OIL USAGE

According to the International Energy Agency (IEA) (2006), fossil fuel will account for 77% of the increase in world primary energy demand between 2007 and 2030, with the major contribution coming from countries in a transitional stage of economic development.[44]

Factors such as enhanced human rights and environmental awareness at the global level have led to declaration of general good governance guidelines for international forums like UN's global compact, as well as specific sustainability guidelines for oil industry by international organizations. In light of these developments, most of the major forums have started annual voluntary public disclosure of their sustainability efforts. All these lead to renewable energy.

In the same direction, we saw a movement by our legislature. The Energy Conservation Act was one such move and it saw institution of various organizational structures. The first of such organization, Petroleum Conservation Action Group, was formed in 1976 by Ministry of Petroleum and Natural Gas. The group was subsequently registered as a society under the Society Registration Act, 1860 and called Petroleum Conservation Research Association (PCRA).[45] Established as a nodal agency for promoting fuel efficiency in the country,[46] the association continues to function through its Governing Body and Executive Committee.[47]

The Advisory Board on Energy, set up under the same authority also recommended setting up of a distinct Energy Conservation Organization to integrate the energy conservation efforts of the Central Government just five years after the formation of PCRA.[48] However the Government again responded with a Society, registered under the Societies Registration Act, known as Energy Management Centre (EMC). Prior to this, an Energy Conservation Cell was also set up in the

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[44] 'World Energy Outlook 2006' (*International Energy Agency*, 2006) <http://www.worldenergyoutlook.org/media/weowebsite/2008-1994/WEO2006.pdf> accessed 16 September 2017.
[45] A Bhattacharyaa, 'Energy Conservation in Petroleum Industry' in Pradeep Chaturvedi, Shalini Joshi (eds) *Strategy for Energy Conservation in India* (Concept Publishing Company 1997) 77.
[46] 'Annual Report 2013-14' (Petroleum Conservation Research Association) <www.pcra.org/pcra_adm/writereaddata/upload/reportts/Annual_Report_2013-14.pdf> accessed 31 August 2017.
[47] Priya Anuragini, 'Bureau of Energy Efficiency: India's Institutional Regime to Conserve Energy*'* (2016) 8 RMLNLUJ 167-69.
[48] Parag Diwan and Prasoon Dwivedi (eds), *Energy Conservation Measures in India, in Energy Conservation* (2009) 29.

Ministry of Power.[49] Scholars have made numerous proposals, falling under the scope of soft law like laying down comprehensive voluntary codes,[50] formulation of a 'natural resource charter', and setting international standards for environment related governance.[51]

Hence, the first action must be to stop using oil in the way we have been using until now. Even though we have not developed a lot of tech in de-polluting the effects of coal and its subsequent energy, oil has been as major and an equally potent polluter. If a move from the conventional 'oil' is *easier said than done*, we have a call to make sure that until it is done, we act in a way that does not hamper the environment so utterly.

EFFECTIVE OVERLAP

Judging by the nature of both these lines of legislations, requisites and externalities of one qualify as 'regulated' under the second. The areas and objects that the environmental laws protect are harnessed and degraded by the energy suppliers, and in turn energy suppliers work under the command of Energy Laws. Hence, objectively, proper carriage of Energy Laws affects environment in one way or another. Hence, energy supplying structures should also come under the ambit of environmental regulation.

DEFINITIONS

In environmental protection act, there is no particular mention of power plants. There is a generic mention of the term 'pollutants', which is neutral to the origin of the same.[52] Now the primal question to be answered is where to implicate liability, at the point of creation of energy, where there is substantial pollution or at the point of its usage, where it trickles down to pollution coupled with environment disruption and degeneration? A progressive and stringent approach would be to protect at both ends.

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[49] Pradeep Chaturvedi and MP Narayanan, *Energy Conservation Perspectives for India, in Strategy for Energy Conservation in India* (Pradeep Chaturvedi and Shalini Joshi eds, 1st ed, Concept Publishing Company 1997) 18.
[50] Paul Collier and Benedikt Goderis, 'Prospects for Commodity Exporters: Hunky Dory or Humpty Dumpty?' (2007) 8 World Econ 22, 23.
[51] Arpita Gupta, 'International Oil Corporations in the Era of Globalisation: Third World Experience Challenges and Opportunities' (2012) 12 NULJ 57, 76.
[52] Environment Protection Act 1986, s 2(b).

Electricity Act defines 'generating station' as any place that generates electricity.[53] This definition restricts the coverage of non-electrical sources from coming under the ambit of the only comprehensive piece of energy legislation at hand. However, since the superset is the domination of the environmental laws, we can still count on the environment legislations.

General rules of establishing structures of energy production are that:

- No industrial plant can be established without the permission of the State Board established under the Air Act.[54]
- No person running an industry shall exceed the standards set up by the State Board established by the Air Act.[55]
- No person can discharge effluents in any stream unless there is a sanction from the statutory body.[56]
- Disposal of wastes in a proper manner is also required under the present law, and the same can be regulated according to the needs of the state government.[57]

The Water Act uses the expression 'trade effluent', which means any matter discharged in water that comes from non-domestic sources.[58] Unlike the Air Act, Water Act does not make sure that pollution of water or discharge of effluents in water at any point of time at every point in the state is prohibited. At times, the area of operation of the Water Act can even be restricted.[59]

By and by, the Environmental Protection Act on the other hand provides a scope for wider interpretation, as the expression of 'occupier' is any person who is under the charge of handling any factory or premises.[60] This brings us to the definition of 'factory'. The same must be established if we have to imply any liability on the government for polluting through power plants.

[53] Electricity Act 2003, s 2(30).
[54] Air Act 1981, s 21.
[55] Air Act 1981, s 22.
[56] Water Act 1974, s 25.
[57] Factories Act 1948, s 12.
[58] Water Act 1974, s 2(k).
[59] Water Act 1974, s 19.
[60] Environmental Protection Act 1986, s 2(f).

There is no mention of power plants or other polluting structures that generate energy. All that environmental laws talk about, are chimneys[61] or industrial plants.[62] A generic and literal interpretation of the word would tell us that a 'factory', which can be interchangeably used with 'plant', is a premise that produces commodities having industrial importance and by using technology. However, the definition of 'factory' in the Factories Act, 1948 is totally based on the capacity of holding/employing workers.[63] The same would qualify under section 2(30) of the Electricity Act, if it produces electricity.

Even a nuclear energy production site is termed as a 'plant', and hence the following example shall be clearing the air on the topic.

In *G Sundarrajan*[64], the appellants opposed the establishment and functioning of the Kudankulam Nuclear Power Plant in Tamil Nadu on the grounds of environmental pollution and safety. The appeal was under Article 32 to enforce Article 21: even if the appeal was dismissed, the Supreme Court gave directions for safety of environment from nuclear wastes. It is not for courts to determine whether an action in fulfilment of a policy is fair, reasonable or required.[65] Many countries started withdrawing from their nuclear plans for the reason that the harms of unforeseen disasters are too great.[66]

DEFENCE

The Environmental Protection Act acts as an interface between the governments at the Central and at the State levels, as is exemplified by Section 3 of the Environmental Protection Act, which says that in the ambit of environment, where the State has the power to make/draft laws, even the Centre can take certain actions. The act also enumerates the principles of sovereign immunity and liability of governmental officials, in the reverse order in its provisions.[67]

[61] Air Act 1981, s 2(h).
[62] Air Act 1981, s 2(k).
[63] Factories Act 1948, s 2(m).
[64] *G Sundarrajan v Union of India* (2013) 6 SCC 620.
[65] *MP Oil Extraction v State of MP* (1997) 7 SCC 592.
[66] *MP Oil Extraction v State of MP* (1997) 7 SCC 592, para 24.
[67] Environmental Protection Act 1986, s 17.

There is exemption given to government bodies if they end up causing an accident by the way of some hazardous substance during the time of energy production[68], unless there is serious allegation and subsequent finding that the fault was from the side of government, in that case the head of the government department shall be prosecuted, obviously only if he wasn't aware of such developments.[69] Section 2(a) of the Public Liability Insurance Act provides the definition of 'accident' and the definition of 'factories' is given under the Factories Act, 1948.

A major problem with the present scenario is that the courts will take cognizance either when a person makes a complaint according to law or when the complaint comes through proper governmental channel.[70] The same is difficult in practicality if a power plant is disrupting the environmental balance, and it might as well be reduced to nothing if we take into consideration the aspect of defence that 'good faith' brings.[71]

CONCLUSION

The interface of the said streams of law trickles down to the dependence of the two on each other, which even though is not apparent, but is not oblivious. Energy is required, and its requirement is not going down in the upcoming times, and so is the case with the environment. Therefore, the only way to go forward is to realise the equal importance both have. In addition, for this there is a need for sustainable development. Since this paper is restricted to the topics of energy and environment, the only logical and legal sphere that the analysis could have gone in, is of renewable energy, which is a baton-holding topic under the aegis of sustainable development. This renewable development is the key when it comes to finding the answer and the jurisprudence on the same is rising owing to the well-recognised need of the same.

To answer the second question is to connote weight into the respective terms of 'sustainable development'. If 'sustainable' is more sought, then energy production, which is under the control of the government must be made equally liable and be put to the dock of guilt, as are other parties. On the other hand, if 'development' is considered heavier then we must consider as the cost

[68] The Public Liability Insurance Act 1991, s 4(3); Gurdip Singh and Amrita Bahri, *Environmental Law* (2nd edn, EBC 2016) 188.
[69] Public Liability Insurance Act 1991, s 17.
[70] Environmental Protection Act 1986, s 19.
[71] Environmental Protection Act 1986, s 18.

incurred for a brighter future. The debate on the proposition and opposition of sovereign immunity can go on and on, and the only answer can be given by legislation or a court's decree.

In conclusion, I would like to say that energy, though comes in a lot of hues and has a lot of answers to give by the way of laws, laid down or carved at the end of the aforementioned discussion shall not be on the grounds of scarcity of regulating texts in the country. The answer comes from the inherent questions and reasonable answers; questions like if hydroelectricity and wind energy are provided for under the provided law, how the access to water and wind can be legally safeguarded? Quite simply the same can be done under the light of the simple notion of sustainable development.

TRANSFER AND TRANSPARENCY

(A shift from complete opaqueness in the proceedings of the collegium to absolute transparency with respect to transfer of High Court Judges)

- *SRIJITA JANA & VIKASH KUMAR BAIRAGI*[*]

INTRODUCTION

"*Selective transfers always give rise to canards and the transferred Judge suffers character assassination*."

- *Justice D Desai*[1]

Arbitrary transfer of High Court Judges in India has a strong nexus with the opaqueness of the collegium system of '*Judges appointing and transferring Judges*' that came into force after the Third Judges case.[2] Due to the discrepancies in judicial appointments and transfers, the collegium system has always remained mired in controversies. However, it has come back under the scanner due to the recent Justice Jayant Patel transfer issue.[3] Justice Jayant Patel of the Karnataka High Court resigned[4] from the office, after he was transferred[5] to the Allahabad High Court from the Karnataka High Court when he had only 10 months of service left.

In the backdrop of the National Judicial Appointments Commission (NJAC)[6] being struck down by the apex court of India, the collegium system was reinstated. In the words of Justice J. Chelameshwar, the collegium system lacks transparency, objectivity and accountability.[7] Mainly the collegium system has two flaws:

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[*] Students, National University of Study and Research in Law, Ranchi.
[1] *S P Gupta v President of India* (1981) Supp (1) SCC 87.
[2] *In re* Special Reference 1 of 1998.
[3] Special Correspondent, 'HC judge Jayant Patel resigns' *The Hindu* (Ahmedabad, 26 September 2017) <www.thehindu.com/news/national/hc-judge-jayant-patel-resigns/article19754051.ece> accessed 20 October 2017.
[4] The Constitution of India 1950, art 217(1).
[5] The Constitution of India 1950, art 222(1).
[6] *Supreme Court Advocates-on-Record Assn v Union of India* (2016) 5 SCC 1.
[7] Dhananjay Mahapatra, 'Sr SC Judge Rips into CJI-headed Collegium' *The Times of India* (Delhi, 3 September 2016).

First, the judicial proceedings are kept within the exclusive domain of judicial circles and are not revealed to the public.

Secondly, the grounds on which Judges are appointed and transferred are not uniform and have no common criteria because each time the material considered by the collegium may be different.

The second cause of arbitrary transfer of Judges is the dichotomy between transferring a judge in public interest and transferring him by way of punishment; the first cause being the opaqueness of the collegium system. In all the Judges' cases related to transfer[8] and appointment of Judges, the Supreme Court has observed that judicial transfers can be effectuated exclusively on the ground of '*public interest*' and this ground in itself, is a safeguard against arbitrary transfers. The definition of public interest has a wide sweep, which can be easily used as a protecting veil to hide political agendas and merely mentioning that a transfer has been effected in the interest of public is an incomplete argument.

Recently, the Supreme Court Collegium has resolved to post every detail and minutes of the collegium's meetings on the Court's official website[9] regarding recommendations on judicial appointments, transfers and elevations for public consumption. The online disclosure of Collegium proceedings will help in checking arbitrary transfer of the judges from one High Court to another, as it will try to arrest the opaqueness to an extent. However, the online updates that are disclosed on the SC website are not a complete solution in itself because it has some major loopholes. The authors took a glance at the recent resolutions related to the appointment of Judges to the Madras High Court on the official Supreme Court website. The authors reached to a conclusion that the updates merely disclose the names of the selected candidates for appointment. The reasons backing the appointments are very sketchy, vague, and are based on unreliable sources. In this context, it is well assumed that the disclosure of proceedings related to transfer is likely to be in the same manner. Thus, the need of the hour is to give sufficient reasons and lay down some common criteria, so as to promote an intergenerational unity in the collegiums; because the inputs taken

[8] *SP Gupta v President of India* (1981) Supp (1) SCC 87; *Union of India v Sankal Chand Himatlal Sheth* (1977) 4 SCC 193.
[9] Supreme Court Collegium, 'Re: Transparency in Collegium System' (*Supreme Court of India,* 3 October 2017) <http://supremecourtofindia.nic.in/collegium-resolutions> <http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf> accessed 22 October 2017.

into the consideration by the collegium for recommending or appointment or transfer may differ each time from one collegium to another one. As far as recommendation of transfer is concerned, the resolutions should also disclose such material that can conclusively prove a reasonable nexus between the public interest and the transfer.

The third element that makes transfer of HC Judges not only arbitrary but also punitive in nature is that the transfer of Judges is non-consensual in nature. Many international conventions, foreign Constitutions, international statutes have made consensual judicial transfers as binding and it is high time that the Indian judiciary incorporates the same view.

Despite repeated attempts to reduce the opaqueness of the collegium system, in light of the recent Justice Jayant Patel controversy, the question arises as to how shall the independence of judiciary be achieved if judges are arbitrarily transferred without their consent and not in the interest of the public? To answer this question, the authors have put forward certain arguments to address the issues.

TRANSFERS OF JUDGES: A THEORETICAL PERSPECTIVE

A CORRECT AND COHERENT THEORY

The theory covers all the facts and principles which it seeks to explain; that it does not lead to contradictions, incongruities, absurdities and anomalies; that it is easy to work in practice and avoids needless complications and over-elaborations. However, the correct theory of the President's power to transfer a High Court Judge must be evolved on the fundamental assumption that any theory that destroys the independence of judiciary must be rejected as opposed to the undisputed position that the independence of the judiciary is a basic feature of our Constitution.[10]

Firstly, the correct theory must be based on the facts; whereas the tenure of office of persons in the service of the Union or the State is during the pleasure of the President or the Governor, the tenure of office of a High Court Judge is during good behaviour. Further, the relation between the Union Government and its servants is that of a master and his servant. Hence, a Government servant is under an obligation to obey all lawful orders of his superiors. The master-servant

[10] HM Seervai, *Constitutional Law of India,* vol 3 (4th edn, Universal Law Publishing 2010) 2803.

relationship does not subsist between a High Court Judge and the Union Government that appoints them. Justice Desai accepted this contention, which is as follows:

"*The rejection of Mr. Seervai's argument that a High Court Judge cannot be transferred without his consent, should not be read as a negation of his argument that there is no master and servant relationship between the Government and High Court Judges. In general, the relationship of master and servant imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done.*[11] *A servant undertakes to serve his master and to obey his reasonable orders within the scope of the duty undertaken. The Government has no power or authority to direct what particular work a High Court Judge must do and it can certainly not regulate the manner in which he must do his work in the discharge of his official functions. A High Court Judge is also not bound, nor does he undertake, to obey an order of the Government within the scope of his duties.*"[12]

Secondly, there is a fundamental difference between the members of an all India Service, an I.A.S., for instance, and a High Court Judge. A member of I.A.S. holds his office at the pleasure of the President, and our Constitution makes no provision for securing the independence, whereas it makes the most elaborate provisions for securing the independence of High Court Judges of which tenure during good behaviour is the corner-stone.[13] A High Court Judge is not a member of an All India Judicial Service. The habit of quoting speeches from the Debates in the Constituent Assembly has led to a speech of Dr. Ambedkar being referred to in the context of the transfer of Judges. That speech contained the following words:

"*The Drafting Committee felt that since all the High Courts so far as the appointment of judges is concerned*, *form now a central subject, it was desirable to treat all the judges of the High Courts throughout India as forming one single cadre like the I.C.S. and that they should be liable to be transferred from one High Court to another.*"[14]

[11] *Halsbury's Laws of England* (3rd edn, 1954) vol 25, para 871.
[12] *Union of India v Sankal Chand Himatlal Sheth,* (1977) 4 SCC 193.
[13] HM Seervai, *Constitutional Law of India,* vol 3 (4th edn, Universal Law Publishing Co 2010) 2809**.**
[14] *SP Gupta v President of India* (1981) Supp (1) SCC 87.

Thirdly, it harmonizes the President's power to transfer a Judge and a Judge's right to tender his resignation[15], which would destroy the President's exercise of the power by removing the public purpose which alone can justify the transfer.

The authors are of the view that the correct and coherent theory of the power of transfer a High Court Judge should be rightly implemented, because non-consensual transfer is, in its essence, punitive. A Judge by giving his consent cannot obtain a transfer if it is against the public interest; but such consent deprives the transfer of its punitive character, and its coercive effect to the Government's line.

PRINCIPLE OF NATURAL JUSTICE

To invoke the principle of natural justice in the case of transfer of a Judge under Article 222(1) if otherwise it is permissible to make the transfer without his consent, will be, stretching the principle, to a breaking point. It will lead to many unpractical, anomalous and absurd results and will have inevitable repercussions in the order of transfers made in other branches of service under either the Union or the State.

ANALYSIS OF CONSENT: HOHFELDIAN THEORY OF RIGHT

Justice Desai in the Sankalchand Case has interpreted Article 222 (1) by comparing it with the Hohfeldian theory of 'Right'. He considered that the 'power' vested in the President to transfer Judges as under article 222(1) shall not remain a 'power' in the true sense of the term as the power shall become a 'liability' if the concept of consent is imported in the meaning of power.

H.M. Seervai has the countered this argument of Justice Desai by literally interpreting the word 'may' as embodied in Article 222(1). Article 222 (1) stipulates that the President *'may'* transfer a Judge and '*not shall'* transfer a Judge. The presence of the word *'may'* is a testament to the fact that the President must exercise the power to transfer Judges in a liberal fashion and the consent of the Judges must be a condition precedent to the exercise of this power.

[15] The Constitution of India 1950, art 217(1).

TRANSFER OF JUDGES: ISSUES AND CHALLENGES

CAN JUDGES BE TRANSFERRED WITHOUT CONSENT?

H.M. Seervai arguing in the Sankalchand case, contended that on a proper construction of Article 222(1) in the context of the basic principle of independence of the Judiciary, consent must be read as a necessary requirement in that article. His second contention was that since transfer of a Judge involves a fresh appointment in the High Court to which he is transferred, such transfer cannot be made without the consent of the Judge.

In the *S.P. Gupta Case*, it was held that Article 222(1) does not inherently contain the word 'consent' and when the Constituent Assembly intended that there should be consent, it has explicitly mentioned the word in clear terms in the Constitution. To establish this rationale, Article 222(1) was compared with Article 127(1) which stipulates that the power to hold sessions of the Supreme Court in the absence of the quorum of the Judges of the Supreme Court can be exercised only if the CJI obtains the previous consent of the President and not otherwise.[16]

The 80th Law Commission Report recommended[17] that in order to prevent the abuse of power of transfer, no Judge should be transferred without his consent from one High Court to another unless a panel consisting of the Chief Justice of India and his four senior most colleagues find sufficient cause for such course.

In the Second Judges case, it was held, "*There is nothing in the language of Article 222(1) to rule out a second transfer of a once transferred judge without his consent but ordinarily the same must be avoided unless there exist pressing circumstances making it unavoidable*'. Now the question is, '*What were the unavoidable circumstances and the cause that necessitated the transfer of Justice Jayant Patel when this transfer was supposed to be his second one*?"

[16] *Union of India v Sankal Chand Himatlal Sheth* (1977) 4 SCC 193.
[17] Law Commission of India, '*Method of Appointment*' (Law Com No VIII, 80th Report) <http://lawcommissionofindia.nic.in/51-100/Report80.pdf> accessed 25 October 2017.

A COMPARATIVE ANALYSIS WITH RESPECT TO CONSENT IN JUDICIAL TRANSFERS

The Constitutions and legislations of various countries have reiterated the view that consent of Judges is a *sin qua non* for transferring them.

S. No.	Country	Relevant Article of Transfer
1.	UK	Sec 5(2) of the Senior Court Act, 1981[18] specifies that, 'The puisne judges of the High Court shall be attached to the various Divisions by direction [given by the Lord Chief Justice after consulting the Lord Chancellor]; and any such judge may *with his consent* be transferred from one Division to another by direction [given by the Lord Chief Justice after consulting the Lord Chancellor], but shall be so transferred only with the concurrence of the senior judge of the Division from which it is proposed to transfer him.
2.	Thailand	Transfer of Judges and Justices *without their consent is prohibited* except for timing as provided by the law and promotion, or in the case of disciplinary action or being a criminal defendant, or prejudicial to an on-going trial, unavoidable necessity, or *force majeure*, as provided by law.[19]
3.	Romania	The Status of Judges Act in Romania specifies that transfers of judges are only possible *with the express consent* of the individual concerned.[20]
4.	Albania	Transfer of judges may *not be done without their consent,* except when the need for reorganization of the judicial system requires it.[21]
5.	Slovak Republic	A judge may be transferred to another court *only with his consent* or on the basis of a decision of a disciplinary senate.[22]

[18] The Indian Constitutional Reform Act 2005, sch 4(1).
[19] Constitution of Thailand 2007, s 197.
[20] Status of Judges Act 2004, s 63.
[21] Constitution of Albania 1998, art 147(5).
[22] Constitution of Slovak Republic 1992, art 148(1).

The convention operating in Britain,[23] where a similar pattern of government prevails, is very relevant in the Indian context can be adapted suitably to meet the conditions prevailing here. The Supreme Court has emphasized the importance of conventions to interpret constitutional provisions in the following words:

'*It was said that we must interpret Art.* 75(3) *according to its own terms regardless of the conventions that prevail in the United Kingdom. If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with, a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed*.'[24]

INTERNATIONAL CONVENTIONS ON TRANSFER OF JUDGES

The Vienna Convention on the Law of Treaties was concluded in 1969 advocates the expression of the *pacta sunt servanda* principle in international law. According to this principle, given in Article 26 of the VCLT, every treaty signed by a country is binding on it and the obligations imposed by treaties must be performed by the country in good faith. *Article 51(c)* of the Constitution (read with Article 253) to supports above conventions. Article 51(c) directs the state to 'endeavour to' 'foster respect for international law and treaty obligations'.

Many international conventions adopted and recognised that consent is prerequisite for the transfer of Judges as follows:

Montreal Convention, 1983[25] unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice that:

[23] MP Jain, *Indian Constitutional Law* (7th edn, LexisNexis 2015) 130.
[24] *UNR Rao v Union of India* (1971) 2 SCC 63.
[25] Montreal Declaration on Universal Declaration on the Independence of Justice 1983, s 218.

"*Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.*"

Beijing Statement[26] of principle of the Independence of the Judiciary in the LAWASIA region adopted under Article 30.

"*Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the judiciary, such consent shall not be unreasonably withheld by an individual judge.*"

IBA Minimum Standards of Judicial Independence, 1982[27] states that,

"*The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.*"

Siracusa Principles[28] - Principles on the Independence of the Judiciary:

"*Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their freely given consent.*"

TRANSFER IN PUBLIC INTEREST V. PUNITIVE TRANSFER

Are Judges actually transferred by way of punishment?

In the *Sankal Chand* case, H.M. Seervai contended that if a Judge misbehaved, he could be impeached according to the provisions of the Constitution rather than transferred by way of punishment. The Court rejected this contention ruling that, "*It is not every misbehaviour or misconduct which may be sufficient to impeach a Judge and indeed it would be difficult to prove*

[26] Beijing Principles of the Independence of the Judiciary in the Lawasia Region 1982, art 30.
[27] International Bar Association, Code of Minimum Standards of Judicial Independence 1982.
[28] Siracusa Principle of Draft Principle on Independence of Judiciary 1981, art 9.

such misconduct or misbehaviour in the manner provided by the Constitution in a large variety of cases".

In other words, what the Court meant was that, since impeachment of a Judge is sometimes not practically feasible, a quick fix solution to discipline an errant Judge is to transfer him. This logic of the Court is itself in contradiction of 'public interest'. This logic would mean that a Judge who is corrupt who indulges in frequent favouritism and thus fails to deliver justice in one High Court shall be transferred to another High Court so that he is freely allowed to vitiate the atmosphere of another High Court.

PUBLIC INTEREST SUFFERS IF THE JUDGE TO BE TRANSFERRED RESIGNS

The authors think, if the transfer of a HC Judge compels him to resign then such transfer shall be not only become punitive but it shall also violate public interest, the only ground on which a Judge may be transferred. Recently Justice Jayant Patel resigned post his transfer was recommended. That his resignation came in as a result of his transfer makes his transfer contradictory to public interest.

BRINGING ON MORE TRANSPARENCY TO JUDICIAL TRANSFERS

A REASONABLE NEXUS BETWEEN PUBLIC INTEREST AND TRANSFER

Public Interest has been defined in the Black's Law Dictionary[29] as "*Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government.*"

In the Constitutional Assembly Debates, Dr. B.R. Ambedkar gave at least two instances of transfers that would purely be in public interest:[30]

[29] Bryan A Garner, *Black's Law Dictionary* (6th edn, Oxford University Press) 19.
[30] Constitution Assembly Debates, vol XI, 580.

I. One judge being transferred from one High Court to another in 'order to strengthen the High Court elsewhere by 'importing 'better talents which may not be locally available.

II. It might be desirable to import a' new Chief Justice because it might be desirable to have a man unaffected by local politics or local jealousies.

III. Further, the *Sankal Chand case*[31] had laid down another instance where a particular Judge is not pulling on well with the Chief Justice and his colleagues in the High Court.

IV. A High Court especially a small one, needs the services of a Judge proficient in a particular branch of law.

V. For the purpose of national integration.[32]

When the collegium recommends transfers, just mentioning the criteria of public interest is not sufficient. The collegium resolutions should also contain such inputs that can establish a reasonable nexus between the transfer and the public interest. This means that when a Judge is transferred from one High Court to another High Court to what extent shall the transfer serve the interests of the public should be elaborately mentioned in the collegium's resolutions.

PERFORMANCE

To establish how far the transfer is in the interest of the public, the collegium must consider the following parameters:

I. No of judgements delivered.

II. Quality and nature of judgements (his past judgements that may decide that how far his transfer may help sort out the public interest in the concerned state).

III. The ability of the Judge to quickly understand and adapt to the ethos and working culture of the High Court to which Judge is about to get transferred.

[31] *Union of India v Sankal Chand Himatlal Sheth* (1977) 4 SCC 193.
[32] Law Commission of India, *Method of Appointment* (Law Com No VIII, 80th Report).

LOCAL RELEVANCE

If the Judge is wholly unfamiliar with the language of the State to which he is transferred, it is possible in some cases that it will affect his efficiency.[33]

PAST BACKGROUND

I. Experience as a lawyer (if the person had been a lawyer before becoming a judge) and as a judge.

II. Integrity as a Judge.

The individual members of the collegium shall consider each of these parameters before recommending a transfer but not in objective way. They should substantiate with written reasons in the resolutions that how far they have considered each of these parameters before recommending a name. All such resolutions should be recorded and disclosed on the official SC website as the SC has already taken the step to disclose the resolutions on the website. Justice Chelameshwar had made a strong pitch for mandatory recording of reasons for selecting a person for appointment as a judge of the SC or HCs, or transferring a judge from one HC to another.[34]

ONLINE DISCLOSURE OF COLLEGIUM PROCEEDING

"*In the darkness of secrecy, sinister interests, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity.*"

- *Jeremy Bentham*[35]

In a historic move to ensure transparency in judicial appointments and transfers, the Supreme Court Collegium, led by Chief Justice of India Dipak Misra, has resolved to post every detail and minutes of the collegium's meetings on the court's official website regarding recommendations on judicial

[33] *SP Gupta v President of India* (1981) Supp (1) SCC 87.
[34] Dhananjay Mahapatra, 'Sr SC judge rips into CJI-headed collegium' *The Times of India* (Delhi, 3 September 2016).
[35] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1st edn, Clarendon Press 1789) 108.

appointments, transfers and elevations for public consumption.[36] The information posted online will also 'indicate' reasons for the recommendation or rejection of a name for judicial appointment, transfer and elevation to High Courts and the Supreme Court. The Supreme Court has also started taking concrete action by already posting its October 3, 2017 recommendations for judicial appointments to the Madras High Court and the Kerala High Court under the tag 'Collegium Resolutions'. This was undoubtedly an unprecedented effort in bringing transparency in the collegium system. The authors looked at the updates that were uploaded on the official website of Supreme Court and personally found many loopholes in the present system. The loopholes that authors have reasoned are as follows:

Firstly, the system is voluntary for the Supreme Court and there is no statutory provision that guarantees that the judges will really adhere to the rules of this proposal. Something that is purely voluntary and does not have a statutory or legal compulsion is highly unlikely to be successfully implemented. Long back in 2010, the Delhi High Court upheld an order empowering a citizen to seek details of assets of judges of Supreme Court and High Courts under the RTI ACT, 2005.[37] Prior to this judgement in 2009, the SC judges under the helm of K.G. Balakrishnan adopted a resolution to make a public disclosure of their assets and liabilities on the official website of the Supreme Court.[38] That this resolution has largely remained on paper is proved by the fact of the twenty-seven present SC judges, only fourteen judges have disclosed their assets.[39] No legal sanction being attached for non-compliance against judges who do not disclose their assets on the SC website has made the whole endeavour futile. However, it is equally true that the decision of the Delhi High Court Judgement[40] prevails as the law of the land as it has not been appealed against in the Supreme Court. A mere resolution even if it passed by the Hon'ble Supreme Court cannot be a complete solution unless it is made binding on judges. Therefore, the need of the hour is to give a statutory recognition to the Supreme Court's resolution of making public disclosure of

[36] Krishnadas Rajgopal, 'Now, SC Collegium to Make Judges' Appointments transparent SC Collegium to Make its Recommendations Public' *The Hindu* (Ahmedabad, 6 October 2017) <www.thehindu.com/news/national/sc-collegium-to-make-its.../article19807802.ece> accessed 8 October 2017.
[37] *Secretary General, Supreme Court v Subhash Chandra Agarwal* AIR 2010 Del 159.
[38] Dhananjay Mahapatra, 'Supreme Court Judges to Disclose Assets' *The Times of India* (Delhi, 27 August 2009) <http://timesofindia.indiatimes.com/india/Supreme-Court...to-disclose-assets/.../4938536.cms> accessed 2 October 2017.
[39] Murali Krishnan, '#JudgesNetWorth: Assets of 13 Supreme Court judges yet to be published on SC website' (*Bar & Bench*, 2 October 2017) <https://barandbench.com/assets-supreme-court-judges/> accessed 2 October 2017.
[40] *Secretary General, Supreme Court v Subhash Chandra Agarwal* AIR 2010 Del 159.

judicial deliberations because as long as it does not assume the character of a law passed by Parliament or prescribes penalty for non-performance, the resolution shall largely remain illusory.

Secondly, the resolution of the SC said, "*The decisions henceforth taken by the Collegium indicating the reasons shall be put on the website of the Supreme Court, when the recommendation(s) is/are sent to the Government of India, with regard to the cases relating to initial elevation to the High Court Bench, confirmation as permanent Judge(s) of the High Court, elevation to the post of Chief Justice of High Court, transfer of High Court Chief Justices / Judges and elevation to the Supreme Court, because on each occasion the material which is considered by the Collegium is different*".[41] The recent update that was uploaded on the official website of Supreme Court[42] regarding the elevation of judicial officers to the Madras High Court has put forward very vague reasons for appointment. The recommendation for elevation to High Courts was made on the basis of one-liner laudatory phrases like 'very good integrity' or 'good reputation as Judicial Officer' 'intellectual acumen as befitting for a Judge of the High Court' or 'quite suitable for appointment as Judge of the High Court'.

Thirdly, the resolution had not mentioned any concrete ground for elevation to the High Courts. Just mentioning the number of collegium members who have expressed views in favour of such elevation, the marking of judgements of the candidates as 'Good/Average' by the Judgment Committee[43] are indeed very vague. How can the Judges who delivered average quality judgements be elevated as permanent Judges by the collegiums? Concrete and reliable grounds of appointment may be describing the number of judgements delivered, the quality and impact of the judgements, experience, past background of the Judge as a lawyer or as a Judge.

Fourthly, when one of the candidates was rejected, no ground of rejection was mentioned. Only that one collegium member has not found him suitable for elevation, that his name was rejected by the Collegium of the Calcutta High Court and the Government of West Bengal were mentioned.

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[41] Supreme Court Collegium, 'Re: Transparency in Collegium System' (*Supreme Court of India, 3 October 2017)* <http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf> accessed 10 October 2017.

[42] Supreme Court Collegium, 'Appointment of three Judges of Kerala High Court' (*Supreme Court of India*, 3 October 2017) <http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Kerala-3%20JOs.pdf> accessed 25 October 2017.

[43] Supreme Court Collegium, 'Appointment of three Judges of Madras High Court' (*Supreme Court of India*, 3 October 2017) <http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Madras-4%20JOs.pdf> accessed 25 October 2017.

Moreover, the recommendation had mainly relied on the reports of the Intelligence Bureau that is hugely susceptible to executive pressure and influence.

Thus, above-mentioned contentions lead us to the conclusion that the SC Collegium Resolutions are only providing some sketchy and imprecise reasons for recommendation. No exhaustive list of reasons, no uniform set criteria, for recommendation was provided.

CONCLUSION

There have been endless controversies related to transfer of Judges in India, the recent most being the Justice Jayant Patel controversy. The opaqueness of the collegium system is invariably linked to the irregularities in judicial transfers. Thus, if the collegium incorporates the elements of *glasnost* (transparency and openness) and *perestroika* (reform and reconstruction)[44] automatically the transfer procedure will become more transparent and accountable. The SC has already decided to disclose judicial proceedings on its official website and thus it is a very welcome step. However, this resolution of the SC is voluntary in nature with no legal or statutory basis and thus the resolution is likely to not be properly implemented. Mere disclosure of collegium resolutions is not the remedy to the malady. Disclosure of proceedings should also include uniform criteria, concrete reasons, reliable sources and valuable inputs for recommendation of transfer. In this way, the opaqueness of the collegium proceedings may be reduced to an extent and this in turn will help to ascertain whether the transfer of a Judge is really in the interest of the public or not.

The transfer of a judge without his consent is essentially punitive, because it inflicts pain damage or loss regardless of the fact that a Judge is just, honest, and upright or that he is unjust, dishonest and unrighteous. A Judge can be punished only by impeachment under Article 124(4)[45] and not by way of transfer. Since, transfers by way of punishment is clearly outside the purview of Article 222(1), and non-consensual transfers are inherently punitive, the authors are of the view that the Supreme Court should reconsider its previous views and declare non-consensual transfers violative of the basic constitutional tenet of the independence of judiciary.

[44] *Supreme Court Advocates on Record Assn v Union of India* (2016) 5 SCC 1.
[45] Constitution of India 1950, art 124(4).

The authors would end this article by quoting Justice Krishna Iyer, '*Even so, the creed of judicial independence is our constitutional 'religion' and, if the executive use Article 222 to imperil this basic tenet, the Court must 'do or die*.'[46]

[46] *Union of India v Sankalch and Himatlal Sheth* (1977) 4 SCC 193.

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