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THE INDIAN JOURNAL OF LAW AND PUBLIC POLICY

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FOREWORD

The origin of law begins with the origin of society itself. While centuries of writings have gone into the analysis of social contracts which supposedly led to the creation of modern civilization, the very essence of society is an ordered community, based on the rule of law.

The interrelation between law and the people, however, has seen tumultuous evolution throughout the history of humankind. While historical legal instruments such as the Magna Carta and the ancient Cyrus Cylinder were path breaking in providing greater autonomy to individuals, the law has often been used to muzzle the *vox populi*, whether during the reign of the incorrigible Louis XVI ,who famously claimed '*L'etat c'est moi'* (I am the State), the laws of the Leviathan-like Third Reich or even in modern day instances where the law and the legal process have been used to legitimize injustice.

Ideally, the law should be the product of democratic and deliberative processes. Outdated laws, such as numerous colonial laws of the past (which I have personally sought to remove from the statute books through my private member's bills), are hurdles for a progressive and forward-thinking society. There is always a need to question, revise and update the law. Aristotle's prescient dictum that '*even when laws have been written down, they ought not always to remain unaltered*', ought to be adhered to by the law makers and judges alike. The legendary President of the United States of America, Abraham Lincoln, in his First Inaugural Address, had correctly observed that '*no foresight can anticipate nor any document of reasonable length contain express provisions for all possible questions.*' It is important to read the law harmoniously with the times we live in, and to update it to meet various challenges from time to time. In India, the colonial-era rule of law was often applied with excessive deference to the skin colour of the defendant. In our more egalitarian times, the failure to question and debate the law often is the path towards an unjust and oppressive society.

Legal writing therefore plays an essential role in the deliberative process in any modern democracy. In fact, the development of modern democracy itself finds its intellectual foundation in legal critique and authorship. Montesquieu's treatise on the separation of powers laid the foundation of the Constitutional mechanism of modern democracies. The writings of Hugo Grotius, Francisco de Vitoria and Alberico Gentili helped mould the very concept of International Law. Similarly, the wealth of ancient Indian jurisprudence came from the commentaries and critiques of various classical texts. Therefore, legal analysis and critique is a lifeline for the growth of law.

While the law must be respected, it is not immune from critiques and revisions. Similarly, while the judgments of the Supreme Court of India are final, they are not infallible and must be subjected to rigorous scrutiny and discussions. Legal lacunae can only be bridged after being identified through scholarly and academic analysis. Let us not forget that the incredible instrument for social revolution, the Constitution of India, was born after lengthy debates with scrupulous attention to each Article by the members of the Constituent Assembly.

Legal journals such as *The Indian Journal of Law & Public Policy* therefore facilitate a crucial aspect of our democracy, by providing a platform for deliberation as well as for dissemination of innovative ideas and concepts.

My best wishes to the editorial team of IJLPP. I whole heartedly extend my good wishes and support to such publications, which eventually enrich the law and thereby society itself.

Shashi Tharoor
Member of Parliament, Lok Sabha

CONCEPT NOTE

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

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

(EDITOR IN CHIEF)

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AN ARMISTICE BETWEEN RIGHT TO PRIVACY AND RIGHT OF SURVEILLANCE

*Varun Kalra and Ramisha Jain**

ABSTRACT

The Supreme Court on 24 August, 2017 upheld the Right to Privacy.[1] Despite this proclamation, a major question remains still unanswered that "What does privacy mean for India".

"What would be the impact of the change in WhatsApp's privacy policy on the users? Is Aadhar a surveillance mechanism? These are the issues which are still dominating the cause list of Supreme Court of India today. The Indian Judiciary has recently answered a question which will have a lingering effect on the Indian democracy, that is, do the Indian citizens have a right to privacy? According to Black's law dictionary, right to privacy is, "right to be let alone; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned". However, this right has been in conflict with the right of surveillance by the sovereign since time immemorial. And since the announcement of the Aadhar Card Scheme, the tussle between the two has been gaining ground.

This paper aims at critically analysing the legal position of right to privacy in India by tracing the case- by- case development of this newly acknowledged right. Also, this paper seeks to discuss the controversies involving the right to privacy, understand the need for a comprehensive privacy policy and to assess the use and abuse of right of surveillance. The object of this paper is to offer recommendations to end the tussle between the right to privacy and right of surveillance, by clearly laying down the restrictions on right to privacy, by recognising surveillance agencies and providing for a code to limit and prevent the abuse of their powers and ultimately, establishing an interface between the right to privacy of the citizens of India and the right of surveillance by the government of India.

INTRODUCTION

The Ghost of Christmas Past, Right to Privacy, had decided to reappear with the Aadhar case.

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[1] Justice K.S. Puttaswamy and Ors. v. Union of India (UOI) and Ors., (2017) 6 MLJ 267.

Not only did this issue once again sparked off the debate that whether the right to privacy is guaranteed under Article 21 of the constitution or not, but had also renewed the fierce battle between right to privacy and right of surveillance.

With the recent change in WhatsApp's privacy policy, questionable use of information by UIDAI and the growing tussle between the government agencies for more lethal surveillance systems, demand for privacy and freedom of speech and expression has been gaining ground. The right of privacy of the citizens and the right of surveillance of the State are once again at loggerheads.

The need for privacy flows from the growing individualistic society, a modern phenomenon.

According to *Black's Law Dictionary*, right to privacy is, "right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned".

As per Article 12 of the Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Right to Privacy is guaranteed in the American Constitution under the Fourth Amendment. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures and requires any warrant to be judicially sanctioned and supported by probable cause. It is part of the Bill of Rights and was adopted in response to the abuse of the writ of assistance, a type of general search warrant issued by the British government and a major source of tension in pre-Revolutionary America.

However, until recently, there was no such explicit guarantee, under the Indian Constitution or so it was argued. According to Article 21, "No person can be deprived of his life and personal liberty except according to the procedure established by law". The question is whether Right to life and Personal Liberty include the Right to Privacy.

Amidst the controversy between National Security and the Fundamental Rights of the people, it's the Indian citizen who is in a no-win situation.

It is a widespread idea that terrorism is a product of globalization and the Internet is a tool used by the terrorists to communicate. Hence governments all around the world believe that surveillance is the most effective methods

of detecting and prosecuting terrorists. All the movements, actions, interests, ideas and everything else that could define a common man or an individual can be known by surveillance. Mass-surveillance as we know today has been in practice since many years. Today, whatever we do, from the moment we switch on our cell phones, to navigating to a location using Google Maps, to catching a metro/bus with CCTV cameras, to using our credit cards for an online or offline purchase, we leave a digital trail behind us. The government is capable of knowing our medical history, routine, preference of food, religion, places of visit, the movies we watch, the place we shop from, what we purchase, whether we are having an affair or not, everything. All these things are easily accessible through our digital trails, some of which we ourselves provide to them by updating our statuses on WhatsApp, Snapchat, Facebook etc. It is the appalling truth behind constant surveillance that the government carries out on us.

Moreover, with the global surveillance disclosures, right to privacy has become a subject of international debate. To combat terrorism, government agencies are undermining this right. Another question which now needs answering is that whether privacy needs to be forfeited as a part of social contract. Hence, it is of utmost importance that the battle between the two above stated rights is brought to an end.

RIGHT TO PRIVACY IN INDIA AND ITS LEGAL POSITION

Right to Privacy is not enumerated in the Indian Constitution, but the Indian Judiciary has from time- to- time debated on the existence of this right in the Indian Legal Framework and has culled the same from Article 21.

(A) 1950- 2000

In, *M. P. Sharma v. Satish Chandra*[2], it was held that, when the constitutional makers themselves did not recognise the fundamental right to privacy, then an analogy needn't be drawn with American Constitution in order to import this right "by some process of strained construction" and thus, the existence of right to privacy in India was denied.

However, in *Kharak Singh v. State of UP*[3], the apex court while acknowledging the existence of right to privacy held that, despite the right not being expressly declared as a fundamental right, it is "an essential ingredient of personal liberty". The legal position of the disputed right was upheld in *Gobind v. State of Madhya Pradesh*[4], wherein the bench held that "*the right to privacy*

[2] AIR 1954 SC 300.

[3] AIR 1963 SC 1295.

[4] AIR 1975 SC 1378.

in any event will necessarily have to go through a process of case-by-case development." Mathew, J. accepted "the right to privacy as an emanation from Art. 19(a), (d) and 21, but right to privacy is not absolute right." Reiterating the same in *R. Rajagopal v. State Of T.N.*[5], or better known as the Auto Shanker case, it was held that "*A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. No one can publish anything concerning the above matters without his consent, whether truthful or otherwise whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in the action of damages*."

(B) 2000-2016

It was held in *Sharda v. Dharampal*[6] that the right to privacy is subject to restrictions. It is not enshrined in the Indian Constitution but has been drawn out from the extensive interpretation of article 21. Also, in *District Registrar and Collector, Hyderabad and another v. Canara Bank and another*[7], another two-Judge Bench held, while accepting the implicit existence of right to privacy in India, that the right to privacy dealt with persons and not places. One of the most prominent and recent case dealing with right to privacy is *Ram Jeth Milani v. Union of India*[8], wherein the ratio of the case was *"Right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner."* Another recent landmark judgement on the same is of *Amar Singh v. Union of India*[9], where it was upheld that it was the Court's duty to protect the right to privacy. Also in *Thalappalam Ser. Coop. Bank Ltd. and Ors. v. State of Kerala and Ors*.[10], the honourable Court held that right to privacy falling under Article 21 of the Indian Constitution is not absolute and needs to regulated in public interest as in the modern state, no right can be absolute. But it was finally in the Aadhaar card case i.e. *Justice K.S.Puttaswamy(Retd)& Anr v. Union Of India & Ors*.[11], it was suggested that in order to settle the legal position of the right to privacy,a constitutional bench must be established.

[5] AIR 1995 SC 264.

[6] AIR 2003 SC 3450.

[7] (2005) 1 SCC 496.

[8] 4 July, 2011, Supreme Court of India.

[9] 11 May, 2011, Supreme Court of India.

[10] 2013 SCJ 7 862.

[11] 11 August, 2015, Supreme Court of India.

(C) 2017

The Apex Court on 24th August, 2017, while reaching out to the foundation of constitutional culture of India, proclaimed Privacy as a postulate of human dignity. They acknowledged that privacy lies across the spectrum of protected freedoms and is the ultimate expression of the sanctity of an individual. While commenting on the nature of privacy, the Court ruled that while the individual is entitled to a zone of privacy, its extent is based not only on the subjective expectation of the individual but on an objective principle which defines a reasonable expectation. Inspite of having settled the legal position of this much disputed, a comprehensive privacy policy is needed to establish a delicate balance between the legitimate concern of the State and individual interest[12].

RECENT CONTROVERSIES ON RIGHT TO PRIVACY

Currently there are many cases and appeals pending in various courts in India the substratum of which is the right to privacy.

Firstly, in the **Naz Foundation** case, the Apex Court of India, is hearing a curative petition on § 377 of Indian Penal Code, which criminalises consensual homosexual sex between adults. The section reads as follows: "Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with impris-onment of either description for a term which may extend to ten years, and shall also be liable to fine."[13]

The High Court of Delhi in 2009, decriminalised consensual homosexual sex in *Naz Foundation v. NCT of Delhi*[14] and held, *"The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21. § 377 IPC denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, § 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the*

[12] Justice Puttaswamy (Retd.) and Anr. v. Union of India and Ors., W. P. (C) No. 494 of 2012 and W. P. (C) No. 000372/2017, 24 August, 2017, Supreme Court of India.

[13] Indian Penal Code (45 of 1860), § 377.

[14] 160 Delhi Law Times 277.

Constitution."

However, the Supreme Court of India, in appeal, overturned the judgment of the Delhi High Court in the case of *Suresh Kumar Koushal & Anr vs Naz Foundation & Ors*[15].

In 2014, the Supreme Court, in a landmark judgement, directed the government to treat the transgenders as the 'third gender' and to include them in the OBC quota. But the matter pertaining to § 377 is still pending.

Secondly, the **Aadhar Card** scheme has been under attack ever since its institution. However, the Apex Court, in the case of *Justice Puttaswamy v. Union of India*[16], quelled the debate for a while by holding that the information obtained by the authorities will have restricted use i.e. for PDS Scheme, and will not be sued for any other purpose, except by the leave of the court for the purpose of criminal investigation. Further, it recommended the institution of a constitutional bench to determine the legal position of right to privacy. Yet, after some time, the Aadhar card issue reared its head again. It is being referred to as an undemocratic way which is being used to take away the right to privacy. Many believe that Aadhar Card Scheme is being converted into the world's biggest surveillance system by obtaining biometric and linking the card to services such as filing of Tax Returns, Bank Accounts etc. A constitutional bench headed by the then CJI, H.L. Dattu, held that Aadhar card is to be voluntary and not mandatory, however, it is being made mandatory for certain schemes, for example it has been made mandatory for availing of minority students' scholarships. In some ways, the policy decisions around Aadhar can be seen as illustrative of erosion of Parliament, for ex., Money Bill aspect of Aadhar card. Moreover the Standing Committee of Finance of 15th Lok Sabha had observed that the scheme was "ladled with lacunae" and was ambiguous. The Committee was of the opinion that a comprehensive privacy law is a prerequisite of the scheme. It is also an erosion of the rights of the citizens. Despite the defence and clarifications offered by Nandan Nilekani, the brain behind the UIDAI, it can be seen that this scheme is not only questionable but has failed on several metrics. Recently, the Aadhar details of 10 lakh citizens were made public by Jharkhand Directorate of Social Security due to a programming order, which further fuelled the debate surrounding the scheme.

Thirdly, the **WhatsApp Controversy**, Karmanya Singh Sareen and Shreya Sethi had filed a PIL with respect to change in privacy policy of WhatsApp without informing users

[15] 11 December, 2013.

[16] 11 August, 2015, Supreme Court of India.

which does not amount to fair practice and is moreover, hit by the principle of estoppel. WhatsApp, after being acquired by Facebook had started sharing the information of the users with Facebook in order to improve advertisements and product service. A bench of the Delhi High Court headed by the then CJ G. Rohini, granted partial relief and ordered WhatsApp to delete all the user information till 25 September, 2016, however, the bench did not declare the sharing of information by the enterprise in the future as illegal by stating that the users who do not wish for their information to be shared to opt for the deletion of WhatsApp account. An appeal was filed with respect to the latter part of the judgment, which is currently pending before the constitution bench of the Supreme Court.

LEGISLATIVE ATTEMPTS TOWARDS SECURING RIGHT TO PRIVACY

There have been various legislative attempts to secure the right to privacy, however, they have not been very successful. *Firstly*, as per the **Information Technology Act, 2000,** when a body corporate fails to protect personal data it owns or controls, such body corporate shall be liable to pay damages by way of compensation[17].

*Secondly***, Venkata Challiah Commission**, the National Commission to review the working of the Constitution (NCRWC) also known as Justice Manepalli Narayana Rao Venkatachaliah Commission was set up on 22 February 2000 for suggesting possible amendments to the Constitution of India. The commission recommended the insertion of Article 21B in the Indian Constitution, which would read as follows:

"21-B. (1) Every person has a right to respect for his private and family life, his home and his correspondence.

(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in the interests of security of the State, public safety or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others."[18]

Unfortunately, it took fifteen years from the date of submission of this report to accept Right to Privacy as a Fundamental Right, and yet, a comprehensive privacy policy is yet to be devised.

[17] Information Technology Amendment Act, 2008, § 43A.

[18] Justice Venkata Challiah Committee Report, Vol. 1, 3.12, http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm.

Finally, despite there being three **Right To Privacy Bills,** neither of the bills have been given the status of a statute. As per the bills, Right to privacy could not be infringed except according to provisions of the act or law. The grounds for infringing the right to privacy included: (a) sovereignty and security of India, technical and economic interests (b) preventing incitement to the commission of an offence (c) prevention of public order or for detecting crime (d) protection of freedom and rights of others (d) in the interest of friendly relations with foreign states (e) any other purpose specifically mentioned in the act[19]. As per the bills, (a) collection, storage, processing and disclosure of personal data, (b) interception or monitoring of communication of individuals, (c) surveillance of individual constitute the infringement of right to privacy[20]. Provisions were made for the establishment of Data Protection Authority of India, National Data Control Registry and Appellate Tribunals. Penalties for violating right to privacy have also been incorporated in the bill, for example, penalty for undertaking surveillance in certain cases would be imprisonment for five years.

NEED FOR A COMPREHENSIVE PRIVACY POLICY

Democracies survive on a delicate balance of power between the government – and the citizens. The more power citizens get, the more robust the democracy. As the government accrues more power to itself, it erodes democracy to a point where it ceases to exist. Thus, privacy is essential to a democracy as it provides for personal autonomy, gives an opportunity for emotional release and self-evaluation. Therefore, there's a need for a comprehensive privacy policy. *Firstly*, to offer **protection from surveillance, search and seizure.** The issue of protection from surveillance was dealt with in Kharak Singh v State of UP[21], wherein the Police abused its power of surveillance, by forcibly entering the plaintiff's house and searching it, keeping a close watch on him, dragging him at times to the police station etc. Hence, the citizens need to be protected from such arbitrary exercise and abuse of power.

Secondly, for the **privacy of the body.** The citizens have an exclusive right over their body, they need to be given the liberty to choose and decide what's correct for them. For example, the Medical termination of Pregnancy Act prevents a woman from exercising her right of abortion by permitting abortion under certain circumstances only. The other issues which fall

[19] Right to Privacy Bill, 2011.

[20] *Supra.*

[21] AIR 1963 SC 1295.

under the ambit of Medical Privacy are: the ability of the state to order persons to undergo medical-examination and to submit to DNA testing in civil suits, to undergo a range of 'truth technologies' including narco analysis, brain mapping, etc., *Thirdly,* to **Protect reputation.** This issue emanates from the Auto Shanker case[22]. With the growing technology and increasing role of media, a mechanism for the protection of reputation is of utmost importance. And *finally,* for the **protection of records, communication and protection from interception in the digital age:** It was in People's Union for Civil Liberties v. Union of India[23], or better known as the Telephone-tapping case, that the question of intimate and confidential nature of communications was brought under the scanner, and the right to privacy was upheld. Therefore, in this digital age, with the increasing rate of cybercrime, a comprehensive privacy policy is inevitable.

SURVEILLANCE

"Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say."

— Edward Snowden

When in 2013, the whistle-blower contractor of USA's National Security Agency (NSA), Edward Snowden, quivered the world by disclosing the extensive global surveillance programs by the US Government; the worldwide perception of the common man, that even the world's largest democracies are free from governmental interference was shattered. Little did we know that even India had its own surveillance program, like NSA, since 2007. It enables the Indian Government to keep track in real time of 900 million mobile phones and landlines and 160 million internet users.

STATE AGENCIES AND SURVEILLANCE ORGANISATIONS

After the perturbing 26/11 terrorist attacks in Mumbai, the government of India introduced many data sharing and surveillance systems. The data sharing schemes being the National Intelligence Grid (NATGRID) and the Crime and Criminal Tracking Network & Systems (CCTNS) while the surveillance systems being the Central Monitoring System (CMS), Lawful Intercept and Monitoring (LIM) system and the Network Traffic Analysis system (NETRA) and many other state Internet Monitoring Systems. The purpose of these bodies is to increase public safety and national security by tackling crime and terrorism.

National Intelligence Grid (NATGRID) is an

[22] AIR 1995 SC 264.

[23] (1997) 1 SCC 30.

intelligence grid which will consolidate data gathered from various agencies and will link the databases of various departments and ministries of the government of India. It will serve as a one-stop shop for accessing the linked data by the intelligence agencies. Under NATGRID, 21 sets of databases will be networked to achieve quick, seamless and secure access to desired information for intelligence/enforcement agencies[24]

Crime and Criminal Tracking Network and System (CCTNS) on the other hand is a network that allows the collection, storage, retrieval, analysis, transfer and sharing of information relation to crimes and criminals across the country.[25] Since there used to be no database for the police officers to refer to, to gather and share any information about a criminal and store it virtually, CCTNS was implemented as an ambitious scheme by the Government of India, to maintain a record of crimes and criminals and to share the information with other police stations using computer and maintaining a connectivity between various police stations creating a hub of criminal information collected and stored by various police officers.[26] The access of the same will be provided to the police stations and to intelligence and national security agencies.

Central Monitoring System (CMS) is an interception system that enables government agencies to intercept communications without requiring court orders or needing to communicate with the telecom service providers. It is the most important surveillance system that monitors text messages, social-media engagement and phone calls on landlines and cell phones, among other communications. Once fully implemented, CMS will allow the government to "listen and tape phone conversations, read e-mails and text messages, monitor posts on Facebook, Twitter, or LinkedIn, and track searches on Google."[27] It will also empower the government to keep a real time track of our whereabouts using GPS embedded in our mobile phones.

Lawful Intercept & Monitoring (LIM) Systems

[24] Government of India, Ministry of Home Affairs, PRESS INFORMATION BUREAU, *Home Minister proposes radical restructuring of security architecture*, (December 23, 2009), http://www.pib.nic.in/newsite/erelease.aspx?relid=56395 .

[25] NATIONAL CRIME RECORDS BUREAU, Ministry of Home Affairs, http://ncrb.gov.in/BureauDivisions/CCTNS/cctns.htm (April 30, 2017).

[26] P. Chidambaram, Ex-Union Home Minister, *Ex-Union Home Minister's mission statement for NCRB under CCTNS*, CRIME AND CRIMINAL TRACKING NETWORK & SYSTEM (CCTNS), National Crime Records Bureau, Ministry of Home Affairs, http://ncrb.nic.in/cctns.htm.

[27] Editorial, "India sets up elaborate system to tap phone calls, e-mail" The Reuters, June 20, 2013, 2:46 AM, http://www.reuters.com/article/2013/06/20/us-india-surveillance-idUSBRE95J05G2 0130620

were deployed by the Government of India to monitor records of voice, SMS, GPRS data, details of a subscriber's application and recharge history and call detail record (CDR), emails, web browsing, Skype and any other internet activity. The LIM Program consists of installing interception, monitoring and storage programs at international gateways, internet exchange hubs as well as ISP nodes across the country. These programs help the government have an unfettered access to petabytes of user data on a daily basis.

Network Traffic Analysis (NETRA) is real time surveillance software developed by the Centre for Artificial Intelligence and Robotics (CAIR) at the Defence Research and Development Organization (DRDO). It is used to detect voice traffic from Skype, Google Talk etc. as well as detection of real time keywords and key phrases such as bomb, blast, attack etc. on social media, blogs, tweets, emails and instant messaging services. It is mainly used for tackling crime and terrorism in India.

Indian Computer Emergency Response Team (CERT-In) has been established under § 70B of IT(Amendment) Act 2008 to serve as an agency to regulate the cyber space and provide for cyber security by

(a) collecting, analysing and disseminating information on cyber incidents
(b) forecasting cyber security incidents by making use of information available on cyber space
(c) handling cyber security incidents
(d) issuing guidelines, advisories, vulnerability notes and whitepapers relating to information security practices, procedures, prevention, response and reporting of cyber incidents.

CERT-In has access to all the information available on cyberspace and the power to regulate the same.

Unique Identification Authority of India (UID scheme) or Aadhaar, currently referred to as a ticking time bomb, is a 12 digit unique-identity number issued to all Indian residents. It is based on their biometric and demographic data which is collected by the Unique Identification Authority of India (UIDAI), a statutory authority established under the Aadhaar Act 2016. It is the world's largest biometric ID system, with over 1.133 billion enrolled members as of 31 March 2017. The government by linking all the services with the UID number can easily monitor anyone continuously. [28]

Lastly, the National Counter Terrorism Centre (NCTC). The 26/11 attacks led to the genesis of

[28] Binoy Viswam v. Union of India, MANU/SC/0693/2017.

NCTC. Based on the model of American NCTC and British Joint Terrorism Analysis Centre, the Indian NCTC, derives it powers from Unlawful Activities Prevention Act, 1967. However, the establishment of the NCTC would lead to concentration of powers pertaining to intelligence and operation, which would disrupt the autonomy of the states and would add to the bureaucratic tangle.

LEGISLATIONS SUPPORTING SURVEILLANCE

Erstwhile, the only substantive law supporting the state surveillance activities was the Indian Telegraph Act, 1855; however, with the technological boom and revolution, the Information Technology Act, 2000 was introduced to facilitate internet surveillance.

According to § 5(2) of the **Indian Telegraph Act, 1885**, "On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order: Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

While § 5(2) forms the substantive part of the law, the procedure for the same is prescribed under **Rule 419A of the Indian Telegraph Rules, 1951**, introduced via amendment Act of 2007. As per this rule, the direction for interception, as specified in § 5(2) of the Indian Telegraph Act, can only be given by Union/ State Home Secretary. However, in unavoidable circumstances, a lawful order may be issued by, with the prior permission of the Union or State Home Secretary, an officer not below the rank of Joint Secretary to GoI. Pursuant to Rule 419A, service providers required by law enforcement to intercept communications are mandated to comply with certain provisions which include the appointment of nodal officers to deal with interception requests and to prevent

its unauthorised usage. The licenses of the service providers stand to be revoked on non-compliance of these rules, resulting in breach of secrecy.

Sections 69 and 69B of **Information Technology Act, 2000** pertain to matters of web surveillance. § 69, is similar to § 5(2) of the Indian Telegraph Act, 1855. It provides for interception, monitoring and decryption of computer sources by Central and State Governments in national interest. While § 69B, grants the Central Government the "power to authorize to monitor and collect traffic data or information through any computer resource for Cyber Security"[29].

Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 lay down the procedure for invoking § 69 of the Information Technology Act, 2000 and is a replica of Rule 419A (as stated above).

Information Technology (Procedure and Safeguards for Monitoring and Collecting Traffic Data or Information) Rules, 2009 prescribe the procedure for invoking § 69B of the Information Technology Act, 2000 and is near- identical to rule 419A.

As per Rule 6 of **Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011,** a body corporate though disallowed from divesting information to a third party without the consent of the provider, may disclose the same without consent of the provider to the government agencies mandated under law for the purpose of verification, investigation etc.

Rule 3(7) of **Information Technology (Intermediaries Guidelines) Rules, 2011,** requires the ISP's etc., under a lawful order to provide authorized government agencies with information for identity verification etc.

As per Rule 7, **Information Technology (Guidelines for Cyber Cafe) Rules, 2011,** an officer may investigate the records of a cyber cafe and the owner has to comply with same and provide all the records, search history etc.

Aadhar Act, 2016 is one of the most controversial acts, it was passed by the Lok Sabha in March, 2016 to provide a legal backing to the UIDAI Scheme.

The government is in the process of developing rules for the compliance of § 67C of the IT Act, 2000, which may require the ISP's and Applications like Facebook etc. to store and collect data. For this purpose, the **Data Retention Rules Bill** has been drafted.

[29] Information Technology Act, 2000 (Act 21 of 2000), § 69B.

These rules put in place several checks and balances and try to ensure that there is an established "chain of custody" and paperwork for each and every detection and interception request. The assumption is that with a clearly defined chain of due diligence and paperwork, the possibility of unauthorized interception is reduced, which ensures that the powers of the interception are not misused. However, although these checks and balances exist on paper, there is not enough information in the public domain about the whole mechanism of the interception for anyone to make a clear judgment as to whether the system in fact reduces the number of unauthorized interceptions.

INCIDENTS

Surveillance in India can be traced back to the A. K. Gopalan case, however, the issue of mass surveillance was raised in the "Telephone-tapping" case. Recently, apart from the WhatsApp and Aadhar card issue, surveillance reared its head in the **BBM case (2012)**.

Blackberry allowed the government agencies access to personal messages on the messenger post certain proposal from the Government of India. Next, in 2012, **The Hindu** released a report according to which several mobile phones were under scanner.[30]

Moreover in 2011, **Mr Milind Deora,** had (in Rajya Sabha) informed that the government had acquired technology to monitor contents on internet and had started surveillance on Facebook and Twitter.[31]

CONSTITUTIONALITY OF RIGHT OF SURVEILLANCE

Ever since their inception, the surveillance systems have had to navigate through muddy waters, with their constitutionality being questioned time and again. Various international statutes provide for the protection of rights and freedoms of citizens.

Article 19 of UDHR and ICCPR guarantee the right to freedom of opinion and expression. These articles hold that everybody has the right to hold opinions without interference and to obtain and convey information and ideas through any media, regardless of the boundaries. Unrestricted freedom of expression and expression, as provided by the UDHR and the ICCPR will be impossible if people have to live

[30] Editorial, *10000 phones and 1000 email Ids under scanner*, THE HINDU REPORT, (October 12, 2012), http://www.thehindu.com/news/national/10000-phones-1000-email-ids-under-the-scanner/article3992185.ece.

[31] Ranjit Sur, *People under surveillance, privacy law for whom?,* (November 5, 2012), http://sanhati.com/excerpted/5753/.

in constant fear of the sanction for their unpopular opinions or information, even in private forums. Furthermore, Articles 12 and 17 of the UDHR and the ICCPR guarantee the Right to Privacy. General Comment No. 16 (1988) by the Centre of Civil and Political Rights (CCPR) adopted by the United Nations Human Rights Council (CCPR) states that Surveillance, whether it was electronic or otherwise, interception of telephone, telegraphic and other communication forms, wire-tapping and recording of conversations, should be prohibited. The storage of information on computers, databases and other devices, whether by public bodies or individuals or corporations, must be regulated by law. No one should be subjected to arbitrary interference with privacy, family, home or correspondence or to attacks upon his honour or his prestige. Everyone has the right to the protection of the law against such interventions or attacks.[32]

Thus, the Indian Surveillance Systems must be formatted and reviewed, so that they are in conformity and in no in breach of these International Statutes and Standards.

In United States of America, the mass surveillance program of the National Security Agency (NSA) has been challenged as being unconstitutional by the American Union for Civil Liberties in the case of ACLU v. Clapper[33]. This is directly relevant to India, in view of our own Central Monitoring System (CMS) which goes much further. In addition to the submission of right to privacy, ACLU also argued that mass surveillance violated the freedom of association, implicitly mentioned in the American First Amendment and confirmed by a long series of cases. In India, this right is expressly guaranteed by the Constitution.

Alexander Abdo, Council for ACLU, stated in his arguments that "Imagine the government coming to your home every evening and forcing you to hand in all your calls for that day. Is not that a clear violation of *the Fourth and First Amendments?*" By repercussion, of course, this whole argument holds with the same force for Free Expression (Article 19 (1) (a)). There are, therefore, two questions which we must take into account: to what extent do Article 19 (1) (a) and Article 19 (1) (c) embody the Doctrine of the Chilling Effect; and what is the standard of security applicable according to Articles 19(2) and 19(4). There is a considerable amount of jurisprudence and precedents interpreting the "reasonable restrictions in the interests of sovereignty and integrity of India", and most of them point to a general proportionality test.

[32] UNIVERSAL DECLARATION OF HUMAN RIGHTS, (January 27, 1997), http://www.hrweb.org/legal/udhr.html.

[33] No. 13-3994 (S.D. New York December 28, 2013).

However, the sheer scale and the degree of mass monitoring require a more precise examination.

Various countries across the globe have expressly recognised the right to privacy. The emergence of modern legislation in this area can be traced back to 1970. The first data protection law in the world was passed in the state of Hesse in Germany. This was followed by Sweden (1973), the United States (1974), Germany (1977) and France (1978). Europe, in this crucial time developed two important instruments i.e. The Council of Europe's 1981 Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data[34]and the Organization for Economic Cooperation and Development's Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data[35] which enunciated specific rules for the handling of electronic data. The rules in these two documents form the core of the data protection laws of dozens of countries. These rules describe personal data as data which seeks to provide protection at every step i.e. from collection till storage and dissemination. The right of a person to access and change their data is an essential part of these rules. With these instruments, European Union also enacted two directives which provide the citizens with wide range of rights and protections against misuse of their data. It also enunciates right to know where the data originated, right to have erroneous data rectified and right to withhold grant and permission to use the data in certain circumstances.

The crippled surveillance systems devised in India, not only violate human and fundamental rights, but also are an epitome of arbitrary use of power. §. 5 (2) of the Telegraph Act and §. 26 (2) of the Indian Post Office Act outline a two-stage examination before the tapping of telegraph or postal articles. The first stage consists of sine qua nons in the form of an "occurrence of the public emergency" or "in the interests of public security". The second set of requirements according to the provisions is "the interests of the sovereignty and integrity of India, the security of the state, the friendly relations with the foreign states or the public order or the prevention of incitement to commit a crime." The sections consider a legal fiction in which a public emergency exists and it is the interest of the sovereignty, the integrity, the security of the state or the maintenance of public order / friendly relations with foreign states. However, the term "public emergency" has not been clearly defined by the legislature or the

[34] *Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data* Convention , ETS No. 108, Stasbourg, 1981.

[35] OECD, *Guidelines governing the Protection of Privacy and Transborder Data Flows of Personal Data* , Paris, 1981

courts. It, therefore, vests arbitrary powers in an official to order the interception of communication which violates fundamental rights. The Supreme Court in State of MP v. Baldeo Prasad[36] considered that a statute must not only provide adequate safeguards for the protection of innocent citizens, but also the administrative authority must be satisfied of the existence of the (clearly laid down) prerequisites before issuing an order with respect to the same. If the statute failed to do so in respect to any condition precedent, then the law suffered from a weakness and was deprecated as invalid. [17] The question of the existence of the public emergency which is left to the sole determination of an administrative officer can be challenged on the ground of being arbitrary and in contravention to Article 14 of the Indian Constitution.

Moreover, Surveillance, as practiced in India, violates Article 19 of the Indian Constitution. The fundamental rights referred to in Article 19(1) cannot be shortened in any way outside the relevant provisions of Cls. 2-6.[37] The restrictive clauses in Cls. (2) - (6) of Article 19 are exhaustive and must be interpreted strictly.[38] And the same has been disregarded by those framing the surveillance legislations.

Though the Right of Surveillance of the State for national protection is not per se unconstitutional, but the arbitrary and unregulated use of this right is unconstitutional. The Indian Legislation, hence, suffer from various loopholes.

USE AND ABUSE OF SURVEILLANCE

The Central Monitoring System (CMS) was approved by the Cabinet Committee on Security (CCS) on 16 June 2011. Since then, the CMS has been operated by India's Telecom Enforcement Resource and Monitoring (TERM) cells and has been implemented by the Centre for Development of Telematics (C-DOT). The government uses surveillance for intelligence gathering, prevention of crime, the protection of a process, person, group or object, or the investigation of crime. Basically is it used to maintain national security and prevention of terrorism. But is it justified to do so while taking a toll on the fundamental and human rights of the citizens? Will it be justified if an unfettered power is given to the government officials without any responsibility and liability? Who will be held liable for any misuse of such arbitrary power? How will they be punished?

[36] AIR 1961 (SC) 293 (296).

[37] Ghosh O.K. v. Joseph E.X. AIR 1963 SC 812; 1963 Supp. (1) SCR 789.

[38] Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305 (315); 1962 (3) SCR 842.

The existing Indian laws do not answer all these questions. The Central Monitoring System (CMS) was announced in 2011, but there was no public debate on it and the government has given little thought about how it will work or how it will ensure that the system will not be abused. The surveillance agencies have got unfettered access to all our personal data with no reliability for the misuse of the same. "No information has been made available about whose data will be collected, how the collected will be used, or how long the data will be retained."[39] There is no statutory redressal mechanism in case of illegal interception and monitoring of information and communications by the State. These agencies are exempted from disclosing information about themselves as per §. 8 of the Right to Information Act, 2005 and hence operate without judicial or legislative purview. Moreover, these Surveillance programs are not in conformity with any of the 'International Principles on the Application of Human Rights to Communications Surveillance'. Hence, it is natural to presume that the Surveillance system might be abused. Its present vagueness and excessive control over communication can create a potential for unprecedented abuse. "CMS will involve an online system for filing and processing of all lawful interception requests, an electronic audit trail will be in place for each phone number put under surveillance."[40] It is still unclear that who will audit the audit trail? The same ministry which authorizes the surveillance requests? Moreover, the surveillance cameras in public places can be misused by officials who want to harass or blackmail their political enemies or opponents. And the lack of any privacy laws in India makes the systems more vulnerable to misuse.

Thus, what we have here is a country with an extremely high level of corruption, no data protection laws, no strict privacy policy and an unregulated monitoring system which lacks public and parliamentary debate prior to its implementation.[41] "If India doesn't want to look like an authoritarian regime, it needs to be transparent about who will be authorized to collect data, what data will be collected, how it will be used, and how the right to privacy will be protected,"[42] Hence, the introduction of

[39] Stakeholder Report by the INTERNET DEMOCRACY PROJECT on *India's Universal Periodic Review: Third cycle*

[40] Editorial, *Govt tightens control for phone tapping*, TIMES OF INDIA, (Jun 18, 2013), http://timesofindia.indiatimes.com/india/Govt-tightens-control-for-phone-tapping/articleshow/20640273.cms?referral=PM.

[41] Maria Xynou, (January 30, 2014), https://cis-india.org/internet-governance/blog/india-central-monitoring-system-something-to-worry-about.

[42] Cynthia Wong, an Internet researcher at New York-based Human Rights Watch.

privacy legislations is the need of the hour. A solid framework and proper legislations are also needed to give a legitimate backing and to control all the functions of the Surveillance systems in India so as to make sure that the power is not misused or used arbitrarily. The legislations need to entail laws on the repercussions of misuse of data, to ensure the protection of rights of citizens against illegal interception of calls and messages, a basic framework and guidelines for deciding whose conversations and activities will be intercepted and also making an independent body to audit the interception of data. Without these measures the abuse of power can't have sighted and rectified.

Thus, to secure the safety of the nation and to balance the same with the rights of the individuals in a democratic nation, a regulated use of surveillance needs to be encouraged while its abuse should be discouraged.

CONFLICT BETWEEN RIGHT TO PRIVACY AND SURVEILLANCE

The Surveillance programs of the Indian Government are having pejorative impact on the civil and fundamental rights of the people. The right to Privacy has been held to be a part and parcel of Article 21 and has now been acknowledged as a Fundamental Right flowing from Right to Life. The IT Act also provides for the right to privacy and data protection. Even though the security concerns of the Indian Government may be justified, the protection of data and privacy can't be ensured by the government with such flawed schemes having no framework, set rules and regulations, penal provisions or accountability for the same. Further, the UID Project as of now does not provide for any safeguards for the protection of privacy nor does it prescribe any obligations on the government agencies.

Talking about the conflict between the right to privacy and surveillance, the latter subjugates the civil and fundamental rights of the people, who are left with no remedies. This can be proved by the fact that India hitherto does not have any Privacy legislations and the only elderly Privacy Bill is yet to see the light of the day, accentuating the conflict between Right to Privacy and Surveillance.

It poses an even greater threat on the privacy of the citizens because, albeit the right to privacy has been held to be the part of Article 21, the citizens won't be able to enforce it because most of these surveillance agencies require the Network Operators, Internet Service Providers (ISPs) and Telecommunications Service Providers (TSPs) like Bharti Airtel, Jio, Idea and Vodafone to intercept the data and are the actual ones who invade our privacy, yet not

falling within the definition of ‘State’ under Article 12.

It’s not just India, but these fundamental right violations are carried out in most of the democratic countries in the name of national security and public emergency. US State Department in its annual review found out that there are about 90 countries which are engaged in illegally monitoring the communications of political opponents, human right workers, journalists and suspected people. This poses a threat to the rights of the innocent people, so much so that for example, in Japan, the police were fined 2.5 million for illegally tapping the phones of the members of the Communist Party. Amidst the controversies like these in so many countries, there are countries who have successfully tackled this conflict. While dealing with the increasing surveillance practices, many countries have reacted by introducing specific rules governing the collection and handling of personal information. In these countries, the constitutional provisions pertaining to surveillance and privacy have been amended accordingly. One of the first legislations in this regard was passed in the Land of Hesse in Germany in 1970, followed by the laws in Sweden, 1973; USA, 1974; Germany, 1977 and France, 1978. The European Union had a major role to play in bringing about all these legislations which while protecting the rights of the people, ensure rightful surveillance for the purposes of maintaining national security. The ‘Council of Europe's 1981 Convention for the Protection of Individuals’ regarding the ‘Automatic Processing of Personal Data’ and the ‘Organization for Economic Cooperation and Development's Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data’ articulated the specific rules with respect to handling of electronic data. The rules have been given force by these two accords to ensure that the personal information gets protection at every step, from collection till its dissemination. The Conventions also allow the people to access and amend their personal data. These laws require the personal information to the obtained fairly and lawfully, and to be used only for the original specified purpose while making sure that the data collected is adequate, relevant and not excessive to purpose it is collected for. They also require the data to be accurate and up to date and most importantly ensure that it’s destroyed after its purpose has been completed. Thus, it is crystal clear that national security is a priority and must not be compromised due to the rights of few private individuals, however due consideration must be paid to the implications it has on the civil and fundamental rights of the innocent citizens.

IDENTIFICATION OF ISSUES AND RECOMMENDATIONS

The dispute over the existence of Right to Privacy in India and concerns over abuse of surveillance power by administrative authorities have existed since before independence. Thus, in order to protect the Indian democracy, to safeguard the fundamental rights and to exterminate threats to national peace and security and sovereignty, several changes need to be introduced. The recommendations are as follows:

1. **Comprehensive Privacy Legislation:** According to Article 21 no one can be deprived of their right to life except by the procedure established by law. Thus, the Indian Legislature should table, amend the Privacy Bills drafted in 2011, 2014 and 2016 to close all the loopholes and pass the same in order to provide the citizens of India with a cosmic privacy policy and to provide for a mechanism for the encroachment of privacy in certain cases.
2. **Justifiable reasons for impinging privacy:** While establishing a nexus between need and legitimate state aim and ensuring that means are proportional to object, the legislature should clearly lay down the justifiable reasons for infringing the Right to Privacy.
3. **§ 5(2) of Indian telegraph Act, 1855 and Sections 69 and 69B of Information Technology Act, 2000:** These sections support surveillance for protection of sovereignty, security of state, friendly relations, public order and prevention of offences, however, they fail to clearly define these terms. Hence, to prevent miscarriage of justice in the future, these sections should be amended and the explanations for the above mentioned terms should be incorporated.
4. **Rule 419A of the Indian Telegraph Rules, 1951:** The said rule refers to 'unavoidable circumstances' however, fails to offer an explanation of the same. Thus, this rule must be amended to explain the above phrase.
5. **Information Technology (Intermediaries Guidelines) Rules, 2011:** Rule 3(7) uses the terms 'lawful order' and 'request in writing' interchangeably, which leads to confusion and seemingly implies that a 'lawful order' as envisioned is a written letter from the government agencies and does not bear the force of law, thus inordinately simplifying the process and thereby, increasing the chances of abuse

of power. Therefore, it is essential to amend this rule prevent the future abuse of this rule.

6. **Aadhar Act:** The Aadhar Act must be amended and provisions should be incorporated to safeguard the rights and information of the citizens, and to increase the confidence of the citizens in the scheme.
7. **Development of strong encryption and data protection system:** The executive should focus on the development of a strong encryption and data protection system to safeguard the personal data of the citizens and to promote financial, medical, technical and generic privacy.
8. **Limiting discretionary powers of authority with respect to usage of personal data of individuals:** All the laws, as mentioned above, need to be amended to limit the discretionary powers of the concerned authorities with respect to the procurement and usage of personal data of the citizens.
9. **Enactment of statutes with respect to surveillance:** The confusion surrounding surveillance is leading to the development of fear amongst the citizens. Hence, statutes should be enacted to provide for Surveillance agencies by clearly stating their composition, duties and powers; also, the circumstances in which such surveillance may be permitted, and the procedure for surveillance must be codified. Provisions should be laid down to ensure accountability of surveillance agencies and officers and penalty should be imposed for abuse of power and for "failure to protect data"[43].
10. **Establish interface between the two rights:** Right to privacy and right of surveillance are two conflicting rights, yet, they need to coexist so that democracy can flourish and sovereignty and security of the nation can be maintained. Hence, the pillars of our democracy need to focus on paving a way for the coexistence of the two above stated rights by establishing interface between them.

CONCLUSION

After so many years and numerous judgments, Right to Privacy has been acknowledged. However, a clear picture is yet to emerge with respect to its extent. India is a democratic republic, and accordingly this right flows from the Constitution itself. Right to Privacy is not only implicit in but forms the backbone of

[43] Information Technology Amendment Act, 2008 (No. 10 OF 2009), § 43A.

Article 21. If there is no privacy, then how can personal liberty be recognized. Also, if there is no privacy then isn't the concept of life equivalent to mere animal existence? Thus, the Supreme Court while recognising privacy as a fundamental right held that pursuit of happiness is founded upon autonomy and dignity.

It is through brute force and guile, unrestricted surveillance ensures an omnipotent and omnipresent government that will have suspicion of its citizens as the default option, which is exactly how democracies come to an end – by giving the ruling oligarchy unbridled power to keep the citizens under watch so that they are rendered incapable of questioning them. Moreover, this is the age of information, wherein, information is power and internet is all pervasive. Thus, there are stark implications on the position of the individual where data is ubiquitous.

Thus, an interface needs to be established between the rights after clarifying their legal position, imposing limitations and reasonable restrictions on them.

COPYLEFT: "COPYING" DONE "RIGHT"

*Arushi Maheshwari & Kartik Agarwal**

"For masterpieces are not single and solitary births, they are outcome of many years of thinking in common, of thinking by the body of the people, so that the experience of the mass is behind the single voice."

Virginia Woolf, A Room of One's Own, 1929

ABSTRACT

Since its inception, mankind has come a long way. And ever since then, it has been continuously evolving towards a better world. Humans tend to develop new ideas over already accumulated knowledge and thereby constantly enhancing the existing knowledge. Soon after realizing their worth, copyright came into existence, protecting such ideas and giving their thinker a monopoly over it. However, subsequently came the concept "copyleft", standing for how there should be a free movement of information and knowledge in society. "Copyleft" (wordplay of copyright itself) is the practice where a work is freely distributed amongst the public with the right to modify or amend it and hence making it a form of licensing just like copyright, only in a contrary sense. Where the Copyright license empowers the author to prohibit others from using, modifying or reproducing his work, Copyleft on the other hand empowers the author to freely distribute his work to the public for the purpose of using, adapting, modifying or reproducing it. To Copyleft a program, it is first protected as copyright and later by the means of distribution terms it's made available to everyone for the purpose of modification, distribution or reproduction with the term that any such act will not further restrict such right. Copyleft is both, highly supported and criticized by socialists and capitalist respectively. Surprisingly, this movement is extending its reach in multiple directions which also include art and religion (Kopimism).[1] This article deals with the history and present status of copyleft, issues with copyleft in relation to competition law, moral rights, etc., theory of Kopimism and the relevance of Copyleft in today's society.

Key Words – Copyleft, Free Access, Uncopyrighted

INTRODUCTION

There always have been debates about how the information should flow in the society but lately

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there has been an upsurge in demands of free and 'accessible to all' information around the globe. Whether should it be free for everyone to use or should it be the sole property of the owner who is the author of such information. This question regarding free flow of content throughout had a fissiparous effect over the society. It came down to question the significance of copyright as well which allows author of the work to prevent others from reproducing, adapting or amending his work without his permission. Believers for copyright say that it is necessary not only because it encourages the author but it also because is beneficial for the economy. However, sceptics argue that copyright obstructs free flow of information in the society and hinders the right of free speech deriving support from the scientific study that a better idea can be built over a previous idea only if it is free to acquire and use[2]. Owning to these and multiple other factors, the concept of 'Copyleft' and other related forms of free licensing emerged. It is important to note that even though Copyleft is about free information in society, it find high regards by believers of liberty, freedom and free markets as well. This is because Copyleft is not about distribution of free goods or other political philosophies but is about freedom and progress of technology. Founding its supporters worldwide, Copyleft is not just trending but is also gaining popularity among people who believe in such free flow of content and licenses. So much has it affected the movement that a religion came up based on whole ideology of Copyleft that is discussed in the later part of this article. Hence, Copyleft is a mechanism devised by believers of free dissemination of knowledge in society backed with strong reasoning and jurisprudence. Nonetheless, Copyleft, though debatable, has become a choice of a lot of authors who believe in such free speech and 'welfare for all' believes.

ORIGIN

Copyleft comes from a wordplay of the word copyright.[3] It is a regime wherein copies of one's work can be distributed freely and can be modified as per one's wish on the condition that the modified work will also be available freely and the same rights will be maintained as the work goes down the line.[4] In simple terms, a work under Copyleft is free to distribute, acquire and amend on a stipulation that work resulting from such Copyleft work will also be free and in public domain for people to acquire. The earliest use of the word "Copyleft" was by

[2]http://ogc.harvard.edu/files/ogc/files/ogc_copyright_and_fair_use_guide_5-31-16.pdf, (last accessed on July 25, 2017).

[3]http://research.omicsgroup.org/index.php/Copyleft#cite_note-1, (last accessed on July 23,2017).

[4] *What is Copyleft*, GNU OPERATING SYSTEM., (July 25, 2017), https://www.gnu.org/copyleft/.

Li-Chen Wang during late 1970's in his Palo Alto 'Tiny Basic's' distribution notice wherein he wrote that "COPYLEFT all wrongs reserved". However it was just a term and no meaning was accredited out of it neither he had any intention to do that because Tiny Basic was a free version of a basic computer programming language.[5] However, the true sense to Copyleft was given by Richard Stallman in his GNU manifesto in 1985. GNU is an operating system which is sponsored by 'Free Software Foundation'. Richard Stallman started GNU when in the year 1984, he was refused the access to an improved software by Symbolics, on which Richard worked. This incident prompted Richard Stallman to create a license which is free to acquire and work on without changing the original source code of the program. According to Richard Stallman, this was a win-win situation for everyone because in this manner improvements can be made without changing the original piece.[6] Copyleft has then come a long way from its origin by founding the supporters worldwide and has resulted in a wide variety of open and free to use license which otherwise is copyrighted.

[5]Linux Information Project, (July 25, 2017), http://www.linfo.org/copyleft.html.
[6] *Supra* 2.

DIFFERENCE BETWEEN COPYRIGHT AND COPYLEFT

Copyleft is generally denoted by a reverted image of copyright symbol. This means it is a mirrored image of copyright and hence in terms of its meaning. Copyright is a right given to the author of any work to reproduce, distribute, and commercially exploit his or her own work. Most importantly, copyright is the right to prevent others from using your copyrighted work without your consent. These rights duly recognize author's work and give them the authority to use or hide it, depending upon their will. Copyleft on the other hand give author the right to freely use distribute their work and pass on the rights to even modify the work only on one term that the Copylefted work cannot be copyrighted and the modified work will also be available freely for the public to use and work upon.[7]

WHY COPYLEFT

The ideology behind Copyleft, as Richard Stallman also puts it is that the work which can benefit the society should be free for everyone to use.[8] If a work is free to use and work upon and still its originality is intact, then the idea

[7] K.G. Kumar, *Beyond the Market*, FREEDOM MATTERS, ECONOMIC AND POLITICAL WEEKLY, Vol. 36, No. 36 (Sep. 8-14, 2001), pp. 3435-3439 .
[8] https://www.gnu.org/philosophy/pragmatic.en.html, (last accessed on July 21, 2017).

should be welcomed because it is benefitting the society largely. Human ideas and thoughts tend to develop over preexisting ideas and notions available around.[9] That is how the civilization has come a long way and has developed so much since its start. That is how the wheels from wood by primitive man have developed into rubber wheels by modern man. Such progress over existing ideas makes it necessary that the viable information should be free in the society to both, acquire and use. However, Copyleft was needed because only providing such information to public and putting it in public domain for free was not a solution. The problem faced was that the people can always use such content, modify it and get it copyrighted and later converting it into a proprietary work thereby restricting its free flow. Thus, mere abandoning of the copyright by one who is willing to distribute it freely in public is not a solution because someone else can always get a copyright over it.[10] It has been observed in the past that in absence of Copyleft, the person who wants to give his work for the public to use freely was embittered because others tried to make personal gains out of it by making mere modifications and getting copright over the work. This is where Coplyleft and other such licensing practices came to rescue to facilitate such free flow and ensure the maintainability of the same.

JURISPRUDENCE OF COPYLEFT

Copyleft in a way is a direct criticism of the concept of copyright. Where copyright believes that an author should get the right to prevent others from using his copyrighted work, Copyleft critiques that and frames on an ideology that a work should be free for everyone to use and ideas should be free to think and develop upon. Owning a property is not an issue of modern era. Owning a property and ownership of resources has always been a subject of debate. Many jurists have presented their view and reasoning, some favoring it and some dissenting with such concept of one person holding a source of production all by himself. Information in this context is relatively a new term. It is not since always that knowledge and information have been considered as a valuable source for society. That probably is a reason why Intellectual Property laws took a lot of time to develop. It is rather a newer concept relatively if seen in light of how valuable land and labor were considered by Karl Marx as a source of production in his labor

[9] R Neethu and Zehra Shakeri, *My Religion: My 'Copy' 'Right,* JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, vol. 18, November 2013, pp 566-575.
[10] Ira V. Heffan, *Copyleft: licensing Collaborative Works in The Digital Age*, STANFORD LAW REVIEW, Vol 49.

theory.[11] However, the importance of information and knowledge now cannot be avoided as they have, if not replaced, become at par with the most vital sources of production. Many theories concerning information and its flow have come up and formed the jurisprudence regarding the flow of information and its importance in a community.[12] If theories of historical materialism are to be abided by, the underlying assumption is that human consciousness is fostered and conditioned through its surroundings and physical environment.[13] However, to fit knowledge and information in the Labor Theory of Karl Marx, let us once assume that as the society and its needs have changed, with it changed the means of production and knowledge has become an important integral part of the same. Assuming that, it is now not difficult to see how the labor theory would back the Copyleft knowing that Karl Marx talks for the welfare of society and is against the ownership of one person over any means of production because that will give him absolute rights over the property. Copyright may not be an absolute right but gives enough power to the author to stop others from using his copyrighted work legally. Thus if creators of socialism would have been alive, copyright would not have come into existence. This also is a reason why it faces strong opposition from staunch socialists. Marxism offers protection to society against ownership in the hand of one person of vital resources. The success of free software against the paid or commercial ones shows how Marxism has succeeded in the theory while stating that production will become more and more societal. It seconds the claims of autonomist Marxists that production is becoming social and with time the gap between collective labor power and economy based on private property will only raise.[14]

TYPES OF FREE LICENSE

Copyleft is a kind of free license of a work to the world. Advocates fighting for such free flow of information in society is not new and this concept is a work of many years and multiple debates. There are different kinds of free licenses available.[15] Some of them are discussed below:

[11]David L. Prychitko, Marxism, Library of Economics and Liberty, (July 26, 2017), http://www.econlib.org/library/Enc/Marxism.html.

[12] Latypov I.A., *Copyleft or Moral Rights Involved In Copyright?* INTERNATIONAL JOURNAL OF APPLIED AND FUNDAMENTAL RESEARCH, 2014-No 2, (July 24, 2017), http://www.science-sd.com/457-24688.

[13] G. Cohen, *Karl Marxs Theory of History: a Defence*.

[14] Johan Soderberg, *Copyleft Vs. Copyright: A Marxist Critique*, First Monday, PEER REVIEWED JOURNAL ON INTERNET, Vol 7 No. 3, 4 march 2002.

[15] http://www.shlomifish.org/philosophy/computers/open-source/foss-licences-wars/foss-licences-wars/types-of-licences.html , (July 22, 2017).

PUBLIC DOMAIN LICENSE

These licenses are also known as 'permissive free software license' or 'copy centre license'. These licenses allow one to freely do almost everything that can be done with a software. That is to freely acquire, use, modify, sell it further, distribute it, etc. this license is however no more recommended because it is not compatible with General Public License. Examples of such license are BSD license, Apache license etc.

WEAK COPYLEFT LICENSE

These licenses are free programming licenses that states that the source code that plunged from programming authorized under them, will stay under the same weak Copyleft permit. Be that as it may, one can connection to frail Copyleft code from code under an alternate permit (counting non-open-source code), or generally fuse it in a bigger programming.[16] Apart from this, these licenses permit free dispersion, use, offering duplicates of the code or the doubles (the length of the pairs are joined by the (obfuscated) source code), and so forth. Case of powerless Copyleft licenses includes GNU Lesser Public License, Mozilla Public License etc.

STRONG COPYLEFT LICENSE

These licenses go above and beyond from powerless Copyleft licenses and order that any appropriated programming that connection or generally joins such code be authorized under perfect licenses, which are a subset of the accessible open-source licenses. Thus, these licenses have been called "viral". Examples of such license are GNU General Public License, Sleepy Cat License etc.

CREATIVE COMMON LICENSE

Another very popular form of free licensing is CC (Creative Commons) License. It is a tool that enables free distribution of work which is otherwise copyrighted under laws. An author can use when he/she wants to give people right to share, use, modify and develop upon the work they have created. These licenses create and maintain a balance between the traditional "All Rights Reserved" methods which was created by the copyright law.[17] These licenses allow everyone, ranging from individuals to large companies, a standardized and simple way to grant copyright permissions for their creative work. The CC license tools and its users worldwide is huge and still a growing world of digital commons. It is basically a pool of

[16] Raymond, Eric Steven, *Licensing HOW TO*, (July 27, 2017), http://www.catb.org/~esr/Licensing-HOWTO.html#id2789302.

[17] About the Licenses, https://creativecommons.org/licenses, (last accessed on July 26, 2017).

content which can be simply edited, copied, remixed, distributed and developed (built upon), well within the boundaries of copyright law. All CC licenses have features between them in common. The creators of license are known as Licensors and if they use CC tools, they are allowed to retain their original copyright while allowing others to copy, distribute and make use of their work, though non-commercially. It is also ensured that every licensor receives the credit for their work, which they deserve. Every CC license so developed is available for access to everyone around the world and lasts as long as copyright under any law.[18] The licensors can above the CC license decide on some additional permission to be given as to how their work is to be used. The CC licenses do not encroach upon the freedoms granted to users of creative works as under the copyright law viz. Fair use or fair dealing.[19] These CC licenses require the licensees to take permission to do anything with a work which only licensor can do under law and license does not allow expressly. Some duties of licensees are: to give proper accreditation to the original licensor, to keep copyright notices of all copies of work preserved and intact and link the license to available copies of work. Also, the licensees are prohibited from using any technical measures which restrict others from accessing the work by licensors.

KOPIMISM AND COPYLEFT

Copyleft, as already stated, has gained a lot of popularity. So much that its belief and believers have created a new religion based on an idea that information should be free for everyone. The newly found religion by Isak Gerson, a 19 year old philosophy student, is devoted to the act of free file sharing and this was subsequently recognized as an official religion by Swedish Government.[20] The religion advocates sharing of files to be absolutely legal and beneficial for the public at large. The propagators of this religion state that it was difficult to get Kopimism registered as a religion and after three hard tries and one year of struggle, the religion was finally recognized. The followers conduct this religion via Church and have followers in thousands by now. Since, the religion is conducted through Church, the question as to mode of engaging of prayers is quite pertinent here to know. The followers of Kopimism regularly engage in Prayer and meditation sessions but what makes them different is, they pray not by physical assembly

[18] Carver, Brian W., *Share and Share Alike: Understanding and Enforcing Open Source And Free Software Licenses,* BERKELEY TECHNOLOGY LAW JOURNAL.

[19] Fitzgerald, Brian and Ian oi, *Free Culture, Cultivating the Creative Commons*, MEDIA AND ARTS LAW REVIEW 9(2).

[20] http://www.bbc.com/news/technology-16424659, (last accessed on July 27, 2017).

but through servers and web pages. Kopimism in other words can be defined as Religion of Law where copying information is considered to be a sacred virtue. The followers of Kopimism are known as Kopimists and they find this idea to be engrained in bible itself. According to them, "COPY ME" phrase is mentioned in the Bible and is forwarded through internet as a meme. "Copy me, my brothers, just as I copy Christ himself"[21]

Kopimi simply means File Sharing and it cannot be said to be an excuse or destination for file sharers. Since, the Kopimism is now an officially recognized religion, the preachers and followers have come out with Kopimist Constitutional Law, which sets out what the Law is all about, its essentials, its principles and it is followed by the religion strictly.

Kopimist Constitutional Law states some of the following points[22]:

1) Copying of information is ethically right.
2) Dissemination of information is ethically right.
3) Copy mixing is a sacred kind of copying, more so than the perfect, digital copying, because it expands and enhances the existing wealth of information
4) Copying or remixing information communicated by another person is seen as an act of respect and a strong expression of acceptance and Kopimistic faith.
5) The Internet is holy.
6) Code is law.

Kopimism, to promote and create their new identity also has their own sign which reflects their ideology. There is the "kopimi" logo, inside which is written the letter 'K' with a pyramid made outside it. It is a symbol used online to portray that one wants to be copied. There are other symbols also such as that represent and encourage copying, for example, "CTRL+V" and "CTRL+C".[23]

LEGAL VALIDITY OF COPYLEFT

There are more than ten types of free software recognized by no proprietary proponents and out of those most important and most popular means of distribution is Copyleft licensing. According to surveys most nonproprietary software in their contractual mechanism uses

[21] Bible: 1 Corinthians 11:1[1], (July 28, 2017), https://www.biblegateway.com/passage/?search=1+Corinthians+11&version=PHILLIPS.

[22] http://ethics.wikia.com/wiki/Kopimism, (last accessed on July 26, 2017).

[23] https://www.newscientist.com/article/dn21334-kopimism-the-worlds-newest-religion-explained ,(last accessed on July 25, 2017).

Copyleft license.[24] To use a Copyleft programme a person or a company or any other human being has to abide by the license agreement which is made before issuing a software for Copyleft. This idea of Copyleft is very good as it helps public in general and it does not restrict a user to use the software according to the creator of the software and he can modify it according to his personal use. In software development programmes also the Copyleft license plays a great role in connecting the developers with the general public. There are different types of work that are freely shared on internet by the developers or any other person and to protect their right Copyleft license plays a major role. There are many different types of licenses of Copyleft out of which most popular type of licenses are GPL (General public license) and LGPL (Lesser general public licenses).

In GPL if a programmer has made a programme and has taken a GPL then he has to give the source code of the programme to the person who is receiving that programme either with the programme itself or to the person who ask for the source code of the programme.[25] And if the person makes some changes in the source code to improve the programme then he has to abide by the GPL and in the same way he would be liable to give source code of the programme to others. A GPL'd programme is a valuable programme and author can also sell it to other and same goes to other who acquire that programme. It is legal to sell a GPL programme and there is no wrong in it but the main problem is buyer because it is hard to find a buyer for a GPL programme.

THE IMPACT OF RECENT CASES

The open source software is one of the widest growing departments of the sector; this could be seen via multiple case laws and federal court decisions. Such growth of the open source software has been observed as it caters the need and serves the branches of arts and science both in a way not many could think about few decades ago. Also, the growth of such software can be observed by a recent survey in which it has been observed that almost 85% of companies use open source software.[26] In the case of Jacobson v Catzer,[27] it was observed

[24] Andres Guadamuz Gonzalez, *Viral Contracts or Unenforceable Documents? Contractual validity of copyleft licenses*, WIPO, (July 27, 2017), http://www.wipo.int/edocs/mdocs/sme/en/wipo_unido_smes_msk_07/wipo_unido_smes_msk_07_www_73625.pdf.

[25] GNU General Public License, version 3, 29 June 2007, Available at, https://www.gnu.org/licenses/gpl.html , (last accessed on July 28, 2017).

[26] David Meyer, *Gartner: 85% use of open software*, (July 23, 2017), https://www.cnet.com/news/gartner-85-percent-of-companies-using-open-source.

[27] 535 F.3d 1373, 1378 (Fed. Cir. 2008).

that, the growth of open source software is largely based upon Copyleft licensing. Copyleft agreements are generally used to curb the availability of open-source software. The agreements are designed in such a way that it would allow a copyright holder for making a software program available to the public that too without charging any fee, and also require all modified and extended versions of the program to be available freely to the public. The idea behind the concept of Copyleft agreements is that an individual would be prevented from using or converting open source program which is freely available to proprietary software.[28] The most common type of Copyleft agreement is the General Public License which was founded by free software foundation. Under such license the authors along with giving right for others to copy also give creation of derivative work, thus not charging for such derivative work by the user. Around 65-70% of the users around the world use General Public licensing.[29]

Criticisms-

1. The general public licensing is generally unenforceable, as there is lack of checks and balances by the court.
2. Also, it amount to price fixing schemes.
3. Main purpose is to eliminate the competition thus, many find it to be anti-competitive as it wants to capture the maximum share in the market.
4. It could constitute antitrust violations.
5. Also, the scope of the license being unlimited, the copyright holders right of bringing the suit for infringement when some user is using it out of his scope is violated.[30]

While the law of Copyleft agreements is still in its earlier stages and is premature, by the recent judgments of the English court in cases such as of *Wallace* and *Jacobsen* recommend that Copyleft agreements is effective in ensuring that copies and modifications and changes to open-source software shall be treated as open source. Also, the courts have taken key notes for public interest in the judgment regarding open source software. Also, they have further tried to make sound public policies for the same and this shows how dedicated the courts are to the issue and thus, the courts shall remain favorable to continue and keep it effective with the Copyleft agreement which shall remain enforceable.[31]

[28]467 F.3d 1104, 1105 (7th Cir. 2006).
[29]Sapna Kumar, *Enforcing the GNU GPL*, 2006 U. Ill. J.L. TECH. &POL'Y 1, 1 (2006).
[30]S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989)
[31] R. Scott Rhoades & Jon Rastegar, *The Impact of Recent Case Law on Copyleft Agreements*, (July 28, 2017), http://apps.americanbar.org/litigation/committees/intellect

CONCLUSION

Copyleft is indeed a noble idea if weighed in terms of what is beneficial for society. Not only its enforcement will benefit the society at large but efforts to make contracts under Copyleft enforceable will also prove the flexibility of our society towards the will of people. Success of licenses under copyleft not only reflects the will of people but also shows the changing phase of societal perspective towards means of production. Giving out information freely to use in itself shows how society is changing and challenging the idea of ownership in private players. However, it is irrespective of how Copyleft challenges or questions the morality copyright, copyright still is a vital tool to encourage innovation. Not just that, copyright is the right thing to do. It reflects how state recognizes the rights of every individual and respects their prerogative of property. Thus, copyleft should be enforceable but only if the parties agree to such terms and conditions. It should not be imposed and should be construed harmoniously with other provisions of intellectual property. At last, the ultimate aim of every law is to facilitate the betterment of society and make every civilization better.

ual/articles/fall2011-copyleft-agreements-gnu-general-public-license.html.

LEGALISING ONLINE SPORTS BETTING IN INDIA: A GAMBLE UNTO ITSELF?

*Sakshi Pawar & Naman Lohiya**

ABSTRACT

The Supreme Court of India in April 2017, has agreed to decide upon the legality of introducing Pan-India sports betting and online betting sites. However, this conflicts with the stance of several states which consider gambling to be illegal within their jurisdictions. Moreover, the statutes of these states have failed to keep up with technological improvements and do not govern online gambling. Hundreds of Indians continue to use online betting sites clandestinely and invest around thousands of crores of rupees in the business, creating a parallel underground economy. The article discusses the dearth of regulatory framework regarding this sector and propose reforms that will help usher in legalisation of online betting in India.

INTRODUCTION

According to Black's Law Dictionary gambling is a game which consists of three components: *consideration, an element of chance and a reward*[1]. It involves winning or losing an (usually) extravagant amounts of money based on some fortuitous event[2]. These games were played in India since the time of Mahabharata and Ramayana, with stakes as high as losing kingdoms or small pittances in sporting animal fights. With the advent of the Victorian British Rule, horse betting was also introduced in India. Their continued prevalence in the modern India society can be found in advertisements for online rummy on social media or the 2013 IPL match-fixing scandal. However, there is a dismal lack of clarity governing both gambling and online gambling in India. Mostly, gambling occurs on the black market, leading India to lose a revenue of approximately USD 60 million (amount greater than 2% of our GDP)[3].

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[1] H.C. BLACK, BLACK'S LAW DICTIONARY (6th ed. 1994).

[2] OXFORD DICTIONARIES, OXFORD ENGLISH DICTIONARY (7th ed. 2012).

[3] Sandeep Unnithan, *Playboys of the Eastern World,* INDIA TODAY, (Oct. 22, 2011), http://indiatoday.intoday.in/story/indian-gamblers-diwali-

Moreover, it is rumoured that the money is used to fund terrorist or other criminal activities[4]. The potential for a regulatory regime to curb such social evil calls for a policy analysis of the gambling and betting laws in India.

THE HISTORY OF GAMBLING LAWS

In 1867, the British enacted the Public Gambling Act [hereinafter **PGA**] in India. The enactment was a result of the then growing wariness of the British Parliament towards betting and gambling. While India (barring Sikkim and Goa) has maintained the orthodox approach against legalising gambling, the United Kingdom itself has amended its laws to reflect the modern economy by licensing gambling premises[5]. Further, UK provides a detailed regulatory framework which covers not only gambling but also online gambling[6]. The dynamism of India's legislation, however, is a far cry from that of UK's laws.

Post-independence, *Entry 34, List II of the Seventh Schedule*[7] empowered the state governments to govern gambling and betting. Regardless, not all states have made use of the constitutional power to either regulate gambling or explicitly ban it. Further, only a few states with specific legislation provide clarity on the definition of gambling itself. It is therefore unsurprising that technological developments such as online gambling are required to operate within a grey area of law.

The analysis of India's online gambling laws becomes imperative in light of recent policy considerations by the Ministry of Youth Affairs and Sports[8]. The Ministry is contemplating furthering the recommendation by former Cheif Justice of India [**CJI**] R.M. Lodha that online betting for cricket should be legalised pan-India[9]. The recommendation, which will take approximately two years to implement, is intended as a double-edged sword in remedying the lack of funding in sports and avoiding corruption (match fixing). However, with inadequate laws governing gambling itself, the

2011-macau-asia-china-asia-hottest-casinos/1/157060.html.

[4] Correspondent, *Gambling Rackets Finance Terror Activities,* THE PIONEER, (Feb. 15, 2016), http://www.dailypioneer.com/STATE-EDITIONS/dehradun/gambling-rackets-finance-terror-activities.html.

[5] United Kingdom Gambling Act, 2005.

[6] *Id.*

[7] CONSTITUTION OF INDIA, 1950.

[8] Amitav Ranjan & Mihir Vasavda, *Sports Ministry lays ground for making onling betting legal,* THE INDIAN EXPRESS, (July 16, 2017), http://indianexpress.com/article/sports/sports-ministry-lays-ground-for-making-online-betting-legal-4752604/.

[9] *Id.*

call for regulating online gambling seems quite ambitious.

STRUCTURE

The article seeks to analyse the feasibility of introducing online betting across India and will do so by examining (**1.**) whether laws in India are receptive to gambling and (**2.**) online gambling? (**3.**) The steps to be taken by the Centre for legalising online betting. (**4.**) Finally, the article will determine the model policy to be adopted for such legalisation.

GAMBLING LAWS IN INDIA

Recently, in Madhya Pradesh, public concern was raised when a quarry worker committed suicide over losing five lakh rupees in illegal IPL betting[10]. Despite other such instances of proof of illegal betting, gambling in Madhya Pradesh is still governed by the obsolete Public Gambling Act, 1867. This Act applies to ten such other states (with minor variations) which have not enacted state specific gambling regulations[11]. The lack of framework is disappointing as these states appeared to have waived the opportunity to decide *first*, the games that constitute gambling and *second*, regulate online gambling (outside the purview of the central act).

While exploring the *first* point, the legislative efforts of states such as Goa[12], Sikkim[13], West Bengal[14] and Nagaland[15] must not be overlooked. By providing an exhaustive or illustrative list as to which games are prohibited, these states have clarified the investment climate within their jurisdiction. Other states have followed the PGA and Supreme Court of India [**SC**] decisions in merely *excluding games of skill from the ambit of gambling*[16]. Games of skills are those which factor the experience, attention, personal attributes and adroitness of the player[17]. Games of chance (gambling) are games where the outcome is dependent largely

[10]B. V. Shiv Shankari, *Quarry worker's suicide exposes cricket betting menace,* THE TIMES OF INDIA, (May 9, 2017), http://timesofindia.indiatimes.com/city/bengaluru/quarry-workers-suicide-exposes-cricket-betting-menace/articleshow/58582671.cms.

[11] The Sports Law & Policy Centre, *Games of Skill in India: A Proposal for Reform,* THE SPORTS LAW AND POLICY CENTRE, (Mar., 2017), https://drive.google.com/file/d/0B6LE5s8UEIKGZXNKNGRnQk94ZEE/view.

[12] The Goa, Daman and Diu Public Gambling Act 1976, §13A.

[13] Sikkim Regulation of Gambling (Amendment) Act, 2005.

[14] The West Bengal Gambling and Prize Competitions Act, 1957.

[15] Nagaland Prohibition of Gambling and Promotion and Regularisation of Online Games of Skill Act, 2016.

[16] Public Gaming Act, 1867, §12: "*Act not to apply to certain games: Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played.*"

[17] Dr. K.R. Lakshmanan v. State of Tamil Nadu, (1996) 2 SCC 226.

on some randomizing device such as dice or roulette wheels. As per the *State of Bombay* v. *Chamarbaugwalla*[18], betting on games of skill does not constitute 'gambling'. Unlike games of chance[19], these games have the protection to trade and occupation under Article 19(1)(g) of the Constitution of India[20].

To determine games of skill, the Supreme Court adopted the '*dominant factor*' test[21]. *Dr KR Lakshmanan* v. *State of Tamil Nadu* in 1996 held horse-racing to be a game of skill. The Court adjudicated that it was a game involving 'substantial or preponderant' (dominant) amounts of skill compared to the element of chance. In a similar fashion, the Court also legalised rummy[22], bridge[23], and video games[24]. It is important to note that lotteries and games involving arrangements of letters are governed by the *Lotteries (Regulation) Act, 1988 and Prize Competitions Act, 1955,* respectively. The reason is that in the Constitution, lotteries are different from gambling and betting and fall under Entry 40 of List I (governed by centre's laws). Further, games of skill where prizes are awarded for solutions based on arrangement of letters, such as crossword puzzles, rarely involve an element of wagering and betting[25].

The aforementioned principles, however, apply for the states that have banned gambling. Goa and Sikkim are two states where gambling is still prevalent. Goa, has granted licenses to opening slot machines in five-star hotels and casinos in off-shore vessels[26]. Sikkim grants licenses for some gambling premises, thereby legalising gambling to a great extent[27]. Assam[28], Orissa[29] and Telangana[30] on the other hand have completed banned not only games of chance but also mixed games of skill and chance such as poker and rummy. As per the MJ Sivani case the state is only permitted to restrict occupations if they are against public interest or participate in immoral practices[31]. Further, in the Lakshmanan case, the court held that the banning of games if

[18] AIR. 1957 SC 699.
[19] *Id*.
[20] LAKSHMANAN CASE, *supra* note 17.
[21] SPORTS LAW AND POLICY CENTRE, *supra* note 11, p. 6.
[22] State of Andhra Pradesh v. K. Satyanarayana, (1968) SCR (2) 387.
[23] *Id*.
[24] M. J. Sivani v. State of Karnataka, (1995) (3) SCR 329.
[25] Ganesh Prasad & Sharad Moudgal, India: Gambling 2017, INTERNATIONAL COMPARATIVE LEGAL GUIDES, (Dec. 2, 2016), https://iclg.com/practice-areas/gambling/gambling-2017/india.
[26] GOA ACT, *supra* note 12.
[27] Sikkim Act, *supra* note 13.
[28] Assam Game and Betting Act, 1970
[29] Orissa Prevention of Gaming Act, 1955.
[30] Ganesh Prasad and Mukund Thirumalai Srikanth, *India: Salient Features Of The Telangana State Gambling (Amendment) Ordiannce, 2017*, MONDAQ, (July 3, 2017) http://www.mondaq.com/india/x/607360/Gaming/Salient+Features+Of+The+Telangana+State+Gaming+Amendment+Ordinance+2017.
[31] M. J. SIVANI CASE, *supra* note 25.

skill itself cannot be allowed. Therefore, such banning of mixed games might be contentious as games of skill are permissible occupations to which fundamental rights are applicable[32]. Nevertheless, it is surprising that former CJI R.M. Lodha suggested legalising online sports betting in a country where most of the states have either banned games of chance or mixed games of skill and chance. *It would be difficult to introduce sports betting in a country where regardless of the passage of time, the legislature has construed it to be a vice*.

ONLINE GAMBLING LAWS

There are however, *arguments in favour of legalising* online gambling. *First*, preventing the issue of match-fixing which has plagued the Board of Control for Cricket in India [**BCCI**] and Indian Premier League [**IPL**][33]. The second-phase of the Lodha Committee had suggested that regulating betting will filter out the unethical participation of the sports persons in betting[34]. *Second*, the presence of sports betting websites will lead to consolidation of betting avenues and will draw the crowd to the online scheme, making monitoring easier. The authorities can ensure that all rules are followed and cheating is caught, paving the way for transparent and fair games[35]. *Third*, it will bring into circulation great amounts of black money. The Federation of Indian Chambers of Commerce & Industry [**FICCI**] had been urging the government to legalise betting as it estimates that the government will receive 12,000- 19,000 crore rupees of revenue through the 3,00,000 crore rupees illegal sports betting market[36]. *Fourth*, people already access betting sites through Virtual Private Networks [**VPNs**][37]. The 2015 Foreign Direct Investment [**FDI**] policy[38] and External Commercial Borrowing

[32] Jay Sayta, *Portions of Assam and Orissa Gaming Acts Might be Unconstitutional, Games of Skill Should be Permitted Across India,* GLAWS (Apr. 29, 2011), https://glaws.in/2012/04/29/portions-of-assam-and-odisha-gaming-acts-might-be-unconstitutional-games-of-skill-should-be-permitted-across-india/.

[33] Desh Gaurav Sekhri, *Lodha Committee's recommendation of legalising cricket betting in cricket is welcome,* THE ECONOMIC TIMES, (Jan. 5, 2016), http://blogs.economictimes.indiatimes.com/et-commentary/lodha-committees-recommendation-of-legalising-betting-in-cricket-is-welcome/.

[34] ET Bureau, *Lodha wants cricket betting legalised, but who will bell the cat?,* THE ECONOMIC TIMES, (Jan. 5, 2016), http://economictimes.indiatimes.com/news/sports/lodha-wants-cricket-betting-legalised-but-who-will-bell the-cat/articleshow/50446279.cms.

[35] Jay Satya, *Time ripe for Gambling Law Reforms-Is the government listening?,* GLAWS, (Sept. 13, 2013), https://glaws.in/2013/09/13/time-ripe-for-gambling-law-reforms-is-the-government-listening/.

[36] *Id*.

[37] V Ramu Sarma, *Ban on online gambling is no child's play,* THE HANS INDIA, (Jun. 19, 2017) http://www.thehansindia.com/posts/index/Opinion/2017-06-19/Ban-on-online-gambling-is-no-childs-play/307317.

[38] Government of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion SIA (FC Division), Press Note No. 5 (2002 Series), *available at* http://dipp.nic.in/sites/default/files/pn55.pdf.

[**ECB**] Rules[39] prevent foreign investment in gambling, taking loans and transactions with foreign entities for rewards. However, gambling companies such as Bet365 which hold a license under UK laws, still operate within India[40]. Since its servers are not located here, the Cyber Police has its hands tied and is unable to do anything. Legal betting will only help normalise such websites. *Fifth*, sports betting is conceptually like the aspect of horse betting, as both are betting on games of skill[41]. Then, as per legal precedence, sports betting should be permitted in India.

Its *disadvantages* are *first*, it is a state subject and most states have banned gambling. In fact, Goa and Sikkim which do allow gambling, have considered barring locals from participating in these games (Goa made amendments which were not enforced, Sikkim proposes to amend its legislation[42]). The legislative intention is that gambling is a vice and should not be accessible to the locals, its mere function is to serve as a tourist attraction. *Second*, taxation and licenses for gambling are usually high, which might lead people to circumvent these legalised websites[43]. *Third*, is the most trite of arguments that match fixing cannot be rooted out merely by legalising gambling. Nevertheless, it is easy to conclude that the advantages outweigh the disadvantages. Before the authors discuss the procedure required to enact such legislation, the current governance of online gambling will be discussed.

Unfortunately, most laws governing gambling are restricted to brick and mortar premises. Central enactments that govern online gambling are the *Information Technology (Intermediary Rules), 2011* which place a responsibility of due diligence on the intermediary to inform users that no promotion or advertisements pertaining to gambling are permitted to be displayed on their websites (does not apply to state of Sikkim

[39] FOREIGN EXCHANGE MANAGEMENT (TRANSFER OR ISSUE OF SECURITY BY A PERSON RESIDENT OUTSIDE INDIA) (THIRD AMENDMENT) REGULATIONS, 2012, Notification No. FEMA. 229/ 2012- RB, s. 3., *available at* https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=7711&Mode=0.

[40] Sports Betting, *Indian Gambling Laws,* SPORTSBETTING.NET.IN, http://sportsbetting.net.in/gambling-laws/ (last accessed July 31, 2017).

[41] SPORTS LAW AND POLICY CENTRE, *supra* note 11, p. 16.

[42] Jay Sayta, *Feature: Senior Sikkim Opposition Leader Navraj Gurung Discusses His Party's Stand on Casinos, Online Gaming and Lotteries,* GLAWS, (Aug. 8, 2015), https://glaws.in/2015/08/08/feature-senior-sikkim-opposition-leader-navraj-gurung-discusses-his-partys-stand-on-casinos-online-gaming-and-lotteries/.

[43] Jay Sayta, *GST Council Announces 28% Tax on Casinos and Betting; 18% Tax Likely on Skill Games; Lottery Tax yet to be Announced,* GLAWS, (May 20, 2017), https://glaws.in/2017/05/20/gst-council-announces-28-tax-casinos-betting-18-tax-likely-skill-games-lottery-tax-yet-announced/.

or any state which wishes to legalise it[44]). As already mentioned, there are FDI policies[45] and ECB Rules[46] that prevent the operation of foreign gambling websites in India.

On the state level, only Sikkim[47], Nagaland[48] and Telangana[49] have shown the foresight to govern online gambling. While Sikkim has permitted the same, Nagaland has explicitly banned online gambling and only permitted online games of skills to be licensed in its state. Telangana on the other hand has banned even online mixed games of chance and skill such as rummy and poker. The legal principle of '*functional equivalence'* applies to those states which have not enacted any laws on online gambling. Functional equivalence applies the general legal framework that exists offline to the online equivalent[50].

Sikkim is the first (and only) State with an online gambling statute : The Sikkim Online Gaming (Regulation) Act, 2008 [**Sikkim Act**] and The Sikkim Online Gaming Rules, 2009 [**Sikkim Rules**]. The Sikkim Act only allows for *an intra-net connection* in the state, where the servers are located locally and the websites are only available within the state. This is because most other states have banned gambling and Sikkim's legalisation of online gambling will be contrary to their laws. The Rule 3 of the Sikkim Rules provide thirteen games that are permitted to be played online. Advertisements for the games are permitted if they do not depict something indecent or immoral[51]. For licensing, a provisional license is first taken. Following this, technological investments are made within the state. If they meet the requirements of the Rules, then with payment of full license money, they are permitted to operate. As per Rule 5(2), this license is granted for a year with renewal for future period of 1 year at the fees of one lakh rupees. In line with India's foreign investment policy, only persons, companies and limited liability corporations [**LLCs**] incorporated in India and held or substantially controlled in India will be allowed to grant licenses[52]. In May 2016, Kapil Dev inaugurated the first online

[44] Jay Satya, *The farce called Sikkim online gaming licenses,* GLAWS, (May 13, 2011), https://glaws.in/2011/05/13/the-farce-called-sikkim-online-gaming-licenses/.
[45] FDI POLICY, *supra* note 39.
[46] FEMA NOTIFICATION, *supra* note 40.
[47] SIKKIM ACT, *supra* note 13.
[48] NAGALAND ACT, *supra* note 15.
[49] TELANGANA ORDINANCE, *supra* note 31.
[50] Bert-Jaap Koops, *Should ICT Regulation by Technology Neutral*, STARTING POINTS FOR ICT REGULATION. DECONSTRUCTING PREVALENT POLICY ONE-LINERS (IT & LAW SERIES) Vol 9 (2006), 84.
[51] The Sikkim Online Gaming (Regulation) Rules, 2009, Rule 8.
[52] *Id.*, Rule 2(g).

betting centre in Gangtok, owned by Golden Gaming International Pvt Ltd[53].

Nagaland's Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015, and Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Rules, 2016 [together **Nagaland Gaming Laws**] are equally extensive. Aside from the accepted games of skills (as per SC decisions), virtual cricket, football, chess and sudoku can be played[54]. Licenses are only granted after empanelled firms (lawyers, financial experts, and information technology companies) ensure that the prerequisites are met[55]. Such prerequisites include that the decision-making licensee is incorporated in India and the technology is hosted within India itself. Since, the Nagaland Gaming Laws prohibit gambling, the websites can operate in other parts of India as well (where mixed games are permitted).

Telangana's State Gaming Amendment Ordinance, 2017 [**Telangana Ordinance**][56] amends the Telangana Gaming Act, 1974 and penalises all those who promote online card games (even games of skill such as rummy and poker) and online gambling. Although rummy was declared legal by the SC in the *1968 Satyanarayana Case*, the same case also held that any operator or business owner who earned more than administrative profits would be running a 'public gaming house'[57]. These public gaming houses are illegal under the PGA. Online rummy is usually played on websites that take a percentage of the award that is won from such games, making them a public gaming house as per the Satyanarayana judgment. However, the Andhra Pradesh High Court in *Krishna Kumar and Anr.* v. *State of A.P*, did not interpret this judgment to penalise operators of games of skill which earn profit from the winnings of games of skill[58]. The Court held that since games of skill are expressly not equated with gambling, it does not matter how much the operator earns from them[59].

[53]Pramod Giri, *Kapil Dev inaugrates India's first online betting centre in Sikkim,* HINDUSTAN TIMES, (May 13, 2016), http://www.hindustantimes.com/india/kapil-dev-inaugurates-india-s-first-online-betting-centre-in-gangtok/st ory-wI HiIKpDeBSeIxrXMCMScL.html.

[54]ANI, *Nagaland Governor approves Online Skill Games Bill,* BUSINESS STANDARD, (May 10, 2016) http://www.business-standard.com/article/news-ani/nagaland-governor-approves-online-skill-games-bill-116051001054_1.html.

[55] Ganesh Prasad & Sharad Moudgal, *India: Gambling 2017,* INTERNATIONAL COMPARATIVE LEGAL GUIDES, (Dec. 2, 2016), https://iclg.com/practice-areas/gambling/gambling-2017/india.

[56] TELANGANA ORDINANCE, *supra* note 31.

[57] SATYANARAYANA CASE, *supra* note 22.

[58] Krishna Kumar and Anr. v. State of A.P, (2003) CriLJ143.

[59] Ranjana Adhikari & Smitha Krishna Prasad & Gowree Gokhale, The Gaming Quotient of Online Rummy, LEGAL ERA, (Oct., 2013), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/

Interestingly, the matter as to the legality of online rummy had already come up before the SC in the Mahalakshmi Cultural Association case but the court had declined to hear the petition[60].

The judgment in Satyanarayana and Krishna Kumar was followed by that of the Delhi District Court in the *Gaussian Network case*[61]. The Court had to give its opinion as to whether an online poker site would be a legal investment in Delhi. The District Court held online poker to be a game of chance, and concluded that wagering on games of skill, where the online companies take a cut is illegal. This judgement explicitly equated an online poker site to a common gaming house. The case was appealed as the petitioners pointed that poker was commonly considered a game of skill and expressly legalized in some states. However, fear of a future adverse judgement from the High Court led them to finally withdraw their petition. They sought to avoid the negative impression that would be created in the minds of the people if poker was banned by the High Court. It may be noted here that the company which is a party to the case, now runs an online poker site called Adda52 based in Gurugram, Haryana (where online games of skill are allowed as they remain ungoverned)[62].

Regardless of the appropriate High Court decision in the Krishna Kumar case, the interpretation of Satyanarayana tilts towards criminalising online games of skills (as long as they charge above an administrative fee). However, this principle is highly criticised as gambling in itself is to be determined by the components of the game and not the method of the business owner or operator. A public gaming house, is one where instruments of gaming are kept for the profit of the person who owns the house[63]. Even after applying functional equivalence, the act applies to the instruments of gaming (games of chance), not the games of skill as they are specifically excluded from the Act.

Moreover, the Gaussian Network case also implied that when the games of skill are played online, the elements of skill, such as observing

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Research%20Articles/The_Gambling_Quotient_Of_Online_Rummy.pdf.

[60] Jay Sayta, *Will a 5-Judge Bench of the Supreme Court eventually decide the legality of online rummy and poker?,* GLAWS, (July 25, 2017), https://glaws.in/2017/07/26/will-5-judge-bench-supreme-court-eventually-decide-legality-online-rummy-poker/.

[61] Gaussian Network Pvt Ltd v. Monica Lakhanpal, (2012) Suti no. 32/2012.

[62] Jay Satya, *Adda52 poker for stakes matter adjourned to 21st April by Delhi HC,* GLAWS, (Jan 21, 2016), https://glaws.in/2016/01/21/adda52-poker-for-stakes-matter-adjourned-to-21st-april-by-delhi-hc/.

[63] The Public Gambling Act, 1867, §1.

another person's body language or memorising cards is eliminated and the elements of chance dominate the game. Online poker requires a person to play the game much faster, reducing his ability to think and play with reason[64]. This understanding of online games is limited as while they do not consist of the skills involved while playing them physically, it still becomes necessary to observe the opponents playing tactics through previous games with other players on the website[65]. In conclusion, online games of skill are valid in those states where *Fortunately, if a bill legalising online gambling is brought into India the confusion pertaining to validity of online games of skill will no longer exist with the repeal of the PGA and other state centric acts*.

PAN-INDIA LEGALISATION OF ONLINE SPORTS BETTING

Since, both sports betting and betting in horse races are similar, it has been suggested that sports betting is in fact already legal as per the laws of India. Both involve determining the skills of the players before placing bets on them. The possibility that sports betting is already legal in India was *suggested by the head of the former IPL probe committee, Justice Mukul Mudgal*[66]. This was supported by the case that decided the fate of 36 cricketers in the match fixing IPL scandal, where the New Delhi Additional Sessions Judge acquitted the defendants from the charge of gambling[67]. The judge factored in the aspect of both games involving betting on a game of skill and held that it was exempted from § 12 of the PGA. Now, with clarity on the issue of legalising online games of skill, online betting of sports can also be validated across India. However, these instances do not cite the concrete stance of the law on online sports betting. To formulise a policy for online sports betting in India, it is still important to determine enacting the same through a legislation.

Chapter IX of the Lodha Committee report deals with match fixing and sports betting[68]. The committee differentiates between the two and considers the former as a criminal act which spoils the integrity of the game for the benefit of a few. The latter it describes as a general

[64] SPORTS LAW AND POLICY CENTRE, *supra note* 11, p. 16-18.
[65] *Id*.
[66] Jay Sayta, *The court order that freed Sreesanth may have also opened the gates for cricket betting*, Scroll.in, (Aug. 4, 2015), http://scroll.in/article/745894/the-court-order-that-freed-sreesanth-may-have-also-opened-the-gates-for-cricket-betting.
[67] *Id.*
[68] *Supreme Court Committee on Reforms in Cricket*, https://lodhacommittee.wordpress.com/(last visited on July 20, 2017).

malaise in society which, if regulated, could be played in a transparent and fair manner. Therefore, it reasons that online betting should be allowed in India. Oddly, the committee itself never delved into the possibility on online sports betting being legal in India and alludes to it as a social evil that will be curbed if legalised to a certain extent. The SC eventually left this matter for the Law Commission of the Government of India [**LCI**] to determine, as it could not be implemented by the BCCI[69].

Based on the Supreme Court order, (former) Justice Balbir Chauhan visited London, to understand its policy of gambling and betting laws. Later, he addressed a gathering of International gaming operators and lawyers and stated that the LCI would seriously consider legalising online gambling in India[70]. Although Union Law Minister DV Sadananda Gowda rejected the proposal of legalising gambling[71], the Law Commission on May 30, 2017 has issued a public notice calling for recommendations on gambling and betting in India[72]. The LCI has asked for a systematic study on the existing laws for gambling and betting and procedures to legalise it. The notice says that the since online gambling operates clandestinely in India, creating an almost parallel economy with the huge amounts of black money investment, it is safer to legalise and regulate the sector.

The Supreme Court on April 28, 2017 agreed to hear the matter on legalising sports betting in India. The Public Interest Litigation [**PIL**] involves all States and Union Territories as defendants and will help conclusively decide the fate of online legal gambling and sports betting in India[73]. There are several considerations before legalising online betting and gambling. For the Union to enact a law in this matter would mean that a constitutional amendment

[69] Jay Sayta, *SC says Lodha committee recommendation to legalise betting falls in the domain of legislature,* GLAWS, (July 18, 2016), https://glaws.in/2016/07/18/sc-says-lodha-committee-recommendation-to-legalise-betting-falls-in-the-domain-of-legislature/.

[70] *Casinos, sports betting to be legalised in India- Law panel examining the issue*, HINDUSTAN TIMES, (March 6, 2017), http://www.hindustantimes.com/india-news/casinos-sports-betting-to-be-legalised-in-india-law-panelex amining-the-issue/story-RUrXc21Q94LTQKhrHJlxTO.html.

[71] Raghav Ohri, *There are sufficient laws to end betting, legalisation can be debated later: DV Sadananda Gowda*, (Jan 7, 2016), THE ECONOMIC TIMES, http://economictimes.indiatimes.com/opinion/interviews/there-are-sufficient-laws-to-end-betting-legalisation-can-be-debated-later-dv-sadanandagowda/articleshow/50474889. cms.

[72] Report on Betting and Gambling, LAW COMMISSION OF INDIA, http://lawcommissionofindia.nic.in/BettingandGambling.pdf. (last visited on July 28, 2017).

[73] Amit Choudhary, *Supreme Court to examine legalising betting in sport,* THE TIMES OF INDIA, (Apr. 29, 2017), http://timesofindia.indiatimes.com/sports/off-the-field/supreme-court-to-examine-legalising-betting-in-sport/articleshow/58428615.cms.

under Article 386 will be required to shift betting from the List II of the Seventh schedule to List I. Such a move would not be uncalled for as lotteries are already governed by the Union under Entry 40 of the List I. Since most states have allowed for a dearth of adequate laws on gambling, it would be ironical for them to petition against the losing of their mandate under List II. The repealing of the obsolete state laws with the ushering in of a central enactment strikes as the best possible solution. Online gambling easily transgresses state boundaries and a central act for the same will lead to an appropriate regulatory regime. As pointed out by the President of the Supreme Court Bar Association, Dushyant Dave and Counsel for BCCI, C. Sundaram, sports betting is legalised on online channels in almost all democratic countries. A central act in India for online betting will place it at par with the other developed or developing economies around the world[74].

CONCLUSION

First, *we will examine the situation in which sports betting were not considered as a game of skill but as gambling in India*. Despite hesitation from the law minister to enact an over-arching law for online betting, the recent Supreme Court PIL brings hope to the dreams of several Indian bettors. Even if the SC decides that a Union law cannot be enacted on a state subject matter, a constitutional amendment will bring gambling and betting under the ambit of List I. As for the constitutional amendment, there is a concern that state legislative assemblies may themselves not ratify such a measure as they do not wish for gambling to be legalised. Gambling is considered immoral by several politicians who have even criticised Sikkim and Goa for permitting it.

Therefore, in anticipating a situation where gambling is not legalised, we must look to legalising online betting as a game of skill. States need to ensure that they enact a comprehensive definition of gambling for their jurisdiction. This definition of gambling must be in line with the Supreme Court decisions that have been discussed, i.e., allowing games which involve preponderant amounts of skill. The M.J Sivani case had only permitted the States to ban games of skill if needed to protect public order or curb the propagation of immoral practices[75]. Otherwise, games of skill are protected under Article 19(1)(g) of the Constitution. The games

[74] Jay Sayta, *Legal Eagles advocate regulating betting,* GLAWS, https://glaws.in/2016/01/10/legal-eagles-advocate-regulating-sports-betting/ (Jan. 26, 2017).

[75] M. J. SIVANI CASE, *supra* note 25.

of skill *must be legalised in all States of India*. These measures will be applicable to the states of Assam, Odisha and Telangana whose statutes and ordinances provide otherwise. Further, it has been speculated that a five judge bench will eventually decide the validity of the Telangana Ordinance[76]. When it does, online games of skill must be excluded from the purview of 'common gaming houses' under the PGA. Permitting such games of skill to be played physically but restricting their online application makes for a ludicrous policy in this age of technology. An argument could be made that these websites must charge only an administrative fee from the participants. However, when these companies can build sites that circumvent Indian laws and earn greater profits from them, why would they agree to be regulated by such an unnecessarily stringent law? Thus, if these measures are followed, online sports betting sites will function even in the absence of legalised gambling.

[76] Jay Sayta, *Will a 5-judge bench of the Supreme Court eventually decide the legality of online rummy and poker?,* (July 26, 2017), GLAWS, https://glaws.in/2017/07/26/will-5-judge-bench-supreme-court-eventually-decide-legality-online-rummy-poker/.

REFLECTING ON THE EXCLUSION OF BARTER IN A CONTRACT OF SALE OF GOODS UNDER THE OHADA UNIFORM ACT ON GENERAL COMMERCIAL LAW

*Dr. Roland Djieufack**

ABSTRACT

The principal focus of this paper is to critically test the application of the OHADA Uniform Act on General Commercial Law to barter-like transactions. It demonstrates how the Uniform Act lacks the necessary technical elements to govern barter. The non-monetary nature of pure barter transactions appears to be the driving force for these authors' rejection of the application of the Uniform Act to barter. Though Article 262 of the Uniform Act requires the buyer to pay the price for the goods, the word "price" is not defined by the Act. Thus, there is ambiguity as to whether or not a price must be monetary in application to barter contracts under the Uniform Act. This is the principal concern of the author inter alia in questioning whether the Uniform Act can be applied to barter-like transactions, because, in a barter transaction, the price paid for the delivery of something is the reciprocal delivery of something else. Arguably, leaving "price" undefined, by the drafters of the Uniform Act raises some ambiguity as to endorse its application to barter transactions. Thus, the conclusion in this paper is based on the premise that the Uniform Act is not suitable to govern barter-like transactions.

INTRODUCTION

The preamble to the treaty of the Organisation for the Harmonisation of Business Laws in Africa (better known by its French acronym OHADA)[1] points to the establishment

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[1] This French appellation refers to *Organisation pour L'Harmonisation en Afrique du Droit des Affaires*. The Treaty setting-up OHADA was signed at Port-Louis, Mauritius Island on 17 October 1993, as revised at Quebec, Canada, on 17 October 2008. The revisions became effective on 21 March 2010. As of July 7, 2010, the West African members of OHADA are Benin, Burkina Faso, Cote d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo, and the Central African members of OAHDA are Central African Republic, Chad,

of a new economic order based on the mutual economic benefit of cross border trade. The primary objective of this treaty was to provide a secure legal and judicial environment for business to operate in.[2] This was to be done through the elaboration and adoption of simple modern and common rules adapted to their economies, by setting up appropriate judicial procedures and by encouraging arbitration for the settlement of contractual disputes.[3] This suggests that uniform laws governing trans-national trade are essential to achieving these goals. To effectively carry out the piece-meal harmonisation of the business laws of member states, specifically through the elaboration of uniform laws, nine Uniform Acts have been adopted till date.[4] Our interest being sale of goods contract, we shall examine the Uniform Act on General Commercial Law (UAGCL),[5] with respect to its provisions governing sales contracts. Thus, the principal concern of this paper is to critically test the application of the UAGCL to barter-like transactions. The focus on the formal OHADA business law is to test its functionality in achieving its predictability of business transactions within its contracting states.[6]

This need for uniformity does not extend to barter transactions pursuant to the scope of the Uniform Act on General Commercial. Because of the complexity of such transactions, especially when conducted across international borders, the focus of this paper is on sale of goods and it specifically assesses the difficulties of the provisions of the UAGCL to govern barter- like transactions. Barter is commonplace in doing business with nations facing

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Cameroon, Comoros, Congo, Equatorial Guinea, and Gabon. *See* http://<www.ohada.org > and http://<www.ohada.com>. On February 22, 2010, the Democratic Republic of Congo's president ratified the country's adoption of the OHADA treaty. By the treaty's terms, a country becomes a member sixty days after the note has been deposited in Senegal. OHADA Treaty, article52, paragraph 3.

[2] Nanette Pilkington, *The Secuity of Transactions and Investment in Africa*, pp. 28-41, p.28-30, culled from the Proceedings of the OHADA Seminar held at the University of Buea, Buea, Cameroon, 18-19 September 2003 on the theme: *The Applicability of the OHADA Treaty in Cameroon*, (ed. Martha Tumnde).

[3] The rules adopted are known as Uniform Acts.

[4] The following Uniform Acts are already applicable in Member States: Commercial Companies and Economic Interest Groupings, Law of Securities, Simplified Recovery Proocedures and Measures of Execution, Collective Proceedings for Wping –off Debts, Arbiitration Law, Accounting Law, Law of Co-operatives.Carriage of Goods by Road. Two other Uniform Acts have been enacted and adopted by the Concil of Ministersbut are still inapplicable, to wit; Consumer Law and Contract Law.

[5] Hereinafter referred variously as 'UAGCL' or 'Uniform Act'. This is known in French as OHADA, *Acte Uniforme portant sur le Droit Commercial Général*, found in the Official Gazette of OHADA, No. 23, of 15th February 2011, http://www.ohada.com/textes.

[6] Nzalie Joseph Ebi, *Reflecting on OHADA Law Reform Mission: Its Impact on certain aspects of Company Law in Anglophone Cameroon*, (2002) (6) ANNALES DE LA FACULTÉ DES SCIENCES JURIDIQUES ET POLITIQUES, Université de Dschang, pp.97-119, p.102.

international sanctions. In addition, enabling parties to circumvent the sanctions, barter solves a common dilemma facing countries under sanction: that they have the capacity to produce valuable goods, but since they are unable to sell them for money, they have very limited stores of foreign currency with which to make purchases.[7]

Generally, when barter occurs in international trade, it is more complex than the trade of one good for another or in exchange for money.[8] These government-to-government contracts bypassed the export restrictions,[9] enabling the parties to trade goods they had surpluses of for goods they had shortages of without subjecting themselves to the aberrations of the global commodities market.[10] It can involve trades of services, or partial barter, where a good is exchanged for another good plus some money. More important are complex and varied barter-like transactions where performance occurs over a long period of time. Also, it is of practical evidence today that emerging countries often get involved into trade by barter than sales for economic development. In the third world countries, data reveal that 35% of international commerce is based rather on barter than on sale contracts. This situation leads third world countries to exchange their valuable resources sometimes with unnecessary goods.[11] It is worth noticing that swaps transactions, which are exchanges of currencies, are taking a huge position in daily practice.

Because of the complexity of such transactions, especially when conducted across international borders, this paper examines the demerits of the applicability of the UAGCL to barter transactions for the purpose of promoting uniformity in the OHADA territories. It supports the argument that the UAGCL lacks the necessary technical elements to govern

[7] William Wallis, Congo Outlines $9bn China Deal, Fin. Times (London, Asia Edition), May 10, 2008, at 4:
China and the Democratic Republic of Congo (hereinafter "DRC") finalized a deal in April, 2008 by which China would develop billions of dollars of infrastructure in the DRC in exchange for millions of tons of copper and cobalt. While this was a means for China to procure much needed raw materials and the DRC to get infrastructure it could not afford otherwise, it also appears to have been intended to circumvent issues with the DRC's debt to western lenders. Particularly, officials from international lending institutions warned that any deal resulting in the DRC acquiring new debt would scuttle ongoing negotiations for a write-off of the DRC's debt. In order to secure debt relief, the DRC was later forced to reduce the size of the China deal by three billion dollars;
Peter Schlectriem, *Requirements of Application and Sphere of Applicability of the CISG*, (2005) 36 VICTORIA UNIVERSITY OF WELINGTON LAW REVIEW, 781, p1-15, p.6

[8] U.N. Secretary-General, Report of the Secretary-General: *Barter or Exchange in International Trade*, 37, 10 Y.B. COMM'N ON INT'L. TRADE L., U.N. Doc. A/CN.9/SER.A/1979 (1979), at 37.

[9] Javier Blas, Nations in Secret Deals over Grain Supplies, Financial Times (London), April 11, 2008, at 9.

[10] *Ibid;* For example, in March, 2008, Egypt agreed to trade rice to Syria in exchange for wheat.

[11] *Ibid*; p.453.

barter.

First, this paper defines barter and examines the issue of the definition of price under the Uniform Act and how this creates an ambiguity with respect to barter contracts. The non-monetary nature of pure barter transactions appears to be the driving force for this author's rejection of the application of the UAGCL. Again, leaving "price" undefined, by the drafters of the UAGCL does not implicitly endorsed its application to barter transactions. In recognition of the fact that the UAGCL specifically identifies certain types of contracts of sale, the next step of this paper is to critically examine the ambit of the UAGCL, by meticulously discussing its limits in accommodating barter-like transactions under its scope. It follows that, the provisions regulating the rights and duties of parties in a sales contract are not suitable for under a barter transaction. With a view to ascertaining the suitability of the UAGCL in accommodating barter-like transactions to an extent, this paper has however shown some sketchy instances where that may be possible. The final part is the conclusion, which straws together various strands of argument explored in the paper to show that the UAGCL lacks the relevant legal framework to regulate trade by barter business.

WHAT IS BARTER ?

Sales mean an exchange of goods for money.[12] Barter contracts are not sales. In its simplest form, barter is the exchange of one commodity for another without the use of money.[13] For example, if a farmer needs tomato seeds, he might find someone who is willing to trade him the seeds in exchange for maize seeds instead of paying with money. This would allow him to get the goods he needs in exchange for the goods he has available without the need for money.

Barter (trade by barter), a well-known term in civil law systems, also referred to as "*troc*"[14] in French legal system, appears to be the historical starting point of what later turned to be sales contracts.[15] Barter is a contract whereby parties give to each other one thing for another.[16] From the onset, it has been the first form of transactions whereby parties could exchange goods according either to their importance or value. Even though, provisions of sales

[12] Schlectriem, *Peter, Requirements of Application and Sphere of Applicability of the CISG*, *op cit.,* p..5.
[13] GARNER, A. BRYAN et al., BLACK'S LAW DICTIONARY, (Thomas Reuters, 9th ed. 2009), p. 171.
[14] Stand for barter as usage and customs denomination.
[15] BENABENT, ALAIN, LES CONTRACTS SPÉCIAUX CIVILS ET COMMERCIAUX, (Droit civil ed., Montchrestien 8 ed. 2008) p. 208.
[16] Cameroon, Article 1702 Civil code (CC); France, Article 1702 CC.

contracts apply to sales by barter as well,[17] this form of transaction remains clearly distinctive from sale contracts which mainly consist of the delivery of the subject matter and the payment of its price.[18] It follows that the paramount distinction between the two forms of contract lies in the money consideration which appears to be of essence in a contract of sale.

As sale contracts, barter contracts are broadly used in commercial transactions. It is extended to services, currencies, movable or immovable.[19] Also, while sales contracts are a bilateral agreement, barter can be trilateral and even triangular.[20]

SUBTLE DISTINCTIONS ON DOMESTIC SALES LAWS

While barter transactions are treated as sales under the American Uniform Commercial Code (U.C.C.),[21] the French Civil code, upon which much of European law is based, establishes a dichotomy between sales and exchanges as distinct entities, which are governed by separate titles of the Civil code.[22] Even so, the Civil code analogizes exchanges to sales, applying the title concerning sales to all but a few issues concerning exchanges.[23]

Additionally, the semantic difference between sales and exchanges under Civil law has been exacerbated by adaptations of the French Civil code in various countries. While the French Civil code defines a "sale" as "an agreement by which one person binds himself to deliver a thing, and another to pay for it,"[24] the French-derived Egyptian Civil code defines "sale" as "a contract whereby the seller undertakes to transfer to the buyer the ownership of a thing or any other proprietary right in consideration of a price in money."[25] By using the word "money," the Egyptian adaptation of the code explicitly excludes barter transactions from sales. Thus, Egyptian commentators reject the application of the CISG to barter.[26] Similarly, while Article 1702 of the

[17] Cameroon, Artitcle 1707 CC; Cote d'Ivoire Article 1707 CC; France, Article 1707 CC.
[18] Cameroon, Article 1582 CC; Cote d'Ivoire Article 1582 CC; France Article 1582 CC.
[19] BENABENT, ALAIN, LES CONTRACTS SPÉCIAUX CIVILS ET COMMERCIAUX, *op cit,* pp.208-209 ; MALAURIE, PHILIPPE, et al., LES CONTRACTS SPÉCIAUX, (Defrénois 3 ed. 2007) p.451.
[20] MALAURIE, PHILIPPE, et al., LES CONTRACTS SPÉCIAUX, *op cit*., p.451.
[21] U.C.C. §2-304 (2008).
[22] See Sales: France, Code Civil, Aticles 1582-1701; Exchanges: Articles 1702-1707; translated at http://195.83.177.9/code/liste.phtml? lang=uk&c=22.
[23] France, Code civil, Article 1707; ("All the other rules laid down for contracts of sale shall apply to exchanges as to other issues.").
[24] France, Code civil, Article 1582, Cameroon, Article 1128 CC; Côte d'Ivoire, Article 1128 CC.
[25] HOSSAM A. EL-SAGHIR, THE INTERPRETATION OF THE CISG IN THE ARAB WORLD, IN CISG METHODOLOGY 355 (André Janssen & Olaf Meyer eds., 2009), http://www.cisg.law.pace.edu/cisg/biblio/el-saghir.html.
[26] *Ibid*; (stating that Egyptian commentators reject

French Civil code defines an "exchange" as "a contract by which the parties give to each other one thing for another,"[27] the French-derived Louisiana Civil code strengthens the distinction between sales and exchanges by defining "exchange" as "a contract, by which the parties to the contract give to one another, one thing for another, whatever it be, except money; for in that case it would be a sale."[28]

At Common law, the absence of money consideration distinguishes sales contracts from exchange or barter contracts.[29] However, it might get complicated when goods are exchanged for other goods in addition to money. The question is whether an agreement amounts to a sales or barter. Common law principle plays an important role in this situation. It has therefore been held that everything depends on the factual situation of each case. [30] However, it was pointed out that the answer depends on whether the money or the goods are the substantial consideration, as opposed to the material consideration as evidence in the English case of *Aldridge v. Johnson.*[31]

DOES THE UNIFORM ACT APPLY TO BARTER?: THE CONTRACT OF SALE OF GOODS DEFINED

As a general principle, the law relating to a contract of sale is an aspect of the general law of contract. A contract of sale is first and foremost a contract, that is, a binding consensual transaction based on agreement to buy and an agreement to sell.[32] It appears therefore that it cannot be examined in isolation from its very context.

The Uniform Act does not expressly define what constitutes a 'contract of sale.' However, it can be established indirectly from the provisions of the Act setting out the duties of the seller[33] and of the buyer.[34] According to those provisions, the contract of sale is a contract by which one party (seller) is obliged to deliver the goods, and to transfer property on the goods, to the other party (buyer) at an agreed price.[35] This denotes the fact that a sales contract is a reciprocal exchange of goods which one party binds itself to transfer against

application of the CISG to barter because of the way they view it as against their home legal culture).

[27] France, Code civil, Article1702.

[28] La. Civ. Code Ann. Article 2660 (2010), (October 21, 2015), http:// www.legis.state.la.us/lss/toc.htm.

[29] P.S. ATIYAH, et al., THE SALE OF GOODS, (Pitman Publishing 11 ed. 2005), p. 7.

[30] P.S. ATIYAH et al., THE SALE OF GOODS, *op cit*., p.10.

[31] (1857) 7E & B 885.

[32] P.S. ATIYAH et al., *op cit.*, p.6.

[33] Article 250 UAGCL: (Conforming goods).

[34] Article 262 UAGCL: (to purchase).

[35] *Ibid;* (refers to buyer's obligation to pay the price).

the price. This is a clear confirmation found under Article 250 para.1 UAGCL; the main obligations of the seller are to deliver the goods, hand over any documents relating to them in the goods. Under Article 262 UAGCL, the main obligations of the buyer are to pay the price and take delivery of the goods. For more clarification, a contract of sale is defined in § 2 of the Sale of Goods Act as:

> *... a contract by which the seller transfers or agrees to transfer property in goods to the buyer for money consideration, called the price.*

Also, in the French Civil code, a sales contract is merely between two parties, one party who is under the obligation to deliver the contract goods and the other one who is under the obligation to pay the price.[36]

To be concise, we can state that the Uniform Act follows the proposition that, a transaction where there is no exchange of goods for money consideration is completely out of its ambit. Thus, barter is completely out of its scope.

The root definition in the above definitions contains a number of ingredients, which are pointers in perceiving the essential requirements and nature of a sale contract and not that of a trade by barter.

PRICE NEED NOT BE DEFINED IN STRICTLY MONETARY TERMS

Though Article 262 of the Uniform Act requires the buyer to pay the price for the goods, the word "price" is not defined by the Act.[37] Thus, there is ambiguity as to whether or not a price must be monetary. This is the concern of the author in questioning whether the UAGCL can be applied to barter, because, in a barter transaction, the price paid for the delivery of something is the reciprocal delivery of something else.

In common English, "price" can refer to either monetary or non-monetary consideration. Merriam-Webster's Dictionary[38] defines price as being either "the quantity of one thing that is exchanged or demanded in barter or sale for another . . . [or] the amount of money given or set as consideration for the sale of a specified thing." In American legal usage, "price" is also inclusive of non-monetary consideration:

[36] *La vente est une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la* payer : See Civil Codes (CC) of Cameroon, Article 1582 CC; Côte d'Ivoire, Article 1582 CC; France, Article 1582 CC.

[37] This is a similar position under Article 53, CISG.

[38] Price--Definition and More from the Free Merriam-Webster Dictionary, (October 26, 2013) http://www.merriam-webster.com/dictionary/price.

Black's Law Dictionary defines price as "the amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold."[39]

From the above standpoint, rejection of the application of the UAGCL to barter transactions should be based in defining "price" in Article 262 of the UAGCL as being monetary. Due consideration to Article 262 which expressly mentions the buyer's obligation to 'pay the price', that is, an element the lack of which characterizes a barter transaction.[40] The non-monetary nature of pure barter transactions appears to be the driving force for this author's rejection of the application of the UAGCL. Again, leaving "price" undefined, by the drafters of the UAGCL does not implicitly endorsed its application to barter transactions.[41] But the reciprocal obligation of the buyer is expressly stated in terms of price and nothing else. It all depends on whether the parties intended to enter into a sales contract rather than a counter-trade transaction. Thus, it would not seem incongruous to exclude barter transactions merely because of the buyer's Article 262 obligation to "pay the price." Basically, the buyer is bound by two main obligations: The obligation to pay the price and the obligation to take delivery of the goods.[42]

THE PLACE OF CONSIDERATION

The UAGCL does not expressly define consideration. But, it is implicitly deduced from the duties of the parties. The seller agrees to transfer goods to the buyer who in return pays for them. The buyer is further expected to take all necessary steps for the effective payment of the price.[43]

The doctrine of consideration is peculiar to the Common law system. Generally, consideration is something of value in the eyes of the law. It follows that a valuable consideration can be some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other.[44] Whether through doctrine or case law, the appropriate definition of consideration seems to lay emphasis on the value of what is exchanged

[39]GARNER, A. BRYAN et al., BLACK'S LAW DICTIONARY, *op cit*, p. 1308.

[40] Franco Ferrari, The CISG's Sphere of Application: Articles 1-3 and 10, in The Draft Uncitral Digest and Beyond 21, 63-64 (Franco Ferrari, Harry Flechtner & Ronald A. Brand eds., 2004).

[41] JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 53 (3d ed. 1999)

[42]Article 262 UAGCL.

[43] Article 264 UAGCL.

[44]Currie v. Misa, (1975) LR 10 Exch 153, 162.

between the parties.[45] At Common law, it does not matter whether the value is too small or too high. What matters is the mere value of the consideration, no matter how small it is, as it was held in *Thomas v. Thomas*[46] when analysing the adequacy of the consideration.[47]

Consideration can also be described differently in sale of goods, for instance, as the price of the promise, as it was held in the case of *Dunlop Pneumatic Tyre Co. v. Selfridge Ltd.*[48] In such case, the House of Lords decided that a promise can be enforceable if it is bought for a price required; consideration here was the price.

In practice, the doctrine of consideration is divided into two categories: Executory and Executed consideration. In a sale of goods transaction, it will be described as "executory" when a promise is made in return of a counter promise and it will be executed when made against the performance of an act.[49]

Under Civil law, where a contract arises from an agreement at the meeting of the minds of the contracting parties, Common law departs from a promise supported by consideration.[50] Therefore, consideration at this stage appears to be relevant because a promise is not a contract unless converted into an agreement upon acceptance.[51] The promises lead then the parties to bargain. This might be the reason why consideration might be considered a consensus of intentions, a consensus of two promises. In a comparative perspective, with regard to onerous French contracts for instance, a promise amounting to consideration may fall within the criteria of "*la cause*". Thus, in a sales contract situation, the buyer's obligation to pay for the price will be treated as follows; the consideration supporting the contract and "*la cause*" of the seller's obligation to transfer the property of the goods. Consequently, in a sales contract, the cause of the seller remains the delivery of the goods and that of the buyer, why he wants the goods.[52] Based on this example, in a substantive note, what may amount to consideration under English Law, will likely be regarded as cause under French civil law.

[45]HUGH BEALE et al., CASES, MATERIALS AND TEXT ON CONTRACT LAW, (Hart Publishing, 2002) p.141.
[46](1842) 2 QB 851.
[47] FURMSTON, MICHAEL, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT, (12th edition, Butterworths), p.106; BARRY, NICHOLAS, FRENCH LAW OF CONTRACT, (Butterworths, London, 1982), p.113.
[48][1915] A.C 847, p 855.
[49]MICHAEL FURMSTON, LAW OF CONTRACT, *op cit*, p .97.
[50] BARRY, NICHOLAS, THE FRENCH LAW OF CONTRACT, *op cit.,* pp. 39-65.
[51]Carlill v. Carbolic Smoke Ball co, (1893) 1 QB 257, AC.
[52] HENRI & LEON MAZEAUD et al., OBLIGATIONS, THÉORIE GÉNÉRALE, LEÇONS DE DROIT CIVIL (9 ed., Montchrestien, 1998) p.271-272.

In the case of the formation of the contract of sale of goods under English law, the consideration consists of rendering of mutual promise and most importantly the payment of the price. Only promises supported by a legal consideration (price) are legally binding. Generally speaking, the central function of the doctrine of consideration is to prevent people from making gratuitous promises, and the purpose of the law of consideration is to distinguish between gratuitous and non-gratuitous promises. The price is money which has to be paid for the purchase of something.

Just as the CISG,[53] the issue of price under the UAGCL can be inferred from the mutual exchanges of goods on the one hand for price on the other. Article 263 of the Uniform Act stipulates that:

> *A sale may not be validly concluded without a specification of the price in the contract of sale, unless the parties referred to the price generally charged at the time of conclusion of the contract in the commercial sector considered for the same goods sold under similar circumstances.*

The wording of the above article shows that price is a determining factor in the formation of a contract of sale. It represents a consideration on the part of the seller while transfer of title is for the buyer. There is however, the possibility for concluding contracts without specifying the price by making reference to the price generally charged at the time of the contract.[54] From the consumer's point of view, price is usually defined "as what the consumer must give up to purchase a product or service".[55] Even though the parties in their contract are free to debate on the price of the object to be sold, they are certain prices of certain commodities which have been statutorily fixed by the government[56], at times in relation to the trade usage and practice.

[53] Article 55 CISG.

[54] Edie, Diable Pascal, *Contract of Sale of Goods under the OHADA Uniform Act on General Commercial Law, The Common Law and the CISG: A Comparative Study*, (Masters Dissertaion, Faculty of Law and Political Science, University of Dschang, 2011) p.45.

[55] J. Paul Peter & Jerry C. Olson, *supra,* p.496.

[56] Price control began in Cameroon, with the Law no. 63/LF/27, of the 19th June 1963, which established a regime of price control. In addition to these general provisions, specific legislation has been enacted to deal with particular businesses. Ministerial Order No. 14/MINEP/DPPM, of March 4th regulates the sales of pharmaceutical products. Another Order, No. 006/MINDIC/DC/82 deals with activities related to the automobile industry.

ARE THE PROVISIONS OF THE UNIFORM ACT SUITED TO THE REGULATION OF BARTER?

THE CATEGORISATION OF A CONTRACT OF SALE UNDER THE UNIFORM ACT

The categorisation of a contract of sale under the UAGCL is very restrictive. The preoccupation of the Act relates to contracts for the acquisition of goods for business purposes which can be identified as B2B contracts. Articles 3 and 4 of the Act circumscribe the scope of issues governed by the UAGCL as the types of contracts it expressly intends to regulate. Thus, barter is out its scope.

Generally, the distinction B2B and B2C in sales contract is often found in civil law countries, whereas; such a distinction does not exist at Common law. B2B contracts refer to sales contracts between two professional sellers. It is often referred to as "business to business contract". On the other hand, business to consumer sales (B2C) contracts refers to sales contracts concluded between a professional seller and a consumer. The UAGCL does not cover B2C contracts but the expected outcome of a B2B contract under the UAGCL is to proceed to a B2C contract. In fact, the goods involved in a B2B transaction are the subject in a B2C contract. Consumers are the end-users of those goods. Broadly speaking, the UAGCL does not as well as regulate Government to Business (G2B) and Government to Consumer (G2C), and others. However, trade by barter can conveniently be suited for Government to Business contracts or Government to Government contracts, as news emerging from many African countries indicates that with respect to virtual and physical goods and services, opportunities are opening up within Africa in the aforementioned areas key facets of commerce trading under such a transaction in exchange of goods.[57]

Business to Business

Today, the Uniform Act is the applicable governing law in the OHADA Member States with regard to the B2B contract.[58] Under the Uniform Act, a B2B contract is conducted by a trader (*commerçant*).[59]

[57] Phiip Esselaar & Jonathan Miller, *Towards Electronic Coomerce in Africa: A Perspective from Three Studies*, (2002) 2(1), THE SOUTHERN AFRICAN JOURNAL OF INFORMATION AND COMMUNICATION, (December 2010), http://link.wits.ac.za/journal/j0201-me.htm1.

[58] These contracts are regulated by all the Articles which fall under Book IV of the UAGCL.

[59] Athanase, Foko, *Le Statut du Commerçant dans l'espace OHADA*, (P.U.A., Collection Vade-Mecum, Yaoundé, 2005) p.19-20; Jean-Marie Nyama, *Eléments de Droit des Affaires Cameroun-OHADA*, (Presse de l'UCAC, Collection Apprendre, Yaoundé 2002) p.18-19.

Generally, in order to determine whether a person or an entity is a trader, it is important to find out whether it carries out a particular transaction on a regular basis. Traders are considered to be those who engage in commerce as their usual professional activities.[60] Thus, traders in this sense could be anyone, a human being, a legal person including all commercial companies, or a person governed by public law.[61] As concerns contracts of sale of goods, the Uniform Act has provided rules for natural persons and corporations who may exercise such sales contract.[62]

However, it would not be necessary here to elaborate on the broad categories of legal persons that may be involved in commercial activity under the Uniform Act on General Commercial Law.

Under the UAGCL, the seller and the buyer must be traders. In fact, the Uniform Act restricts the status of the parties that may be party to a contract of sale. The status of the traders, either a physical person[63] or a company,[64] must be acquired by registration in the Commercial Registry.[65]

The Uniform Act has listed out the different types of business transactions it intends to cover. These transactions include; the purchase of movable or immovable property for resale; banking, stock-exchange, currency exchange, brokerage, insurance, and transit transactions; contracts between traders for business purposes; the industrial exploitation of mines, quarries and any natural resource deposit and rental of movable property; manufacturing, transportation and telecommunication operations; the operations of trade middlemen such as commission, brokerage and agency, as well as middleman's operations relating to the purchase, underwriting, sale or rental of immovable, property, businesses, shares in commercial companies or property development companies; A bill of exchange, a promissory note, and a warrant.[66] The list is not exhaustive.

[60] UAGCL, Article 2. The language in this text is ambiguous to a Common law reader.

[61] Uniform Act, Article 1. To a Common law lawyer, this notion seems strange since it has no specific legal connotation in the Common law system. A close idea to this in view to ease understanding may relate to public sector of the economy, that is public enterprises. Many public bodies are corporations in a similar sense to private companies operating in a private sector. Therefore, a public body is an organisation set up in the public interest to carry out a public service function. It may be a public enterprise of an administrative or commercial kind. They have an inherent power to protect the public interest.

[62] Book IV UAGCL.

[63] *See* UAGCL, Article 44.

[64] *See* UAGCL, Article 46.

[65] Book II UAGCL; Article 6 Uniform Act on Commercial Companies and Economic Interest Groups.

[66] UAGCL, Articles 3-4.

The type of B2B contract with which we are concerned here is a contract between professional traders for business purposes what is here referred to as contract for sale of goods. The predominant feature of this type of contract is that it involves the selling of goods between the seller and commercial buyer. The purpose for which the goods are bought in exchange of money is of special relevance. This leads to the justification that the OHADA Uniform Act is entirely implicitly concerned with the selling of goods between the seller and the commercial buyer in exchange of a money consideration known as price. This expressly excludes the trade by barter transaction between this category of business persons except based on their own agreement. Trade by barter does not fall under the scope of this kind of business regulating the relationship between the seller and the buyer under the UAGCL. Again, undeniably, the idea connected with this issue of reselling of goods under the Uniform Act concerns expressly commercial buyers (acting as retailers or wholesalers), exercising trade for the purpose of the goods which are bought for resale and not for personal consumption.[67]

In a B2B contracts under the Uniform Act, if a dispute arises that is not covered by the provisions of this Act, domestic law rules shall apply to resolve the dispute.[68] These include the commercial code, the civil code or other national sources of law in force in the OHADA Contracting States. In practice, the civil code and the commercial code are the primary reference in term of B2B and B2C contracts.[69]

LEGAL CAPACITY OF COMMERCIAL PERSONS ENGAGED IN BUSINESS

Capacity is very important as far as the conclusion of a sale contract is concerned. Capacity means the ability to perform legally binding acts. The parties must possess the legal capacity before entering into a contract of sale. Also, as mentioned above sales contracts are a bilateral agreement, whereas barter can be trilateral and even triangular.[70]

The UAGCL subjects the practice of commercial activities to a class of individuals. This is because the practice of business warrants a certain degree of maturity and experience. This is why the UAGCL expressly prohibits minors from delving into such business. The

[67] Akuété Pedro Santos and Jean Yado Toé, O*HADA Droit Commercial Général*, *op cit.*, p. 341.

[68] UAGCL, Article 237.

[69] For example, in Senegal, it is the Civil and Commercial Code of Obligations.

[70] MALAURIE, PHILIPPE, et al., LES CONTRACTS SPÉCIAUX, *op cit*,, p.451.

UAGCL stipulates that for a person to engage in trading as a regular occupation, he must be legally fit.[71] This means that such a person must be of the required age and free from any legal restrictions. The UAGCL restricts certain persons to undertake commercial activities due to the complexity of business especially with minors. A minor does not have the legal capacity to have the status of a commercial person or engage in trading, he can only do this if he becomes emancipated.[72]

As in English law, those wishing to involve in commerce under the Uniform Act come in different guises. An individual wishing to engage in business may act on his own or a wide variety of business organisations are possible, most being legal or 'moral' persons, that is, having a legal personality in their own right, distinct from that of the natural persons involved.[73] Those who involve in doing business under the OHADA Uniform Act on General Commercial Law must *prima facie* be considered to be *commerçants*,[74] and their acts are deemed to be commercial acts subject to the rules of French commercial law.[75] In English there is no equivalent defined term. As Article 2 of the Uniform Act puts it:

> *Est commerçant celui qui fait de l'accomplissement de commerce par nature sa profession*.

(A trader is a person who carries out commercial acts in nature as its profession).

There is obviously circularity in the definition but this has not led to practical difficulties in delimiting the scope of a trader's commercial acts by 'nature' as identified under the Uniform Act. Probably the nearest equivalent in English law to '*un acte de commerce'* is the notion of 'acting in the course of a business'.[76] This word 'profession' translates the fact that a trader must engage in a business. 'Business' includes a profession and the activities of certain professions are not permitted under the Uniform

[71] UAGCL, Article 6.

[72] UAGCL, Article 7; *See* Djieufack Roland, *The Nature of Agency Relationship under the OHADA Uniform Act on General Commercial Law: A Comparative Study", (*D.E.A. Dissertation, Faculty of Law and Political Science, University of Dschang), p.5.

[73]Specifically, the businesses of these organisations are governed by the Uniform Act on Commercial Companies and Economic Interests Groups of OHADA. These are profit-making organisations. The general term used in French law is société such as, société anonyme (SA), société en commandite simple (SCS), société en nom collectif (SNC), société a responsabilité limitée (SARL), and Groupements d'Intérêts Economiques (GIE).

[74] UAGCL, Article 1.

[75] KUATE, TAMEGHE SLYVAIN SOREL ed. PAUL-GERARD POUGOUE et al., IN ENCYCLOPEDIE DU DROIT OHADA, (Lamy, Paris 2011), p.3 ; Paul-Gérard Pougoué & Foko Athanase, *Le Statut du Commercant dans l'espace OHADA,* Yaoundé, (P.U.A., Collection vademecum, Yaoundé) pp.19-21.

[76]BRICE, DICKSON, INTRODUCTION TO FRENCH LAW, (Pitman Publishing , London 1994*)* p.170.

Act.[77] The term is a wide one and denotes any regular activity of a business character carried out by a person on its own account. 'In the course of a business' has a broad meaning. It is not necessary that the transaction should be one of a type conducted with regularity by the seller.[78] From the text of the Uniform Act, it could involve for example a dealer in sales of goods or sales by an agent.[79]

As the characterisation of a person as a commercial person depends on the nature of the particular activities in which it is engaged under the OHADA Uniform Act, registration of the business in the Commercial Registry is also an important factor. This seems to be a permission or admission to commercial professions. The Uniform Act has created a central register[80] to supplement the registers kept at the national courts.[81] The impact of registration differs depending upon whether the name registered is that of an individual or of a company.[82] Registration of the former has merely a declaratory effect: it raises a rebuttable presumption that the acts of that individual are commercial in nature (Article 3 UAGCL). If the individual is not registered, he cannot rely upon his status as a commercial person vis-à-vis other persons but retains the duty to fulfill the obligations which lie upon it as a person. For companies' registration has a constitutive effect: it is only then that the company acquires legal personality.[83]

Likewise, any incidental acts which a trader undertakes in the context of his or her trade or profession are nevertheless classified as commercial acts (*actes de commerce par acessoire).* It is in this concept of 'commercial acts'(*actes de commerce*) that the key to the scope of French commercial law is to be found, for commercial law is essentially about acts and the *commerçants* who engage in them.[84] Some acts under the Uniform Act are considered commercial by virtue of their nature that is, taking account of what is done and by whom (actes de commerce par nature).[85] Certain acts

[77] UAGCL, Article 9; *See,* Anoukaha, François, *'L'incompatibilité d'exercise d'une activité commerciale dans l'espace OHADA: le cas du Cameroun*, (2001) 1 (5) ANNALES DE LA FACULTÉ DES SCIENCES JURIDIQUES ET POLTIQUES, Université de Dschang, p.6.

[78] ROY GOODE, COMMERCIAL LAW, (3rd edition, Penguin Books, 2004) p.300-301.

[79] KUATE, TAMEGHE SLYVAIN SOREL, ENCYCLOPEDIE DU DROIT OHADA, *op cit.*, p.23.

[80] UAGCL, Article 76-78.

[81] The organisation of this registry is contained in Book III UAGCL.

[82] This is contained in Book II Chapter 1 of the UAGCL.

[83] UAGCL, Article 59-69.

[84] BELL, JOHN et al., PRINCIPLES OF FRENCH LAW, (Oxford University Press, 1998), pp.432-433; KUATE, TAMEGHE SLYVAIN SOREL, ENCYCLOPEDIE DU DROIT OHADA, *op cit*, pp.2-4.

[85] UAGCL, Article 3. These acts purposefully constitute a participation in the circulation of wealth (such as, goods and services).

are automatically deemed to be commercial because of the form of the act itself or of the organisation involved: *actes de commerce par la forme*.[86] In addition, acts which normally if they are done as an ancillary part of a commercial activity: *actes de commerce par accessoire.*

Besides that, the OHADA Uniform Act on General Commercial Law now covers a special category of traders known in French as "*entreprenant*". There is still wonder as to what may be the equivalent to this in English. For the sake of convenience, 'entrepreneur' will be referred to in this work. A closest meaning can be derived from the literal meaning given to who an entrepreneur is: "someone who uses money to start business and make business deals".[87] This is a natural person who when sales pass a threshold, will lose that status and, when eligible, acquires that status of a commercial person.[88] The determining factor in circumscribing an entrepreneur's activities will be done particularly to taxes and the obligation to pay social charges in accordance with the national laws of OHADA member States.[89] In other words, it all depends on the income of the individual. This current dispensation is contrary to the spirit of harmonisation as championed by the OHADA Treaty as its principal objective.[90]

By virtue of Article 30 of the Uniform Act, an entrepreneur is:

> *L'entreprenant est un entrepreneur individuel, personne physique qui, sur simple déclaration prévue dans le présent Acte Uniforme, exerce une activité professionnelle civile, commerciale, artisanale ou agricole.*

The above text suggests that it is a natural person who undertakes a commercial or civil act, artistic or agricultural activity. It entails

[86] UAGCL, Article 4. The clearest examples covered by the Uniform Act are the bill of exchange, negotiating instrument and a warrant.

[87] MACMILLAN ENGLISH DICTIONARY FOR ADVANCED LEARNERS, INTERNATIONAL STUDENTS ed, (Macmillan Publishers Limited, 2002), p. 462.

[88] Martha Simo Tumnde, *Cameroon offers a Contextual Approach to Understanding the OHADA Treaty and Uniform Acts*, UNIFIED BUSINESS LAWS FOR AFRICA, COMMON LAW PERSPECTIVES ON OHADA (ed. Claire Moore Dickerson), *op cit*, p. 66; PAUL-GÉRARD POUGOUÉ, JEAN CLAUDE JAMES, YVETTE RACHEL KALIEU, et al, ECYCLOPEDIE DU DROIT OHADA*, op cit.,* p.49.

[89] UAGCL, Article 30 para. 7. Such a measure usually scares away some entrepreneurs of this category for fear of paying taxes upon disclosing their business activity to the government. Thus, they usually carry out their different activities hiddenly in most towns of Cameroon. This is even further evidenced by the non-declaration of their business activities at the Commercial Registry. However, based on exchanges which the researcher had with some of these individuals in the city of Douala, the problem stems from lack of information and illiteracy. It also concerns the remote geographical zone where some of these persons are found. Some do migrate from town to town. *See,* Kanchop Thierry Noel, *Le Secteur Informel a l'Epreuve du Droit des Affaires OHADA,* Memoire de D.E.A., Universite de Dschang, 2008, pp.82-83.

[90] PAUL-GÉRARD POUGOUÉ, JEAN CLAUDE JAMES, YVETTE RACHEL KALIEU, et al, ECYCLOPEDIE DU DROIT OHADA*,* op cit., p.*49.*

therefore that the acts carried by an entrepreneur can be categorised to be '*acte de commerce par nature'*or '*acte de commerce par accessoire'* because acts which would normally be regarded as civil (that is not commercial) will be categorised as commercial if they are done as an ancillary part of a commercial activity.[91] This entails that if any person who is prohibited by the Uniform Act to exercise a trade may fall under this head if he engages in a commercial activity provided it is not incompatible with the rules of his profession.[92]

PARTIES' OBLIGATIONS: THE SELLER'S DUTY OF CONFORMITY

In contracts of sale of goods governed by the Uniform Act, the duties of the seller are principally governed by the notion of 'conformity'. This duty is expansive, imposing an absolute liability for defects that exist when risk passes to the seller, regardless of the fault.[93] The duties of parties to a contract of sale of goods are very important under commercial transactions. These conditions are encapsulated into the concept of conformity in the Uniform Act, namely, quantity, quality, description, packaging, particular purpose and sample or model.[94] This is because parties most often show concern to what needs to be done and how it has to be done so as to achieve each other's interests in the transaction. It is not an over-statement to say that, the obligations of parties is the core of a contract of sale. Since the other requirements notably the contract formation and the terms of a contract shall have no significance if contractual parties fail to honour respective obligations. So, the subsistence of a contract of sale largely depends on the full respect of duties by parties concerned.

Similar to the former Civil law position applied in the OHADA States, goods conform to the contract when the material and functional *(impropriété de la chose and vice caché)*[95] parts of the goods are satisfied, unless otherwise

[91] HARRIS, DONALD AND TALLON, DENIS, CONTRACT LAW TODAY, ANGLO-FRENCH COMPARISONS, (Clarendon Press, Oxford 1991), p. 15.

[92] UAGCL, Article 9.

[93] Maley, Kristian, *The Limits to the Conformity of Goods in the United Nations Convention on Contacts for the International sale of Goods (CISG)*, (2009) 12 INTERNATIONAL TRADE & BUSINESS LAW REVIEW, pp.83-126, p. 83.

[94] PAUL-GÉRARD POUGOUÉ, JEAN CLAUDE JAMES, YVETTE RACHEL KALIEU, et al, ECYCLOPEDIE DU DROIT OHADA, *op cit*, p.55; *See* sections 12-15 of the 1893 Act, and Articles 35-44 of the CISG.

[95] Under French law, the element of hidden defect is dealt under sale law. This is actually in effect the purport of the text. *See,* PAUL-GÉRARD POUGOUÉ, JEAN CLAUDE JAMES, YVETTE RACHEL KALIEU, et al, ECYCLOPEDIE DU DROIT OHADA, op cit, p.55 ; Francis Fourment, *Défauts caches de la chose vendue que reste-t-il de l'action en garantie des vices caches ?*, (1997), 3 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL ET DE DROIT ECONOMIQUE, pp. 416-419; Jacques Ghestin, *Conformité et Garanties dans la Vente (produits mobiliers),* Paris, L.G.D.J., 1993.

provided in the contract.[96] While the material conformity relates to the quality, quantity, specification and packaging of the goods,[97] the functional conformity relates to the fitness of the goods to the usual purpose or purposes for which goods of the same nature are used or to such particular purpose, expressly or impliedly made known by the buyer to the seller.[98] Material conformity therefore consists of four elements derived from the contract, quantity, quality, description, and packaging.

A key concern arising from the application of trade by barter under the above provisions under the UAGCL is that of legally appreciating the duties of the parties under such commerce. A potential buyer or seller could fall victim to a host of vices over the goods in question. The risks may often be less appreciated, which principally may stem from the defective nature of the good. Are the negotiations critically based on the material aspects relating to the goods: quality, quantity, sample, description, packaging, labeling, and weight? Could it as well be based on the functional elements of the goods: fit for purposes, fit for ordinary purposes? Intellectual property rights are also prone to abuse the legal rights of the parties including copyright and trade infringements.

These key concerns discussed above could give rise to considerable uncertainty for accepting to regulate trade by barter under the Act and the resulting legal risk could generate panoply of cases in the courts and dampen the appetite of persons wishing to conduct business within the OHADA member countries. It is therefore very important that an adequate legal and regulatory mechanism should be put in place for trade by barter with a view to reducing the risks associated with it, and giving confidence to business people to use it in lieu of strictly sales of goods contracts. Adjudicating these issues will be more difficult and that parties would be wise to preempt difficulties through careful drafting, especially in defining what constitutes a fundamental breach.

MEANS OF SECURING PAYMENT OF THE PRICE BY THE BUYER

Under the UAGCL, the buyer is bound by two main obligations[99]: that is, the payment of the price[100] and the taking of delivery.[101]

[96] AKUÉTÉ PEDROS SANTOS & JEAN YADO TOÉ, OHADA DROIT COMMERCIAL GÉNÉRAL, *(*Bruxelles, Bruylant, Collection Droit Uniforme Africain), 2002, pp. 392-393.
[97] UAGCL, Article 255 para. 1.
[98] MBA-OWONO CHARLES, *Non-Conformité Et Vice Cachés Dans La Vente Commerciale En Droit Uniform Africain*, (2000) 41 JURIDIS PÉRIODIQUE, PP.107-127, PP. 110-116.
[99] UAGCL, Article 262.
[100] UAGCL, Article 263-268.

According to the UAGCL, the exact time the buyer has to pay is located at the time thereupon the seller makes available to him either the goods or the documents representing the goods.[102] From this standpoint, it is could be understood that the acceptance of the goods in a contract of sale under the UAGCL is based on the payment of the price in terms of a monetary form. Thus, delivery and payment in money are concurrent.

Inferred from the SGA,[103] case law and doctrine follows the principle of "cash on delivery" as implicit on all contracts for the sale of goods.[104] This position was illustrated in the English case of *Clemens Horst & Co V. Biddell Bros.*[105] but generally, parties are meant to agree on the method of payment, which should be referenced in the contract of sale. Upon failure, the default rule state that methods of payment will be inferred from the surrounding circumstances, the course of dealings between the parties or any relevant custom of the trade, business or profession or even by a legal tender.[106]

Generally, the modes of payment are diverse: Under the SGA, reference is made for instance to a bill of landing or bill of exchange. But the mode of payment can also be cash, negotiable instrument, or banker's commercial credit.[107] Upon failure, the default rule states certain remedies which the parties could use to exercise their rights.

Retention of Title

Under the UAGCL, the goods and the property in the goods are usually transferred from the seller to the buyer once the latter has paid the price in accordance with the contract stipulations. It is therefore an obligation of the buyer to pay for the price of the goods at the contract stipulated time, once the seller makes the goods available or the documents representing those goods.[108]

Furthermore, the UAGCL states that the seller shall condition delivery of the goods or the handing over of the documents on payment

[101] UAGCL, Article 269-274.
[102] UAGCL, Article 267.
[103] SGA 1893, s 28.
[104] IGWEIKE, K.I., SALES OF GOODS, NIGERIAN COMMERCIAL LAW, (Mathouse Law Books, Lagos), 2001, p 188.
[105] [1912] A.C 18 pp. 22-3.
[106] IGWEIKE, K.I., SALES OF GOODS, NIGERIAN COMMERCIAL LAW, *op cit*, p 190.
[107] 2 LIVY UZOUKWU, NIGERIA, IN REMEDIES FOR INTERNATIONAL SELLERS OF GOODS (Dennis Campbell ed., 2008). P. II/650.
[108] UAGCL, Artcle 266; CISG, Article 58 (1).

of the purchase price.[109] It is therefore clear that both parties enjoy under these provisions the right of retention. On the one hand, the buyer's right of retention is evidenced by the fact that he will only release payment when the goods are placed at his disposal. Consequently,, the title over the goods will be retained until the goods are handed over to the buyer upon payment of the agreed price.[110]

Moreover, the buyer's right may sometimes be extended when he has to examine the goods before acceptance.[111] In accordance with the UAGCL, the seller exercises his right of retention of title by keeping control over the goods until the buyer pays the price.[112] Also, if the contract of sale requires transportation of goods by a carrier, the seller usually takes the risk to forward the goods to the buyer.[113]

Right of Stoppage in Transitu

The right of stoppage *in transitu* is a right available to the seller. It is exercised against an insolvent buyer, but might also include anyone that apparently has by his conduct or acts furnished evidence of general inability to perform a substantive part of his obligation undertaken under the contract.

In practice, the right of stoppage *in transitu* is used by the seller against the buyer, to reclaim possession of goods while they are still in transit. Although, the UAGCL does not directly discuss this principle as the case under the CISG,[114] it does however clearly discuss the suspension of the contract when there is a substantial part of the contract that might not be fulfilled,[115] which could be due to the buyer's financial inability to pay the contract price.[116] Under the UAGCL the seller is given the legal remedy and right to prevent the handing over of the goods if it becomes apparent that the buyer will not perform the substantive part of his obligation.[117] Such an action is exercised through a court process.

Thus, on notice of the buyer's insolvency,[118] the seller may resume possession of the goods as long as they are in transit, and may retain

[109] *Ibid.*
[110] *Ibid.*
[111] UAGCL, Article267; CISG, Article 58 (3).
[112] AKUÉTÉ PEDROS SANTOS & JEAN YADO TOÉ, OHADA DROIT COMMERCIAL GÉNÉRAL, *op cit*, p. 405 ; INGEBOD SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), (Schlechtriem & Schwenzer edition, Oxford University Press, 3rd edition., 2010), para. 23-25, p. 852.
[113] UAGCL, Article 252.
[114] CISG, Artcle 71 (2).
[115] UAGCL, Article 281.
[116] UAGCL, Article 285; AKUÉTÉ PEDROS SANTOS & JEAN YADO TOÉ, OHADA DROIT COMMERCIAL GÉNÉRAL, *op cit,* p 409-10.
[117] UAGCL, Article 281.
[118] Kendall v. Marshall Stevens & Co, (1883) 11 Q.B 356, 364.

them until payment or tender of the price.[119] It is the performance of this right by the seller that constitutes the stoppage in transit.

The right of stoppage in transitu strictly takes place when the property in the goods has already passed to the buyer and constructive delivery has been made and before the goods get to their agreed destination. In practice, the unpaid seller retains the goods until payment obligation from the buyer is fulfilled or when the price is tendered: the right is therefore against the good and no more. In short, in implementing his right of stoppage in transit, the law considers some elements for the lawful exercises of this right: the seller must be an unpaid seller,[120] the buyer must have gone bankrupt or insolvent[121] and the buyer must have parted with possession of the goods and these must have been in the course of *transitu* to the buyer. [122]

However, in the process of transiting the goods, three different issues may arise which are useful to be identified in other to determine whether or not the right of stoppage *in transitu* must be exercised. The first issue is related to a carrier, acting as an agent; he holds the goods on behalf of the seller.[123] Here, the right of stoppage is useless as the seller's lien remains on the goods while they are in transit.

In the second instance, the carrier holds the goods while in transit, not as an agent of either both parties but on his own; the seller should use his right of stoppage in transit in order to resume possession of the goods and secure payment. Normally, in accordance with the provision of Article 252, it would all depend on the agreement of both parties.

At the third instance, the goods in transit are with the carrier acting as the buyer's agent. The SGA treats the latter position as the right of stoppage in transit as never having existed or considered terminated.[124] Same result occurs if the goods are delivered to the buyer before the seller exercises his right or the buyer takes delivery before the transit comes to an end.[125]

Also, although stoppage in transit cannot be used once the goods get to destination, this is not the case when the goods have been rejected by the buyer and the goods remain in the

[119]SGA 1893, § 44.
[120]SGA 1893, § 38 (1).
[121]However, for this element to be satisfied, it is not enough if the seller merely believes or suspected that the buyer was bankrupt, he must have reasonable proof for the circumstance as it was decided in *Constantia's case* (1807) 6 Ch. D. Rob. 321, 387, as per Sir William Scott.
[122]Goods in the course of transit have defined in SGA 1893, § 45 (1).
[123] UAGCL, Article 252.
[124]SGA 1893, § 45 (2-7).
[125]SGA 1893, § 45 (2).

possession of the seller's agent; the transit is not then considered at law and the seller therefore is still entitled to exercised his right of stoppage in transit.[126] Almost in the same circumstances, if the buyer rejects the goods upon notice from the seller's agent, the right of stoppage in transit is said to have been revived or reinstated as the agent continues to hold the goods. The statute has also admitted that the seller can still exercise his right of stoppage *in transitu* over part of the goods unless he has waived or stopped his right.[127]

Notwithstanding the fact that common law knows no formalities as to the exercise of the right of stoppage in transit, this is not the case under the SGA which provides that an unpaid seller may use his right of stoppage either by taking actual possession of the goods,[128] or by giving notice of his claim to the carrier or the agent in whose possession of the goods are.[129] However, the direct consequence of the stoppage *in transitu* does not as such rescind the contract of sale and the insolvency as described earlier amounts to anticipatory repudiation of the contract.[130] In stopping the goods while in transit, the seller merely resumes possession goods[131].[132] In practice the commonly known effect of stoppage *in transitu* is to give or restore to the unpaid seller his lien over the goods in security for payment of the price.[133]

ELEMENTS NECESSARY TO GOVERN BARTER TRANSACTIONS UNDER THE UAGCL

THE RECIPROCAL CONTRACT DOCTRINE: APPLYING SALES LAW TO BARTER TRANSACTIONS

As this paper tends to demonstrate the argument that the UAGCL may practically be applied to barter-like transactions, it relies upon the reciprocal contract doctrine: that two contracts exist as consideration for each other. Thus, the seller in one contract is reciprocally the buyer in the other contract. In the first contract, party A (the seller) agrees to sell good A to party B (the buyer) in exchange for the delivery of good B. In the second contract, party B (now the seller) agrees to sell good B to party A (now the buyer) in exchange for the delivery

[126]SGA 1893, § 45 (4).
[127]SGA 1893, § 45 (7).
[128]SGA 1893, § 46 (1).
[129]SGA 1893, § 46 (1).
[130]SGA 1893, § 48 (1).

[131]Whether he received possession or direct the carrier who holds to his order; *Booth Steamship Co Ltd v. Cargo Fleet Iron Co Ltd*, (1916) 2 KB 579; for the carrier's duty, with the leading case of *Continental Grain Co v. Islamic Republic of Ireland Shipping Lines,* (1983) 2 Lloyd's rep. 620.
[132]SGA 1893 s 44.
[133]As it was held in the wording of *Kemp v. Falk* (1882) 7 App. Cass. 573.

of good A.

The Uniform Commercial Code (UCC) illustrates this doctrine, stating that if the price "is payable in whole or in part in goods each party is a seller of the goods which he is to transfer."[134] Though the UAGCL does not specifically enumerate the reciprocal contract doctrine, it can be implied so long as "price" under UAGCL Article 262 is interpreted as being non-monetary, as the price paid under Article 262 in a reciprocal contract situation is the delivery of something under another contract.

Opposition to this application of the UAGCL to barter could stem from a belief that the UAGCL does not contain the necessary technical elements to effectively govern barter transactions. Similarly, under the CISG this is generally based upon the 1979 United Nations Commission on International Trade Law (*hereinafter* "UNCITRAL") report, which suggests that there might be some gaps in the CISG that would frustrate its application to barter transactions.[135]

The practical issues concerning applying the UAGCL to barter transactions are not insurmountable. The main problem concerns remedies. Specifically, under the UAGCL the seller's right to make the tender of delivery conditional upon the buyer's payment of the price seems to pose some difficulties.[136] The paper contemplates difficulties in deciding when failure to perform is serious enough to justify non-performance by the other party, when remedies are required because non-performance is insufficient, and when a party may conclude that the other party is unable to perform due to a change in creditworthiness or conduct in preparing to perform.[137]

This paper illustrates how the UAGCL can be applied to some of these situations using the reciprocal contract doctrine. It should be recall that under that doctrine, each party is buyer and seller. For the purposes of resolving these issues, it is most productive to focus on each party's role as a seller. This helps to avoid issues concerning the buyer's obligation to pay the price and results in more appropriate remedies.

[134] U.C.C., §2-304 (1977).

[135] U.N. Secretary-General, *Report of the Secretary-General: Barter or Exchange in International Trade*, *op cit;* Horowitz, Andrew, *Revising Barter under the CISG*, (2010) 29 JOURNAL OF LAW AND COMMERCE 99, pp.1-13.

[136] UAGCL, Article 266.

[137] UAGCL, Article 282 (for the seller"s non-performance) ; UAGCL, Article 285 (for the buyer"s non-performance).

REMEDIES IN SITUATIONS OF PART PERFORMANCE

One of the main issues is the question of remedies, especially in the area of damages for part performance.[138] The concern appears to be a situation where one party wants to reduce the price under UAGCL Article 288 or is seeking damages for non-performance.

This situation can be dealt with under existing UAGCL principles using the basic premise that all goods have monetary value[139] and reciprocal contract principles. First, the court would have to determine the fair market value of the goods as contracted for. It is immaterial that these values might not be equal because the UAGCL affirms in Article 281that damages should allow a party to recover the benefit of his bargain in the event a contract is avoided. Then, the court should determine the value of each party's partial performance, and determine the money damages due to each side for the breach of the other party as though they were two separate contracts. In doing this, the court would be best advised to treat both parties as breaching sellers.[140]

Practically, the right for the buyer to reduce the price applies with respect to all the non-conforming goods, whether they have subsequently perished or not. If the goods do not conform to the contract the buyer may reduce the price in the same proportion as the value that the goods actually delivered bears to the value that conforming goods would have had at that time.[141] In doing this, the buyer could impliedly be treated as the seller in actually determining the value of the goods in terms of price based on certain factors. In order to calculate how to reduce the price, courts need to interpret the two elements of the aforementioned proportion.

As to the first element – "value of the goods actually delivered".[142] This would mean that the value of the goods accepted.[143]

Turning to the second element of the proportion in order to quantify the price

[138] Chapter IV; UGACL, Article 291-293.

[139] UAGCL, Article 263 allows that when the price is ambiguous, parties are "determined to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned." This is the author's translation.

[140] CISG, Article 61(a) (b) (allows the seller to claim damages if the buyer does not perform his obligations under the contract. Since under reciprocal contract doctrine, both parties are sellers, both could claim such damages).

[141] UAGCL, Article 288; Mba-Owono, Charles, *Non-conformité et vices cachés dans la vente commerciale en droit uniforme africain*, *op cit*, p.126.

[142] UAGCL, Article 292 para. 2; § 2- 714 (2) of the UCC.

[143] UCC, § 2-714 (2) contains the same meaning.

reduction as regard to the "value that conforming goods would have had" – would be determined by the price agreed upon by the parties.[144]

A potential ambiguity arises in determining when each party's obligation to perform is triggered under UAGCL, which obligates the buyer to make payment when the seller places the goods or documents controlling the goods at the buyer's disposal and allows the seller to make tender of delivery conditional upon the buyer's payment.[145] According to the UAGCL, the exact time the buyer has to pay is located at the time thereupon the seller makes available to him either the goods or the documents representing the goods.[146] In other words, payment and delivery must be made simultaneously. By analogy, it would be unclear as to which party is buyer and which is seller for the purposes of Article 267 thus creating an ambiguity as to which party must perform first to trigger the other party's obligation to perform.

This provision seems to secure both parties: it allows the seller to remain in control of the goods until the buyer pays and on the buyer's part, he will not proceed with the payment until delivery of the goods. At times, payment of the price may be conditioned: Depending on the circumstances of each case, the seller may condition delivery of the goods or handing over of the documents on payment of the purchase price[147] or the buyer may condition payment of the price after examination of the goods.[148]

When transportation of goods is required in the contract of sale, the seller may forward the goods, provided that the goods or the documents representing the goods are handed over to the buyer only on payment of the purchase price.[149] However, in a sales involving the transportation of goods, the seller is less secure at the instance where he has to fulfil the obligation to hand over the goods to a carrier for delivery to the buyer, where the contract of sales provides for such transportation and particularly when the seller is not bound to deliver the goods in a specific place.[150]

In accordance with the Sale of Goods Act (SGA) 1893, the general rule to be mindful of in relation to the time of payment states that: Unless a different intention appears from the

[144] UAGCL, Article 292 para. 1.
[145] UAGCL, Article 267 ; CISG, Article 58 (2).
[146] UAGCL, Article 266.
[147] UAGCL, Article 267.
[148] *Ibid*; this condition will not be possible only if the contract includes a clause related to a form of payment against the handing of documents; Article 58 (4) CISG.
[149] UAGCL, Article 267.
[150] UAGCL, Article 252 para.1.

terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sales. [151] Whether stipulation as to time is of the essence of the contract or not depends on the contractual terms.[152] However, the SGA makes it clear that payment runs concurrently with delivery. The default rule makes it clear that unless stipulated otherwise by the parties, the right time for payment shall be at delivery.[153] However, if the buyer fails to observe this rule, he will be held liable for damages to the seller as an "unpaid seller".[154]

An alternative reading might be that performance by either party triggers the other party's obligation to perform, since the seller's performance triggers the buyer's obligation to pay the price,[155] and price is defined in a barter contract as being the obligation to deliver on another contract under the reciprocal contract theory, where each party is the seller of the goods he is to deliver.

The problem of who is obligated to perform first remains if neither party performs. Theoretically, both parties would be liable for damages for breach if neither performs,[156] provided that neither party was excused because of an impediment outside his control under Article 294.

THE PROBLEM OF INTEREST ON REFUNDS

In the OHADA member States, parties in a sale of goods contract are required to pay the interest due as per the UAGCL.[157] The law states that whenever any of the parties fail to pay the contract price or any other sum of money owed, he is under the duty to pay the interest of the sum owed. Hence, the obligation to pay interest on any sum as interest may occur from the contractual obligation.[158] While interest has been awarded in barter transactions,[159] it is problematic because the price paid by the buyer is the delivery of a good. It would be fairly simple to determine interest based on the monetary value of the goods, but this would not effectively serve the policy objectives of Article 291 reflects the principle

[151] SGA 1893, § 10 (1).
[152] SGA 1893, § 10 (1).
[153] SGA 1893, § 28.
[154] Any questions related to the unpaid seller are governed under SGA 1893, § 38.
[155] UAGCL, Article 267.
[156] UAGCL, Article 281.
[157] UAGCL, Article 291.
[158] As opposed to the default rules, contractual parties may agree on the contract on terms and conditions related to the payment of interest.
[159] *See*, e.g. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Russia, 17 June 2004, (October 26, 2013). http://www.cisg.law.pace.edu/cisg/wais/db/cases2/040617r1.html.

that a party who is required to refund the contract price or return the goods because the contract has been account for any benefit which he has received by virtue of having had possession of the money or goods. In the case of a seller holding the buyer's money, the benefit he derived from the money is the use of the money during the time that he held it, and it makes sense under the policy objectives of Article 291 that he must return that benefit in the form of interest.[160] But this makes little sense in the case of a seller holding the buyer's payment in goods. Instead of viewing this party as a seller, it is best to treat him as a buyer who is returning goods and thus obligated to compensate the other party for any benefit he derived from holding the goods under Article 292. This best meets the objectives of Article 291 in accounting for any benefit which he has received by virtue of having had possession of the money or goods.

Although the UAGCL does not fix the interest rate, it gives reference to the application of domestic law. In addition, it gives guidelines as to how it shall be calculated and how it is dispatched.[161] It starts running from the moment the notice is dispatched. It should be noted that although most of the provisions of the UAGCL derive from the CISG, the latter is silent as concerns the time at which interest starts accruing.[162] Moreover, the CISG does not either provide the interest rate.[163]

In particular, if the avoidance of the contract turns effective, during the restitution process, the buyer is given an opportunity to claim for the interest of the purchase price, while claiming for the refund of the very purchase price. The interest so claimed is as important to the buyer as it starts running not from the day of the avoidance but, from the day of the payment thereof.[164] Here the payment of interest is mandatory once the payment is not fulfilled as required. It is immaterial whether failure to pay was caused by a prejudice or there was no notice of payment.[165]

At Common Law, it is said that there are four exceptions where a contracting party can claim interest. These include: (1) Common law courts have discretionary power to award

[160] This is a similar view under Article 84 CISG; See guide to CISG Article 84, http:// www.cisg.law.pace.edu/cisg/text/secomm/secomm-84.html (October 26, 2013).

[161] UAGCL, Article 291.
[162] Ingeborg Schwenzer, *op cit.,* p.1055.
[163] *Ibid.,* p.1054.
[164] UAGCL, Article 300.
[165] JOSEPH ISSA-SAYEGH et al, OHADA TRAITÉ ET ACTES UNIFORMES COMMENTÉS ET ANNOTÉS, (3 éme édition, Juriscope, 2008), p.301.
op cit., p. 301.

interest on a case to case basis and provided the money was owed at the time the proceedings were instituted, or when statutes provide the payment of interest; (2) where the court in analysing the case in dispute, finds out that the parties have implicitly agreed on the interest,[166] (3) where there is an express term in the contract providing for interest in specific circumstances,[167] (4) where interest is claimed as a special damages as per the landmark case of *Hadley v. Baxendale*.[168]

CONCLUSION

Since we already have a uniform legal framework in the UAGCL that can effectively govern sales contract, it does not make sense that it should be applied to barter transactions. Barter is not a sales contract and it is expressly out of the scope of the UAGCL. The Uniform Act follows the proposition that, a transaction where there is no exchange of goods for money consideration is completely out of its ambit. Thus, barter is completely out of its scope. This assessment has been drawn widely from different angles: the determining issue of price, the rights and obligations of parties and the available remedies in a contract of sale. Nevertheless, this paper has also highlighted some instances whereby implication; the UAGCL could apply barter-like transactions. However, this argument does not advocate for such an application but rather make an expository study to an extent in testing the application of the UAGCL to barter transactions. This is just showing the other side of the story.

Because of the complexity of barter transactions, especially when conducted across international borders, this paper however endsby suggesting that, despite the complexities, it remains far preferable to the use of national law of OHADA contracting states that may itself be uncertain or even unknown to barter-like transactions in view to regulate such a business transaction of the parties concerned.

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[166] Minter v. Welsh Health Technical Services Organisation, (1980) 13 BLR 1.

[167] FURMSTON,, MICHAEL, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT, *op cit.*, pp.777,778.

[168] *Op cit.*

DECENT WORK FOR DOMESTIC WORKERS: REFLECTIONS IN THE INDIAN LEGAL CONTEXT

*Shraddha Gome**

INTRODUCTION

Domestic work is one of the most important avenues of work for semi-literate or illiterate people. In fact, it is the primary source of employment for women working in unorganized sector. Increase in per capita income due to India's economic growth leads to more families falling under the category of middle/high income households. This significantly influences the demand for domestic workers in the country. According to the report of an online job placement agency, more than 2.5 million households are searching for domestic workers in just eight largest cities in the country.[1]

Despite, the huge upsurge in the number of people working as domestic workers in recent years, domestic helps in India continue to be deprived of any protection under the labour laws. Domestic helps in India are still seen as mere 'servants' doing menial tasks rather than as paid professionals who are responsible for managing household chores. A vast majority of domestic workers belong to backward areas and communities. The isolated and unprotected nature of the work exposes workers to greater vulnerability.[2] Several workers are trafficked and kept as virtual bonded labour. Thus, the reality of domestic work in India is very different from the utopian solutions that the State and International Organizations rallies for.

The article aims to examine the status of domestic workers and the legal framework for decent work for domestic workers in India. The analysis is done in light of the Constitutional mandate, judicial pronouncements and ILO's decent work agenda. The paper is divided into three parts. The *first* part examines the domestic work sector in India. The author studies the definition and scope of 'domestic workers',

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[1] National Skill Development Corporation, *Human Resource and Skill Development in Domestic Work Sector, 2013-17 and 2017-2022*, http://www.nsdcindia.org/sites/default/files/files/Domestic-Help.pdf.

[2] *Ratify this Convention*, THE HINDU (June 2, 2016), http://www.thehindu.com/todays-paper/tp-opinion/ratify-this-convention/article5139660.ece .

importance of domestic work sector and need to recognize 'domestic work" as "work". The *second* part addresses the key challenges and problems faced by domestic workers. The *third* part examines the constitutional and legislative framework that seeks to protect the interest of domestic workers and ensure them the right of decent work. The author also discusses the important judicial pronouncements regarding the rights of domestic workers. The author concludes the paper with recommendations to improve the status of domestic workers in India.

UNDERSTANDING THE DOMESTIC WORK SECTOR IN INDIA

DOMESTIC WORKERS: DEFINITION AND SCOPE

Article 1 of the ILO Convention on Domestic Workers defines "Domestic worker" as a person who works in and for a household in an employment relationship.[3] A more comprehensive definition is provided by the Domestic Workers Welfare and Social Security Act, 2010' Bill. According to the bill, Domestic Worker is a "*person who is employed for remuneration whether in cash or kind , in any house hold 'or similar Establishments' through any agency or directly, either on a temporary or contract basis or permanent, part time or full time to do the household or allied work*."[4]

Their work may vary from cooking, gardening, cleaning to looking after children, household pets or elderly members of a family.[5] There are several factors responsible for the increase in demand for domestic workers. Apart from the rising per capita income of the families, one of the important causes is the need to maintain work-family life balance.[6] Domestic helps can significantly reduce the work-family-life tension by looking after the household chores and responsibilities. [7] Lack of alternative source of employment for semi/illiterate people is another reason why large number of people takes up work as domestic helps.

IMPORTANCE TO THE ECONOMY

Domestic work sector is one of the prominent avenues of work, especially for women in unorganized sector. As per the recent estimates, there was an increase from 33.2 million in 1995 to 52.6 million in 2010 in the number of

[3] International Labour Organization, Domestic Workers Convention, 2011, C-189, Geneva, 100th ILC session (June 16, 2011).

[4] Domestic Workers Welfare and Social Security Act, § 2(f), 2010' Bill.

[5] International Labour Organization, *FAQ: Decent Work for Domestic Workers*, Report VIA, 99th ILC Session, Geneva, 10 (2010).

[6] *Id*.

[7] *Supra* note 5.

domestic workers. According to ILO, This is equivalent domestic workers account for 3.6 per cent of global wage employment.[8] This number is larger than the number of working people in certain countries.[9] Domestic work is an extremely important source of employment and accounts for nearly 2 per cent of the total employment worldwide. In developing countries like Latin America, around 11.9 per cent of all paid employees are domestic workers.[10] Out of this, 83% are female Domestic workers.[11] This makes domestic work an important source of wage employment for women.[12]

In addition to the gender dimension, international migration is another aspect of it.[13] Domestic workers often migrate to other countries in search of better employment prospects and standard of living. Further, they belong to diverse age-groups prominently child laborers which is not even recognized. It is important to address these issues and realize the importance of organization.

RECOGNISING DOMESTIC WORK AS "WORK": CORE OF HUMAN RIGHTS CLAIM

Domestic work is still seen as an extension of household of work. Domestic helps are often seen as "helping" the women of the households, and therefore part of the family.[14] . In fact, rather than treating it as an employment relationship, there is a tendency to see the act of hiring domestic workers as a sign of benevolence by the employer. It is believed that this would help these workers in breaking through the shackles of poverty.[15] This is one of the major hurdles in its recognition as a legitimate market activity. It undermines the employment relationship between the "helper" and the "household" where the household is the employer and helper, an employee.

Thus, recognizing domestic work as 'work' is an important step towards ensuring social

[8] International Labour Organization, *Domestic Workers Across the World: Global and Regional Statistics* (2013).
[9] LF Vosko, *Decent Work: The Shifting Role of the ILO and the Struggle for Global Social Justice*, 2(1), GLOBAL SOCIAL POLICY (2002).
[10] N. Smit, *Decent Work and the Promotion of Access to Social Protection For Workers in the Informal Economy – An International and Regional Perspective*, JOURNAL OF SOUTH AFRICAN LAW, 700 (2007).
[11] D. Lucera and N. Roncolato, *Informal Employment: Two Contested Policy Issues*, 147(4), INTERNATIONAL LABOUR REVIEW (2008).
[12] International Labour Organisation, *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection*, (2013), (January 2, 2017), www.ilo.org/wcmsp5/groups/public/---.../wcms_173363.pdf.
[13] *Id.*
[14] Meenakshi Sinhai, *Domestic Work Not Seen as Real Work*, THE TIMES OF INDIA (April 28, 2010), http://timesofindia.indiatimes.com/edit-page/Domestic-work-is-not-seen-as-a-real-occupation/articleshow/5864745.cms.(December 30, 2016).
[15] *Id.*

protection and work security to the domestic workers. Attempt has been made to achieve this through ILO Convention C.189 on Domestic Work.[16] The convention affirms that domestic work is a 'work" and that domestic workers are entitled to Labour rights protection. It was adopted by the International Labour Conference in 2011 with wide support from the 185 ILO member States. India was among those who supported the "birth" of this Convention. However, it has not been ratified by India yet.[17] Legal recognition granted to domestic work through this global convention makes the official neglect of this sector in India even harder. Given the amount of expected growth as can be seen in the chart, it is high time that the government realizes the importance of guarantying social protection and job security to the domestic workers.

ADDRESSING THE PROBLEMS FACED BY DOMESTIC WORKERS

In some countries, domestic work accounts for up to 10 percent of wage employment.[18] Despite their importance to the economy as well as employer's households, domestic workers continue to be neglected and abused. They are still excluded from the protection guaranteed by labour laws. [19] Their life is far from the utopian views of the government. Their vulnerability increases due to invisibility of their work. It's difficult to see them in an employment relationship with private households. In this chapter, the author highlights the problems faced by domestic workers.

WAGE EXPLOITATION

Domestic workers are one of the most exploited employees. They are grossly unpaid and are forced to work for long hours. There is no minimum wage guarantee to these workers which facilitates their easy misuse. In fact, as per the report of the Human Rights Watch, one of the most common complaints of domestic helps is the nonpayment of the wages.[20] Lack of awareness and absence of legislations

[16] International Labour Organization, Domestic Workers Convention, 2011, C-189, Geneva, 100th ILC session (June 16, 2011).
[17] Ratification of Convention No. 189, International Labour Organization, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::p11300_instrument_id:2551460.
[18] Women in Informal Employment: Globalizing and Organizing, *Domestic Workers: Size, Contribution, Challenges*, (December 30, 2016), http://wiego.org/informal-economy/occupational-groups/domestic-workers.
[19] Human Rights Watch, *Decent Work for Domestic Workers: Case for Global Labour Standards*, (2011).
[20] *Id,* at 3.

guaranteeing social and job protection makes it impossible for these workers to fight for their rights. It is not uncommon for employees to withhold wages of their "servants" before festivals to ensure the return of domestic workers. [21]

EXCESSIVE WORK HOURS

Domestic workers are expected to work around the clock. They are the first member of the household to be up in the morning and the last one to go to sleep at night. In households with newborns, they are also responsible for looking after the children at night. Thus, they hardly any have time to rest.[22] In addition to the household chores, some are also expected to help in business and provide labor in other forms.

PHYSICAL HARM AND SEXUAL ABUSE

Lack of recognition of domestic work as work exposes domestic helps to grave abuse. They are often beaten up, locked up and insulted. Almost without an exception, all domestic workers interviewed by Human Rights Watch suffered some kind of mistreatment.[23] It is common for the employers to send back the workers home or report them to police or immigration officials.[24] Fear of losing livelihoods and being deported ensures that workers are under full control of their employers and bear the harm silently. There have been several reported incidents of physical violence against domestic workers ranging from slaps to severe beatings.[25] The abuse is not limited to it, privacy and isolation exposes these workers to sexual abuse. Financial pressure and threat of greater harm prevents them from raising their voice against it. [26] In Guatemala, Human Rights Watch found that one-third of the adult domestic workers have suffered some kind of unwanted sexual approaches or demands by employers.[27]

FORCED LABOUR AND TRAFFICKING

The restrictions and conditions of work imposed on domestic workers may constitute forced labor. Human Rights Watch found incidents

[21] Human Rights Watch, *Slow Reform: Protection of Migrant Domestic Workers in Asia and Middle East,* 2010.
[22] International Labour Organization, *Working Around the Clock: A manual for trainers to help live-in domestic workers count their working time*, (2014), (December 30, 2016), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_308825.pdf.
[23] Annie Kelly and Rebecca Falconer, *The Global Plight of Domestic Workers: Few Rights, Little Freedom, Frequent Abuse*, THE GUARDIAN, March 17, 2015, (December 30, 2016), https://www.theguardian.com/global-development/2015/mar/17/global-plight-domestic-workers-labour-rights-little-freedom-abuse.
[24] *Id.*
[25] Kelly and Falconer, *supra* note 23.
[26] Human Rights Watch, *Domestic Workers and Labour*, https://www.hrw.org/topic/womens-rights/domestic-workers.
[27] *Supra* note 26.

where workers have been locked, denied wages just to prevent them from leaving the work. [28] Some were under direct or indirect threat from employers or labor agents of being trafficked into forced prostitution. Another fear was the fea of being imposed heft fines for not fulfilling the contract. According to Anti-Slavery International, domestic work is particularly vulnerable to forms of slavery such as forced labour, trafficking, and bonded labour which makes it equivalent to modern slavery.[29]

CHILD LABOUR

According to ILO estimates, at least 15.5 million children aged between 5 to 17 years were engaged in domestic work in 2008.[30] This makes domestic work sector the largest single sector of child labor involving girls. A prominent example of this is Kathmandu, Nepal where one in five households employs children.[31] The major reason behind is the notion that girls are burden on the family and therefore should contribute to the household income. Employers also prefer to employ child labors who can be paid comparatively less wages and can be easily controlled. [32]

ABSENCE OF LEAVES

As discussed earlier, domestic workers are expected to work 24 hours. Since, there are excluded from the protection guaranteed to employees under organized sector, there is no legally binding instrument to guarantee minimum wages and minimum working conditions. Thus, they are rarely granted any leave. Employers often justify saying this helps domestic workers save money. [33]

However, it is important to realize that absence of leave increases their isolation and vulnerability as they are unable to break through or even realize the vicious circle they are caught in. .[34]

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[28] *Supra* note 26.

[29] Anti-Slavery Organization, *Domestic Work and Slavery*, (December 30, 2016), www.antislavery.org/english/slavery_today/domestic_work...slavery/default.aspx.

[30] International Labour Organization, *ILO Guidebook: Effective Protection for Domestic Workers*, 34, (2012), (December 30, 2016), http://mrci.ie/wp-content/uploads/2012/10/ILO-Guidebook-Effective-Protections-For-Domestic-Workers-A-Guide-to-Designing-Labour-Laws-2012.pdf.

[31] *Id.*

[32] International Labour Organization, *ILO Guidebook: Effective Protection for Domestic Workers*, 34, (2012), (December 30, 2016),http://mrci.ie/wp-content/uploads/2012/10/ILO-Guidebook-Effective-Protections-For-Domestic-Workers-A-Guide-to-Designing-Labour-Laws-2012.pdf.

[33] Human Rights Watch, HELP WANTED: ABUSES AGAINST FEMALE MIGRANT DOMESTIC WORKERS, 38 (2014).

[34] Human Rights Watch, HELP WANTED: ABUSES AGAINST FEMALE MIGRANT DOMESTIC WORKERS, 38 (2014).

Inadequate Living Conditions and Absence of Healthcare Compensation

Absence of a minimum floor of working conditions increases the vulnerability of the domestic workers. They often live in unsafe and unhealthy quarters with reckless disregard to their dignity or security. At times, they sleep in kitchen area or a living room with adult males which pose grave concerns to their security.[35] Further, in most countries, domestic workers are excluded from health care or workers' compensation schemes.[36] They are left at the mercy of employer. This shows that the plight of domestic workers which are not even guaranteed minimum constitutional rights is far from the decent work agenda of ILO.

Decent work for Domestic Workers: Analysis of the Constitutional, Legislative and Judicial Framework

Constitutional Framework: Recognising Right to Decent Work

The Constitution of India is our grundnorm. All labour laws in India addressing the legal rights or restriction on working people shall be in strict adherence to the provisions of the Constitution of India. The need for safeguarding the interests of labour and importance of dignity of labour has been enshrined in Part III and Part IV. The constitutional guarantee of equality, expressed in the triumvirate formed by Articles 14, 15 and 16,[37] seeks that there be equality generally as also for especially disadvantaged groups who are allowed to benefit from positive discrimination.

Furthermore, the directive principles which are supposed to serve as guiding beacons for the State, also prescribe labour equality and the end of discrimination.[38] Articles 36 to Article 51 of the Constitution of India reflect the socio-economic principles that are crucial to the governance of the country. With reference to Entries 22, 23 and 24 of List III of the VII Schedule, the articles have been given effect to.[39] It is therefore a matter of public interest that for the domestic workers which are a major chunk of the unorganized population constituting largely of women must be assured

[35] *Supra* note 18.
[36] *Supra* note 19.
[37] The Constitution of India, 1950, Articles 14, 15 and 16.
[38] The Constitution of India, 1950, Part III and IV.
[39] The Constitution of India, 1950, Schedule VII.

regularity of employment and decent service conditions.[40]

Not only is there a need to statutorily recognize the right of domestic workers to decent work but also to ensure that such recognition is firmly based in Constitutional underpinnings for it to sustain a Constitutional challenge. Such a right of the workers will emanate from Fundamental Rights such as the right to life and personal liberty[41] and the DPSP's as aforementioned. It was at the 2005 World Summit and later at the July 2006 ECOSOC high-level segment, that the United Nations endorsed the ILO agenda of *Decent Work* in order for there to be sustainable development and shaping of a fair globalization.[42] It is imperative that this agenda outlined by ILO as an international standard for ensuring decent work to domestic workers must be read into the Constitution of a country for it to gain legitimacy and recognition.

[40] Women in Informal Employment: Globalizing and Organizing, *Domestic Workers in India,* (December 30, 2016), http://wiego.org/informal_economy_law/domestic-workers-india.

[41] THE CONSTITUTION OF INDIA, 1950, Art. 21.

[42] International Labour Organization, *Director-General's Introduction on the International Labour Conference-Decent Work for Sustainable Development*, ILC 96-2007/Report I(A).

REVIEW OF THE LEGISLATIVE FRAMEWORK:

National Policy for Domestic Workers

The policy was drafted by the ministry of labour and organization, government of India to safeguard the interests of domestic workers. The Act envisages a minimum salary of Rs. 9,000 per month in case of full time household helps apart from other benefits such as mandatory leaves.[43] With regard to the Indian domestic workers working abroad, the Draft National Policy states bars India from offering more favorable treatment under bilateral or multilateral instruments or schemes.[44] This provision was incorporated following the suggestion given by the Ministry of Overseas Indian Affairs that the national laws of the destination country will apply to domestic workers who work abroad. Unfortunately, the policy is still under consideration and still awaits to be tabled before the Union Cabinet.

Domestic Workers Welfare and Social Security Act, 2010.

The Domestic Workers Welfare and Social Security Act Bill, 2010 which was drafted by

[43] National Policy on Domestic Helps in the Work, THE TIMES OF INDIA, August 17, 2015, (December 30, 2016), http://timesofindia.indiatimes.com/india/National-policy-on-domestic-helps-in-the-works/articleshow/48507341.cms.

[44] *Id.*

National Council of Women aims to be a comprehensive Central Legislation dealing with the working condition of the domestic workers.[45] One of the important aspects is the provision for registration.[46] It recognises that domestic workers are an important segment of service sector of Indian economy. It enables women particularly to maintain a healthy work life balance. However, six years have lapsed since the National Council of Women drafted the bill; no progress has been made since then.

Unorganized Workers' Social Security Act, 2008

Unorganized Workers' Social Security Act, 2008 was enacted to provide social security to the unorganized workers. Domestic workers are included in the definition of 'wage worker' to which the Act extends.[47] The Act has constituted the National Social Security Board which recommends formulation of schemes for social security, viz. maternity benefits, old age security, and health cover for the unorganized work force.

Child Labour (Prohibition and Regulation) Act, 1986.

The Act prohibits the employment of children below 14 years of age, in certain occupations. The ban on child labour includes employment of children in domestic work. The Act also provides that on a complaint by a domestic worker, the Local Committee in the presence of a *prima facie* case, forward the complaint to the police.[48] This was seen to be a step towards the ratification by India of the United Nations Convention on Rights of the Child in 1992, wherein India had reservations vis-à-vis certain issues relating to child labour.[49] Yet, according to the current conservative Government estimates, the numbers of children working in as

[45] Statement of Objects and Reasons, Domestic Workers Welfare and Social Security Act, 2010.
[46] Domestic Workers Welfare and Social Security Act, 2010, § 15.
[47] Unorganized Workers' Social Security Act, 2008, §. 2(n).
[48] Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §. 11(1).
[49] United Nations Treaty Collection, Chapter IV Human Rights, Convention on the Rights of the Child (New York, November 20, 1989), (December 16, 2015), https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en#EndDec.
"*While fully subscribing to the objectives and purposes of the Convention, realizing that certain of the rights of child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation;* […] *the Government of India undertakes to take measures to progressively implement the provisions of article 32, particularly paragraph 2 (a), in accordance with its national legislation and relevant international instruments to which it is a State Party*."

laborers are as high as four million children under the age of fourteen years.[50]

Minimum Wages Act, 1948.

The Domestic workers are excluded from the scope of the Minimum Wages Act, 1948. They are not covered under the 45 occupations to which the Act applies. There is an exception to this general rule in the form of amendments brought about by the states of Karnataka, Kerala, Tamil Nadu, Bihar, Andhra Pradesh and Rajasthan in that they have set minimum wage rates specified for domestic workers.[51]

Rashtriya Swasthya Bima Yojna

The health insurance coverage provided to the Below Poverty Line (BPL) families under the National Health Insurance Program (*Rashtriya Swathya Bima Yojna*) launched in 2007, is extended to the domestic workers and their families.[52]

The Central Civil Services (Conduct) Rules, 1964

It prohibits any government official from employing children below the age of 14 years as domestic workers.[53]

Task Force for Domestic Workers

In 2009, Ministry of Labour and Employment, Government of India had set up a task force in light of the vulnerabilities of the domestic workers. It was set up with an objective to deliberate on the issue of welfare and regulation of domestic workers with the decent work agenda as promulgated by the Convention on Domestic Workers, 2011 which was the one hundred and eighty ninth International Organization Convention that came into force on September 5, 2013. The primary rights given to the domestic workers given under the Convention are that of decent work, minimum wage and choice of place to live and spend leave.[54]

[50] Ministry of Labour and Employment, *Census Data on Child Labour* (November 27, 2015).

[51] The Act has been amended by the following enactments:
Uttar Pradesh Act 20 of 1960; Bihar Act 3 of 1961; Maharashtra Act 10 of 1961; Andhra Pradesh Act 19 of 1961; Gujarat Act 22 of 1961; Madhya Pradesh Act 11 of 1959; Kerala Act 18 of 1960; Rajasthan Act 4 of 1969; Madhya Pradesh Act 36 of 1976; Maharashtra Act 25 of 1976.

[52] Rashtriya Swathya Bima Yojna, (December 30, 2016), http://www.rsby.gov.in/about_rsby.aspx.

[53] The Central Civil Services (Conduct) Rules, 1964, Rule 22A.

[54] International Labour Organization, Domestic Workers Convention, 2011, C-189, Geneva, 100th ILC session (June 16, 2011).

Initiatives undertaken by the State Governments:

The Kerala government has included Domestic Workers into the Schedule of employment under the Minimum Wages Act, 1948.[55] Further, Domestic Workers have been included as members to the Kerala Artisan and Skilled Workers' Welfare Fund. This allows them to avail of several benefits. The Kerala arm of the National Domestic Workers' Movement is responsible for issuing Labour Certificates for the Fund to the Domestic Workers. They have also been registered as trade unions under the Kerala Domestic Workers Movement.[56]

On 10th December 2007, the Andhra Pradesh Government issued the notification fixing the Minimum Wages for domestic workers.[57] Similarly, The Karnataka government passed the Minimum Wage Act for Domestic workers on 1st April 2004.[58] The Tamil Nadu Government also included Domestic Work in the schedule of the Tamil Nadu Manual Labour Act 1982.[59]

JUDICIAL PRONOUNCEMENTS:

National Domestic Workers Welfare Trust v. Union of India

In a petition filed by the National Domestic Workers Welfare Trust, several important issues relating to the domestic workers were raised. The petitioner sought the direction from the apex court to guarantee minimum level of protection to domestic workers in accordance with the Constitution of India.[60] The demands included:

- Enactment of a comprehensive legislation ensuring protection to the domestic workers
- Guaranteeing Minimum wages and other benefits such as weekly holidays
- Ensuring safety of women and children working as domestic helps

In response to this petition, the Central Government had argued that the Unorganized Sector Workers Bill, 2004 will guarantee all

[55] Neetha N., *Minimum Wage Setting Practices in Domestic Work: An Interstate Analysis*, INTERNATIONAL LABOUR ORGANIZATION, 2015, (December 30, 2016), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_423600.pdf.

[56] Neetha N., *supra* note 55.

[57] *Id.*

[58] Minimum Wage Act for Domestic Workers in Karnataka, 2004; United Nations Development Programme New Delhi, *Synthesis of important discussions on livelihood and microfinance issues of domestic workers*, pg. 5 (2012).

[59] Schedule, Tamil Nadu Manual Labour Act, 1982.

[60] Human Rights Law Network, National Domestic Workers Welfare Trust v. Union of India, (December 30, 2016), http://www.hrln.org/hrln/labour-rights/pils-a-cases/269-national-domestic-workers-welfare-trust-vs-union-of-india-.html.

these benefits and will include domestic workers. Previous to the petition, the Domestic Workers were not included in the schedule of employment in the Unorganized Sector Workers Bill, 2004.

In a pro employer decision by the Delhi High Court, the petition of a domestic help at the Mater Dei Society who had been informally working for the nuns of the school for thirteen years was dismissed on the ground that there was no formal employment letter, nor did any returns or declarations filed by the institution before the Directorate of Education showed her name on the records.[61] Therefore, the petitioner whose services were terminated without retrial benefits that are given to regular employees were merely a part time employee who allegedly tried to misappropriate a humanitarian gesture for her own convenience.[62] This case therefore, laid down the requirement of formal proof of engagement as a regular employee for domestic work to be the pre requisite for availing benefits that accrue to such employees. By virtue of such decisions given by courts in India it becomes all the more imperative for there to be a non-cumbersome formal mechanism of checks and balance with registration and regulation, minimum wages and social security as the primary concerns

Supreme Court's Role in Promoting Social Justice

The Supreme Court has taken active measures to secure the rights of labourers. In *People's Union for Democratic Rights* v. *Union of India,*[63] Justice P N Bhagwati emphasized on the duty of the courts "*to enforce the basic human rights of the poor and the vulnerable sections of the community and actively help in the realization of the constitutional goals*."

Further, the Supreme Court in *Sanjit Roy* v. *State of Rajasthan*[64] held that the State cannot be permitted to take advantage of the helpless situation of affected persons and such persons cannot be denied protection under labour legislations. In *P Sivaswamy* v. *State of Andhra Pradesh*, [65] the court held that given the similar suffering and constraints, it would not be wrong to equate domestic workers with bonded labourers.[66] The court relied on *Bandhua Mukti*

[61] Mrs. Florence Joel v. Mater Dei School, 113 (2004) DLT 511.
[62] Mrs. Florence Joel v. Mater Dei School, 113 (2004) DLT 511.
[63] People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473.
[64] Sanjit Roy v. State of Rajasthan, AIR 1983 SC 328.
[65] P Sivaswamy v. State of Andhra Pradesh, (1988) 4 SCC 466.
[66] Areeba Hamid, Harsh, *Everyday Realities*, ECONOMIC AND POLITICAL WEEKLY, Vol. 41, No. 13, 1236 (2006).

Morcha v. *Union of India*[67] wherein the Supreme Court, with respect to bonded labourers, held that:

> "*The society envisaged under the constitutional set-up can no more take bonded labour as a part of it. Every citizen must be prepared to accept every other citizen as a person equal to him for enjoying the social benefits and the guarantees provided under the Constitution. It must, therefore, become a conscious obligation of every employer not to take advantage of the economic disability of a brother citizen and force him into the system of Bonded Labour*."

The Court came down heavily on various state governments for not implementing the provisions of Bonded Labour System (Abolition) Act, 1976 to its fullest and directed state governments such to rehabilitate the bonded labourers in accordance with the Act. These pronouncements further espouse the need for a comprehensive legislation to protect the rights of domestic workers in India.

CONCLUSION AND RECOMMENDATIONS

An analysis of the legislative framework in India shows that domestic workers continue to remain neglected and deprived of social protection and job security. They are excluded from the scope and ambit of several important labour legislations. The author recommends following measures to improve the status of domestic workers in India:

RECOGNISE DOMESTIC WORK AS "WORK" UNDER INDIAN LEGISLATIONS

Domestic work is seen as mere extension of household chores and it is often believed that law should not interfere with private households i.e. the workplace of domestic workers. Thus, one of the first steps towards recognizing decent work for domestic workers is to amend the definition of legislations like The Minimum Wages Act, 1948; The Maternity Benefit Act, 1961; Workman's Compensation Act, 1923; Inter-State Migrant Workers Act, 1979 and include domestic work within the ambit of the Act.

[67] Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.

ENACT A COMPREHENSIVE LEGISLATION ADDRESSING THE NEEDS OF DOMESTIC WORK SECTOR

A comprehensive legislation responding to the specific needs of domestic work sector is must. For instance, domestic workers frequently cross inter-state boundaries and safeguards are needed to protect their interests. The Inter-State Migrant Workers Act,[68] has been unsuccessful in preventing their abuse. According to the National Human Rights Commission, 90 per cent of trafficking in India is internal.[69] Thus, a strong legislation is required which can address such concerns in relation to domestic workers in India.

An attempt has been made by the Central government to address the needs in the form of Domestic Workers Welfare and Social Security Act, 2010.[70] However, the act suffers from certain lacunae and need following changes:

1) A helpline should be created for domestic workers
2) Compulsory registration of placement agencies by the government
3) Provision for half yearly or annual leave to domestic workers
4) There should be social security scheme for this unorganised domestic workers sector
5) Domestic workers should also be entitled to medical facilities as these are available to factory workers
6) Domestic workers should be registered as workers with Labour Department and be recognised as workers

IMPLEMENT NATIONAL POLICY FOR DOMESTIC WORKERS

Another progressive move has been the National Policy for Domestic Workers. The national policy aims to protect the interest of domestic workers which would ensure a monthly minimum salary of nine thousand rupees for skilled full time helps, which would also guarantee social security and mandatory leaves for these workers. The policy also provides for provisions against sexual harassment, maternity leave, compulsory paid leave and bonded labour. The policy further contemplates provisions for collective bargaining and grievance redressal mechanism. The policy is in

[68] Inter-State Migrant Workers Act, 1979.
[69] Women in Informal Employment: Globalizing and Organizing, *Domestic Workers Law and Legal Issues in India*, 21, (2014), (December 30, 2016). wiego.org/sites/wiego.org/files/.../Domestic-Workers-Laws-and-Legal-Issues-India.pdf.
[70] Domestic Workers Welfare and Social Security Act, 2010.

keeping with the ILO Convention on Domestic Workers as adopted by India. The draft policy proposes minimum monthly wage for highly-skilled, skilled, semi-skilled and unskilled domestic workers.[71] However, it has been pending for long. Thus, there is urgent need to adopt the policy as expeditiously as possible.

BRING DOMESTIC FRAMEWORK IN CONSONANCE WITH INTERNATIONAL STANDARDS

It is important to realize that social protection and security is a human right for all. Therefore, lessons must be taken from the international framework and include them in the domestic legal framework. These standards include Social Security (Minimum Standards) Convention, 1952 (No. 102); Forced Labour Convention, 1930 (No. 29) etc.

[71] PTI, *Government readies domestic workers policy, proposes Rs. 9,000 minimum pay with benefits*, F. INDIA, August 17, 2015, (December 15, 2015), http://www.firstpost.com/india/govt-readies-domestic-workers-policy-proposes-rs-9000-minimum-pay-benefits-2395116.html.

REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016: CEMENTING THE GAPS OF AN UNSTABLE FOUNDATION

*Mrinal Pandey & Parimal Kashyap**

INTRODUCTION

Real estate is considered as the most important sector in Indian economy after agriculture. The sector amounts to 5-6% of the GDP of the country and it is expected to reach 13% by 2028.[1] There are approximately 3,489 projects worth Rs. 14.5 lakh crore in real estate sector currently existing in the country.[2] The fact that real estate acts as a facilitator in satisfying the requirement of home and infrastructure makes it one of the most essential sectors of the economy. The growth of the real estate sector in India can be attributed to the substantial investment which it has drawn due to quick urbanization, rising income levels, and foreign investments.

Investment in the sector reached its peak in 2010 with the rate being 13.5% but ever since then, a sharp decline in investment has been recorded.[3] Further, there is an acute housing shortage of at least 24.7 million units for 67.4 million families.[4] Currently, 70% of the Indian population lives in rural areas, however, with advent of Foreign Direct Investment (FDI) and rapid urbanization, it is being estimated that 40% of the population will be residing in urban areas by 2030.[5] With development of urban areas, there is dire need for better regulation and governance of the real estate sector. Moreover, with only 5 years left for maturity of 'Housing

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[1] India Brand and Equity Foundation, *Real Estate,* (July 23, 2017), www.ibef.org/download/Real-Estate-March-2017.pdf.

[2] The Associated Chambers of Commerce of India, *3 States Together Account for Half of Total Investments Attracted by Real Estate & Construction Sector: Study,* (July 22, 2017), https://assocham.org/newsdetail.php?id=6278.

[3] *Id.*

[4] Government of India, Ministry of Urban Development, *Streamlining Procedures for Clearance of Building Projects Town and Country Planning Commission*, (July, 25, 2017), http://tcpomud.gov.in/Divisions/MUTP/Streamlining_Procedure.pdf.

[5] Department of Economics and Social Affairs, United Nations, *World Urbanization Prospects – The 2014 Revision*, (24th July, 2017), https://esa.un.org/unpd/wup/publications/files/wup2014-highlights.Pdf.

for All by 2022' scheme, it is imperative that the real estate sector boosts up.[6]

In order to put a check on all the issues plaguing real estate sector, government has brought an act called The Real Estate (Regulation and Development) Act, 2016 (hereinafter RERA or The act). However, the act isn't free from loopholes and these loopholes could act as obstacles in attaining the main objective. This paper seeks to address the positive features and the lacunae present in the act. The paper, then provides plausible solutions for the problems prevailing within and around the act.

POSITIVE IMPACTS OF THE ACT

ON BUYERS

1. Registration of builders is mandated by this act. No promoter can sell, buy, advertise, or invite customers to buy projects without registering the project with Real Estate Regulatory Authority.[7] Hence, all the activities of builders will be checked by the authority created by this act.
2. RERA guarantees buyers right to get details of the project which includes cost of land and construction, project completion time, phase-wise plans of development, any minor alteration in the project and so on.[8] Over 13,000 projects have been registered with Maharastra RERA.[9] Developers have to update project progress in every 90 days.
3. The act mandates formation of a Residents' Welfare Association (RWA). Out of 5576 registered societies in Delhi,[10] only about 1200 societies have a registered Residents' Welfare Association.[11] Given that, the act mandates formation of such society, buyers will have a platform to direct their grievances to the promoters and post-allotment maintenance of the projects.

[6] National Mission for Urban Housing, "*Housing for All by 2022" Mission*, (July 22, 2017), www.pmindia.gov.in/en/news_updates/housing-for-all-by-2022-mission-national-mission-for-urban-housing/.

[7] Real Estate (Regulation and Development) Act, 2016 § 3.

[8] Real Estate (Regulation and Development) Act, 2016 § 19.

[9] APNA RERA, *More than 13k Ongoing Projects Registered with MAHA RERA*, (July 23, 2017), http://apnarera.com/more-than-13k-ongoing-projects-registered-with-maha-rera.

[10] Office of the Registrar Cooperative Societies, *Summary of Current Registered Societies*, (July 21, 2017), http://delhi.gov.in/wps/wcm/connect/doit_rcs/RCS/Home/General+Information/List+of+Registered+Societies.

[11] Office of the Registrar Cooperative Societies, *List of Societies Registered W.E.F. 09.06.2010 TO 31.03.2014*, (23rd July, 2017), http://delhi.gov.in/wps/wcm/connect/81325f00463cfec9bafbfec2f3146d7f/LIST+OF+SOCIETY+LATEST.pdf?MOD=AJPERES&lmod=-993297804.

4. If any structural defect occurs in the unit within five years from the date of handling over the project to the alottee, developer is liable to fix such defect without charging the alottee. If developer fails to fix such structural defect within thirty days, RERA gives buyers right to file a complaint before RERA authority.[12]
5. The act prohibits builders to make any alteration in the project without obtaining consent of at least 2/3rd of alottees.[13] In this way, the buyers are safeguarded against arbitrary action of the dishonest promoters over the project.
6. The act prescribes penalty on the developers if they fail to deliver the project on time. A developer will have to pay monthly interest on bank loan taken for under-construction project if delay occurs.[14]

In case, a promoter fails to comply by the aforementioned provision, the act prescribes for heavy penalties.[15]

If someone fails to comply with these rules, he will have to face proceeding in the Real Estate Regulatory Authority. One such case was initiated by Maharashtra RERA where a RERA registered promoter had put advertisement of an unregistered project. In this case, it was established that the act of the promoter had violated the § 10(a) of the 2016 Act and § 9(5) of the 2017 Act. Consequently, an order was passed by the authority which included a penalty of Rs. 1,20,000 to be paid in instalments of Rs. 10,000 for 12 days.[16]

FOR BUILDERS

1. With this act, the process of depositing payment will be smoothened. The act prescribes that buyers have to make payments on time. Secondary payments like registration charge, municipal taxes,

[12] Real Estate (Regulation and Development) Act, 2016 § 14(3).
[13] Real Estate (Regulation and Development) Act, 2016 § 14(2)(ii).
[14] Real Estate (Regulation and Development) Act, 2016 § 18(2)(b).
[15] Real Estate (Regulation and Development) Act, 2016 § 59.
[16] Maharashtra Real Estate Regulation Authority v. Sai Estate Consultant Chembur Pvt. Ltd. Suo-moto Case No. 1 of 2017, (27th July, 2017) https://maha.mahaonline.gov.in/Upload/PDF/Legal-Advisor-Mahareal Estate (Regulation And Development) Act, 2016-Vs-Sai-Estate-Consultant-Chembur-Pvt-Ltd-Suo-Motu-Case-No-1-of-2017-dated-5-06-2017.pdf.

and water and electricity charges are also included in this.[17]

2. The act will also ensure that customers take possession of the respective units within two months of circulation of occupancy certificate.[18]

POSITIVE IMPACTS OF THE ACT ON THE ECONOMY

The necessity of keeping 70% of the total amount in a reserve account aims to solve the issue of delay. Earlier, builders used to divert funds stipulated for one project to a different project. Now, earnings of such an account can only be towards outflow of land and construction. Moreover, it'll be verified by an expert.[19] However, this provision needs to be implemented strictly else there could a misuse as discussed later in this paper.

The documents of projects will not be verified by RERA directly. There is provision for verification by an authorized architect after appropriate statement to the buyer.[20] Hence, if any wrongdoing occurs, the promoter along with the architect will be liable.

Since, the act prescribes huge penalties in case of non-conformity of the rules[21], builders who aren't customer-centric will be eliminated. Thus, there will be reduction in the total cost of ownership for consumer in the long run.[22]

Further, cash transactions will likely become extinct and consecutive trail of transactions will be possible. This will check fraud and a good deal of anomalies will be solved.

According to § 16 of the act, it is mandatory for the promoters to obtain insurances for title and land of the project and construction of the project. The act also makes promoters liable to pay premium in relation to the insurance. Further, promoters are expected to transfer documents and insurance to the buyers at the time of sale.[23]

The act will also solve the problem of Floor Space Index (FSI) by bringing in the concept of

[17] Real Estate (Regulation and Development) Act, 2016 § 19(6)
[18] Real Estate (Regulation and Development) Act, 2016 § 19(10).
[19] Real Estate (Regulation and Development) Act, 2016 § 4(2)(l)(D).
[20] Real Estate (Regulation and Development) Act, 2016 § 14(2)(i).
[21] Real Estate (Regulation and Development) Act, 2016 § 59, 60.
[22] The Times of India, *Real estate grappling with triple whammy*, July 13, 2017, (24th July, 2017), http://timesofindia.indiatimes.com/city/goa/real-estate-grappling-with-triple whammy/articleshow/59568179.cms.
[23] Real Estate (Regulation and Development) Act, 2016 § 16.

'net carpet area'.[24] It can be seen as a major step in eliminating corruption that used to occur due to haphazard implementation of FSI policies. Now, it'll be determined by 'net carpet area'. The habit of putting porch, balcony and roof within the ambit of 'carpet area' will come to an end. While this would lead to an increment in property rates, the buyers will be completely aware of the useable portion of the land.[25] This would also cause the builder to provide a better design and productivity.

While many are seeing the act as a hassle for developers, it will be beneficial for them in the long run as it aims at bringing discipline, hence, the act custodian for the beginners. The act aims at eliminating ambiguity. Thus, it would inspire ambitious builders to build their credibility in the market without encountering any legal obstacles.

Consequently, RERA will have two-fold positive impact. At micro-level, this act will bring relief to homebuyers by facilitating quick delivery of homes. At marco-level, this act will heal the entire real estate sector by bridging the trust deficit between buyers and developers.

HOW RERA AIMS TO SHAPE PRIVATE EQUITY INVESTMENT

Private equity is the investment which isn't noted on a public exchange. When an investor directly invests in a private company, it results in delisting of private equity and thus, such an investment is known as private equity investment.[26] It has been calculated that private equity investment has fallen from $3.6 billion in 2015 to $3.1 billion in 2016.[27] RERA also affects private equity investors in a way. Investment documents usually endow rights to private equity investors to undertake projects and guarantee completion if builder defaults. Now, since the act mandates requirement of consent of 2/3rd of the allotees in the project, private equity investors will have to work on the side of the allotees.[28]

In a recent case, the Apex Court stated, "While application of law and interpreting a particular

[24] Real Estate (Regulation and Development) Act, 2016 § 2(k)

[25] Vibha Singh, *How Carpet Area Definition Changes in Real Estate (Regulation And Development) Act, 2016* (June 13, 2017), https://housing.com/news/carpet-area-definition-changes-Real Estate (Regulation And Development) Act, 2016/.

[26] M.K PITHISARIA & MUKESH PITHISARIA, TAX LAW DICTIONARY 579 (LexisNexis 2013).

[27] Abhineet Kumar, *PE investors cautious on real estate Real Estate (Regulation And Development) Act, 2016 (*May 11, 2017), www.business-standard.com/article/economy-policy/pe-investors-cautious-on-real-estate-with-new-law-117051000966_1.html.

[28] *Id.*

provision, economic effects of a decision has to be kept in mind. Courts needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy or the revenue of the State. It is in this context that economic analysis of the impact of the decision becomes imperative".[29]

While Private Equity fund would come under the ambit of 'Promoter', thus, incurring all the liabilities and obligations under RERA, the returns which would come as a result of the investment would also boost. This could be attributed to mandatory lock-in of funds till the time of project completion. This would benefit PE investors in a two-fold manner. Firstly, monetizing on the stake of PE fund before completion would become challenging. Secondly, PE funds could seek higher returns for the time-risk undertaken by it.[30]

Now, since the act is already leaning on the side of the customers, RERA authorities should take cues from the aforementioned decision to encourage perpetual investments in the sector.[31] If RERA achieves its objectives and black money goes down to minimal level, then, investors would need just sources of capital and that would boost private equity investment in the sector.[32]

After analysing the act, we can conclude that RERA does carry a promise to bring transparency and rationalization which would certainly promote a constructive environment for private equity investment in the sector. Although, a lot will be determined on the way it is implemented across the country.

ISSUE OF DELAY IN GETTING PERMITS

It is quite unfortunate that RERA Act fails to solve the issue of delay caused in obtaining clearances. Delay in obtaining permits is one of the major reasons behind lagging of projects and unreasonable rise in the prices.

While India has brought measures to lessen the time involved in getting a building permit,[33] the time consumed in granting permits is still high as compared to world's average. Countless

[29] Shivashakti Sugars Limited v. Shree Renuka Sugar Limited, 2017 SCCOnline SC 602.
[30] Ketan Dalal, RERA – *It Takes Two to Tango!* Taxsutra (June 14, 2017), http://www.taxsutra.com/blog/2/7/RERA%20%E2%80%93%20It%20takes%20Two%20to%20Tango!.
[31] Sambhav Ranka & Nitesh Tiwari, *Real Estate (Regulation and Development) Act, 2016: A Private Equity Perspective*, PRESS READER, (June 27, 2017), www.pressreader.com/india/mint-st/20170627/281621010346269.
[32] *Id.*
[33] *Supra* note 31.

reports published by World Bank have said that India has one of the bulkiest and prolonged process for construction permits. There are 34 processes and it normally takes 196 days to get construction permits.[34] The situation on ground is worse. It has been found that it takes up to 6 months to a year to get these approvals. Further, if the clearances are related to land, the time stretches up to two years.[35]

The situation is further deteriorated by massive costs of construction permits. In a report published by World Bank, it was said, "The cost of construction permit in Greater Mumbai is 46.05 per cent of the cost of construction".[36] The statistics of other cities aren't different either.[37]

High costs of construction permits coupled with the delay offer negative impacts on the economy. An economy plagued with high costs and delay in construction permits, is less likely to be stimulated by interest rates change. Consequently, the monetary policy of the economy becomes less functional. This leads to scarcer rate of consumption and also lessens the employment in the real estate sector.[38]

The bulky process of obtaining construction permits also paves way for corruption and bribery. Politicians and bureaucrats take wrongful advantage of these loopholes and demand bribes for construction clearances by using their power to delay.[39]

Although, the act does contain a provision relating to creation of a single window system to check delays in permit,[40] however, scope of this provision may lead to infringement of the state list. The binding nature this provision remains under question. It is safe to say that the aforementioned provision is not definite and it is left up to states to enforce the provision in the way they choose to do. Hence, it could be a long time before the consumers see digitisation of land records or creation of a single window

[34] *Supra* note 32.
[35] SAPREP Committee, *Volume I Report of The Committee Of Streamlining Approval Procedures For Real Estate Projects In India Key Recommendations*, (23rd July, 2017), www.naredco.in/notification/pdfs/SAPREP%20Committee_draft%20report_Volume%20I.pdf.
[36] The World Bank, *Dealing with Construction Permits in Mumbai – India,* Doingbusiness.org, (23rd July, 2017), www.doingbusiness.org/data/exploreeconomies/india/sub/mumbai/topic/dealing-with-construction-permits.
[37] *Id.*
[38] Pedro Gete, *Dealing with Construction Permits*, *Interest Rate Shocks and Macroeconomic Dynamics, (*24th July, 2017), http://faculty.georgetown.edu/pg252/GETE_permits.pdf.
[39] R Jagannathan, *Surgical Strikes on Black Money in Real Estate and Gold will Not be Possible*, HINDUSTAN TIMES, Nov 21, 2016, (23rd July, 2017), www.hindustantimes.com/analysis/surgical-strikes-on-black-money-in-real-estate-and-gold-will-not-be-possible/story-mBQm7OzV3BaHDVcRKLzqYN.html.
[40] Real Estate (Regulation and Development) Act, 2016 § 32(b).

system, provisions indispensable for the development of a modern, transparent and efficient real estate sector. The Centre needs to understand that the financial institution will not be willing to finance such projects if their interests are not taken care of and therefore it needs to make provision regarding the same. For the growth of a transparent and efficient real estate sector it is imperative that enabling provisions under § 32 should be implemented in a time bound manner. The Centre, through a notification, should specify a time period within which the states must come up with rules and regulations implementing the same.

It should be understood that the permits should not exist for the sake of it but rather for a prompter and smoother functioning of the sector. It is quite essential to calculate which permits are indispensable and which ones require simplification. A balance between cost of such regulations and their benefits should be maintained. Therefore, it is must for the central and state governments to bring a single-window authorization system at the earliest to avoid delay and unreasonable hike in prices of projects. A single-window clearance system will certainly be a stepping stone in advancement of real sector. It can be implemented through online windows.

ISSUE OF JUDICIAL MECHANISM PROVIDED IN THE ACT

One of the major objectives is to establish an adjudicating mechanism for speedy dispute redressal. The Act provides for the same and imposes a period of 60 days on the Authority,[41] the Adjudicating officer[42] as well as the Tribunal[43] to dispose of the matter before it. If any of the authorities are unable to dispose of the matter in the said time period, they have to record their reasons in writing for the same.

Inclusion of limitation on time periods for the adjudication of issue is a major relief to the consumers and shall instil confidence in the consumers and act as a deterrent for the promoters who use the, lengthy and unavoidable proceedings in the courts and forums to their advantages. Although, provisions like appointment of an adjudicating officer instead of filing an application to the Authority for adjudging compensation, time barred appeal to the High Court, power to pass interim orders both by Authority and the tribunal have made speedy dispensation of justice accessible to the

[41] Real Estate (Regulation and Development) Act, 2016 § 29(4).
[42] Real Estate (Regulation and Development) Act, 2016 § 71(2).
[43] Real Estate (Regulation and Development) Act, 2016 § 44(5).

aggrieved, the Act suffers from two major lacunae which are inter-related.

The first is in the form of § 3 which limits the jurisdiction of the Act to apartments where the area of land exceeds five hundred square metres and number of apartments to be developed is more than 8 inclusive of all phases.[44] This would result in exclusion of the bulk of urban middle and lower class home buyers from the protection of the act as the plot sizes across urban areas are usually below five hundred square meters, especially in dense neighbourhoods inhabited by this section of the society. It was suggested at various stages of formation of the Act to lower the exclusionary provision to 100 square meters of land area and the number of apartments to three[45] or even abolish the limitation set by § 3[46] so as to bring all the homebuyers under the purview of the act.

The problem is further aggravated by the language of the act which on various occasions uses the phrase 'under this Act' which limits the jurisdiction of the act strictly to the provisions contained in the act and effectively excludes a large number of consumers from redressing their concerns under the act directly. This is related to the second problem that is of forum shopping and conflicting jurisdiction. § 79 bars the jurisdiction of the civil courts to try disputes covered under the act. However, it does not bar the jurisdiction of consumer forums set up under the Consumer Protection Act, 1986 [47] and other tribunals like the Competition Commission of India. Any decision that affects the competition in the relevant market will come under the jurisdiction of CCI. The tussle between TRAI and CCI, CREC and CCI and RBI and CCI, in which the government had to intervene, is a relevant precedent in this regard.[48] Hence, these forums will exercise simultaneous jurisdiction facilitating forum shopping and conflicting jurisdiction which will eventually harm the interested parties.[49]

This problem will be further aggravated by consumers not covered under RERA as instead of appealing to the Regulatory Authority, they might go to the Consumer Court for dispute redressal as it provides the best three tier

[44] Real Estate (Regulation and Development) Act, 2016 § 3.
[45] 15th Lok Sabha Ministry of Housing and Urban Poverty Alleviation, *The Real Estate (Regulation and Development) Bill ,2013, page* 25.
[46] Rajya Sabha Secretariat, *Report of the Select Committee on Real Estate (Regulation and Development) Bill, 2013 Presented to the Rajya Sabha on 30th July, 2015*.
[47] Real Estate (Regulation and Development) Act, 2016 § 71.
[48] The Indian Express, *So Many Regulators*, THE INDIAN EXPRESS, July 30, 2014, (24th July, 2017), http://indianexpress.com/article/opinion/columns/so-many-regulators/.
[49] *Id.*

mechanism for such complaints. The act does not bar the jurisdiction of the Consumer Forum while answering the queries of the Standing Committee on § 61 of the RERA Bill (§ 71 of the Act).[50] Hence, forum hopping and delayed justice can very well be the scenario when the act is finally implemented.

REAL ESTATE AGENTS AND SECONDARY MARKETS

The act is conspicuous by the absence of regulation for controlling the secondary market operations of the Real Estate Agents as a major portion of the transaction in the Real Estate sector takes place in the secondary market in which the agents and brokers play a pivotal role accounting for approximately 65% transaction in the secondary and resale market and 20% - 30% in the primary market.[51] Further, the Indian realty broking market is estimated at ₹15,000-20,000 crore and approximately five lakh agents operate out of top 15 cities.[52] Thus, one could easily calculate the extent of the secondary market and the role played by the agents in it.

§ 9 of the act provides for registration of the Real Estate Agents for the sale of apartments. However, the regulation is prospective in nature and only covers those projects that are registered under the act. The phrase 'real estate project' isn't included in the definition of 'real estate agent'. By doing so, secondary market operations of the agents could be brought under the ambit of the act.[53] It would be a major step in ushering in transparency in the sector and would further augment the authorities during compensating the aggrieved consumers and penalising the agents for default.[54] A one-time registration, a model code of conduct and strict eligibility criteria through a notification by the Centre for Real Estate Agent would go a long way in achieving the objective of transparency and efficiency in the market, one of the primary aims of the Act.[55]

[50] 15th Lok Sabha Ministry of Housing and Urban Poverty Alleviation, *The Real Estate (Regulation and Development) Bill, 2013, Standing Committee,* page 85.
[51] Bindu D Menon, *Small Brokers Worried Over Impact of New Realty Law*, THE HINDU BUSINESS LINE, April 30, 2017, (25th July, 2017), www.thehindubusinessline.com/news/real-estate/small-brokers-worried-over-impact-of-new-realty-law/article9674777.ece.
[52] *Id.*
[53] 15th Lok Sabha Ministry of Housing and Urban Poverty Alleviation, *The Real Estate (Regulation and Development) Bill, 2013, Standing Committee,* page 20.
[54] Real Estate (Regulation and Development) Act, 2016 § 71, 72.
[55] *Id*. 11 at 50.

ADVERSE IMPACT OF ACT ON SMALL REALTORS AND CURBING COMPETITION (HARSH PENAL PROVISION OF THE STATE)

The Act has imposed strict regulations for promoters and agents to be a legitimate player in the sector and has imposed even harsher penalties on the promoters, real estate agents as well as buyers in case of contravention on any of the provisions of the act or the rules made there under. It is expected that harsh penalties shall act as a deterrent and remove non-serious players from the market.[56] One cannot but agree that in a sector where currently developers and promoters are charging 12% to 18% – sometimes even 36% – interest from buyers for any delay in payment, while they themselves usually pay in the range of Rs. 5 to Rs. 10 per sq ft, it is the way to go.[57]

The act, however, will have a negative impact on the local and regional developers. Already a number of small developers have either left the market or entered into agreements with the large firms for the development of the projects under taken by them.[58] The major difficulties these developers face relates to maintenance of 70% of the amount accrued from the buyers in a separate account, harsh penalties for even minor defaults, lack of capital and the comprehension and compliance of the new standards imposed by the Act. Further, § 14(3) imposes duty on the promoter to take care of any structural defects arising within the period of five years free of charge and within 30 days of it being brought to their notice. The small developers may find it difficult to associate with the project for such a long period as they do not have the required capital.[59]

The cost associated with longer association of the developer in the project would ultimately be borne by the consumer, especially in case of small developers. This would effectively work as an 'exit barrier' and the small developers might not be willing to take the market risks. Another issue that small developers may face relates to the provision 4(2)(l)(D). It provides that seventy per cent of the money from the buyer has to be kept in a separate account to be used for construction purposes and the withdrawal of money from this account shall be

[56] Real Estate (Regulation and Development) Act, 2016 Chapter VIII.

[57] *Homebuyers to get Penalty for Delay in Projects but is That Enough?,* http://www.financialexpress.com/money/Real Estate (Regulation and Development) Act, 2016-homebuyers-to-get-10-penalty-for-delay-in-projects-but-is-that-enough/659011/.

[58] *Supra* note 52.

[59] *Supra* note 55.

in proportion to the development of the project subject to verification by various professionals. A situation may arise where at a later stage of development of the project the developer is found contravening the provision of the act and hence is penalised under Chapter VIII.[60] As the builder has already used most of the capital for the development of the project, he might not be in a position to pay the fines and refund the money of the consumers as has happened in a number of cases.[61] The situation will be severely acute in case of small developers who barely have capital to complete the ongoing projects.

The Hon'ble Apex Court rightly held that the hard earned money of the consumer has to be returned, however this is just to refer how the section might work as a deterrent for the small developers to take up new projects on their own.[62]

This will result in reduction of competition over time as these developers will either merge or enter into partnership with large Real Estate Firms or leave the market altogether. It is being contended that as the small firms shall have the backing of large firms the projects shall be completed and delivered on time as the large firms make use of their vast capital resources to execute the development task while the small firms maintain the land and local asset for the big companies.[63]

On the other hand, less competition entails the necessary consequences of reduction in R&D and a trend towards oligopolistic orientation of the market among other things. Whether the consumer shall benefit from the emergence of serious market players or the act effectively reigns in the large developers that are sure to dominate the market in the time to come, the fact that emerges is that the small developers have already lost under the new act. Whether this will benefit the consumers in the long run or harms them remains to be seen.

ISSUE OF EXCESSIVE STATE INTERFERENCE AND DELEGATION OF POWER

The Act provides for excessive powers to the state in matters relating to the Real Estate

[60] *Supra* note 57.
[61] Sakshi Post, *Supreme Court Directs Builders to Refund Customers at Any Cost*, (September 7, 2016), http://english.sakshi.com/business/2016/09/07/supreme-court-directs-builders-to-refund-customers-at-any-cost.
[62] Anupam Charakborty v. Supertech Limited, (2015) 16 SCC 290.
[63] Bidya Sapman, *RERA impact: Small Developers Look to Partner Larger Firms to Revive Stalled Projects*, LIVE MINT (June 21, 2017) http://www.livemint.com/Politics/2izLBw3qr7BSZzujQA9YaP/Real Estate (Regulation And Development) Act, 2016-impact-Small-developers-look-to-partner-with-larger-fi.html.

Regulatory Authority. Excessive delegation has been done under § 73 of the bill (§ 84 of the respective Act) in the name of flexibility which defeats the very purpose of the central law and recommended inclusion of specific provision in the act to safeguard the interest of the stakeholders as the states may or may not take into consideration their interests while framing rules and regulations under the said provision. The parliament's power to scrutinize these rules is also ousted due to delegation. Hence, only minimum provisions should be left for delegation and the matters of substantial nature should be clearly spelt out in the Act itself.

Other instances of excessive powers being granted to the state government may be seen in Sections 8, 82 and 83 of the respective Act. § 8 provides, "the Regulatory Authority has to consult the State government for action that is to be taken on lapse of registration or its revocation by the authority". Although, the first right of refusal is granted to the association of allottees the development work will be carried out by the government upon refusal as the Authority is not competent to take up project execution work.[64] The grant of power to the state government to carry out work as a developer raises a conflict of interest as to its function as a facilitator and the other as a developer. Further, more often than not, the actions of the government are underlined by political interests. Hence, it is not in the best interests of the consumers to leave the development of the project in the hands of the State or Union Territories.

As the issue directly affects the consumers, rules should be issued by the Centre framing the procedure to be followed in case of revocation of registration which might include procedure for an auction to be conducted by the Regulatory Authority or the respective government to allot the rights of development to an interested party.

Similarly, § 82 and 83 provide over-arching powers to the respective governments in terms of control, functioning and dissolution of the Regulatory Authority. Under § 82, the government on the grounds provided may dissolve the Regulatory Authority. It is contended that dissolution of a regulatory authority should not be on the whims and fancy of the respective government that may become the case when political interests of the ruling party is involved. Instead, an element of judicial scrutiny should be introduced for the dissolution of the Authority. This would safeguard the state

[64] 15th Lok Sabha Ministry of Housing and Urban Poverty Alleviation, *The Real Estate (Regulation and Development) Bill, 2013, Standing Committee,* page 44.

level Authority from the prevailing politics to some extent.

ISSUE OF AMBIGUOUS TERMS AND SCOPE OF THE ACT

Ambiguity prevails throughout the various provisions of the Act. The term 'Construction Execution Certificate' hasn't been defined in the act. The inclusion of the term 'Construction Execution Certificate' would have made the provision exhaustive, justifiable and would further ensure better development of the project and fix responsibility of the promoters/builders in clear terms. As it stands, the fate of § 14(1) is left to the judiciary if such an issue does arise.

Similarly, § 76(2) provides that the state may keep the money realised through way of penalties in a separate account on the discretion of the state. The Act does not specify what has to be done with the same. The amount could be appropriated for the compensating the allottees from out of the fine money and to pay the financing bank whose interests have been prejudiced due to the default of the promoter. It is hereby recommended that a provision regarding the same should be inserted in the act.

The ambiguity prevailing under § 14(1) to demarcate the scope of the act and the excessive powers granted to the state under sections 8, 82, 83 and 84 should be immediately taken care of in the manner prescribed above or through any mechanism that the centre deems fit as any state regulatory body needs to be autonomous to perform to the best of its ability.

In view of the fact that several units have already been purchased under super built up area, it is recommended that an exemption Section should be added to § 4(h) of RERA

DILUTIONS IN THE ACT BY STATES

It has been seen that states have diluted and omitted various provision of the centre's act. This includes promoters' liabilities on structural defects, bringing ongoing project in the ambit of RERA, saleable area and so on. While, it can't be said that in every case, such dilutions would have negative impact on the real estate sector but such dilutions would certainly bring ambiguity which isn't healthy for the sector. For instance, Karnataka's Real Estate (Regulation & Development) Act provides that all on-going projects which are 60% complete or 60% of the sale deed is completed would not come under the scope of RERA.[65] Moreover, the act doesn't provide for an authority to get into if 60% of the

[65] Karnataka Real Estate (Regulation and Development) Rules, 2017 § 4(iii).

task is completed. This also raises a question over builder's right to receive 80% to 100% payments without providing. This is not in terms with the rules provided by the centre under RERA. Loopholes like this could nullify the objective of this act.

Maharashtra has departed from the essence of centre's act and has a made an act which is slightly inclined in favor of the developers than the customers. This attitude can be attributed to the investment Maharashtra enjoys in this sector. Maharashtra alone accounts for 25% of the total investment in the real estate sector in the country.[66] Thus, it seems as the state government doesn't want to jeopardize the investment that it is receiving. While, this view can't be condemned outright, steps like these certainly add up to the ambiguity which isn't beneficial. For the act to achieve its aim, centre and states need to be on the same page.

CHALLENGES TO IMPLEMENTATION

The biggest challenge to this act is efficient implementation. In order to achieve the aims of RERA, the act should be implemented in true spirit or it would turn into another centre of corruption and delays.

It was found in a study that out of 2,300 construction projects which are under-implementation, 886 are encountering a delay of about 39 months. Most of these projects belong or housing and commercial sector. It should also be noted that 95 percent of such projects belong to private sector tenure.[67]

Additionally, postponements and disagreement in withdrawal of sums may prompt cases endangering the tasks. Moreover, since, real estate sectors experiences rising prices very frequently, the tax rate applicable is in form of stamp duty. Now, this tax rate coupled with capital gains tax paves a way for tax evasion by the means of under-reporting of transaction price. This may lead to both creation and investment of black money.[68] The Act neglects to address the issue of investment through black money.

[66] The Associated Chambers of Commerce of India, *Construction and real estate investment: State-level analysis*, (26th July, 2017), https://assocham.org/newsdetail.php?id=6278.

[67] *Ibid*.

[68] Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi, *Black Money, White Paper*, (21st July, 2017), http://finmin.nic.in/sites/default/files/WhitePaper_BackMoney2012.pdf.

The act prescribes time limit for the adjudication process.[69] However, it should be noted that on similar lines, a time limit of 90 days was given in consumer courts dealing with real estate case but majority of the cases weren't disposed in the prescribed time. Hence, it is highly unlikely that time limits prescribed in RERA would work. The situation is made evident in case of Uttar Pradesh where around 15,000 complaints were lodged on the first day itself.[70]

RERA provides for process to appoint real estate regulators but the onus is one the states to appoint an able official for the post. In order to fulfil the issue of objectivity and transparency, a person who isn't close to any promoter should be appointed for the post. The fact that the authority is more of an executive body than a judicial one, a well-designed set of norms should be laid out.

In order to implement this act proactively, all the prevailing local building control departments should record a list of ongoing projects for onward communication to the Real Estate Regulating Authorities in their respective jurisdiction. By doing so, they would make the work of the RERA's quite easier.

Buyers, builders and legal advisors need to be well versed with the provisions of the act to make implementation of the act efficient. It can be achieved by providing training session and campaigns for both the customers and the developers.

CONCLUSION

It is undeniable that real estate is one of the most crucial sectors in Indian Economy. However, in recent years, the sector has been tainted due to various reasons. Real Estate Regulation Act, 2016 seeks to restore the charm of the sector. After analysing the act both on paper and ground level, we came to the conclusion that the act is certainly very promising. Nevertheless, a lot will depend on its implementation. One might argue that the act is excessively consumer-centric however, in current scenario where the balance is excessively tilted towards the realtors it is the need of the hour. The speedy redressal mechanism available in the act will restore the faith of the consumers and aggrieved in the sector and the harsh penalty provided in the act

[69] Real Estate (Regulation and Development) Act, 2016 § 29(4).

[70] The Times of India, *15,000 complaints flood UP Real Estate (Regulation And Development) Act, 2016 Site on Day 1, Pay Rs 1000 Fee Next Time,* (29th July, 2017), http://timesofindia.indiatimes.com/city/noida/15000-complaints-flood-up-Real Estate (Regulation and Development) Act, 2016-site-on-day-1-pay-rs-1000-fee-next-time/articleshow/59781535.cms.

shall deter all the interested parties from contravening the provisions of the act. One cannot claim that the act does not suffer from any legal lacunae, yet as the act is a first in its kind, it is certainly going to bring revolution in the sector if implemented in the truest sense.

TRANSFORMATIVE CONSTITUTIONALISM AND THE JUDICIAL ROLE: BALANCING RELIGIOUS FREEDOM WITH SOCIAL REFORM

*Sanskriti Prakash & Akash Deep Pandey**

INTRODUCTION

Constitutions are, *stricto sensu*, documents that contain provisions governing the interrelationship of the various organs of the state, and provide for checks to prevent abuse of power by them. However, the significance of a constitution is much more than just that. A constitution is a living organic document embodying the will of the people. Constitutional drafting is often a landmark moment in a nation's history. This is especially so in the case of countries having a history of being colonized. The constitution in such countries contain not just restraints on state power, but also provisions that 'echo the aspirations of the nation' to bring about a transformation in the order of things as they exist.[1] The Indian Constitution, originating from the same historical background, is considered a transformative document.

The judiciary has been given the power to breathe life into the letters of the law by interpreting constitutional provisions. In recent years, the judiciary in India has come under attack by many scholars for 'over-reaching' or playing an 'activist' role. However, such a criticism proceeds on the assumption that there is a 'proper role' of the judiciary which it has overreached. Scholars have been grappling with the question of the proper role of judiciary in modern times, when the state itself has transformed from a police state to a welfare socialist state displaying transformative constitutionalism. The paper focusses on the judicial behavior in India with respect to religious questions and how the court has tried to balance religious freedom with the constitutional aspiration of social reform, that has in effect, led to the dilution of secularism in India due to an interventionist judiciary, much

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[1] Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES 2(7), (2014) p. 135.

beyond the constitutionally permitted limits of intervention.

TRANSFORMATIVE CONSTITUTIONALISM

A constitution, apart from laying down the interrelationship between the state organs and their scope and powers, embodies the ideals and aspirations and the values to which the people have committed themselves. It mirrors the soul of the nation and the people's supreme will. That is why the Constitution is considered an organic document that helps in shaping democracy.

The mere fact that a nation has a constitution does not imply that it also necessarily has constitutionalism. Baxi defines constitutionalism thus:

"Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance."[2]

Klare defines transformative constitutionalism as:

'a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.'[3]

Therefore, constitutionalism as a concept conveys legal restraints on the exercise of state power and adherence to the constitution, to the rule of law and thereby, to the people's will.[4]

Constitutions that have been made by states having a colonial history are often seen as 'a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future

[2] Upendra Baxi, *Postcolonial Legality*, in Henry Schwarz and Sangeeta Ray, (eds.), *A Companion to Postcolonial Studies* 540, 544. Cited in Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. CAL. INTERDISC. L.J. (2016) p. 122

[3] Klare, E. Karl., *Legal Culture and Transformative Constitutionalism,* 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS, (1998) p. 146. Cited in Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES, 2(7), (2014) p. 136.

[4] MADHAV KHOSLA, THE INDIAN CONSTITUTION (Oxford University Press, New Delhi, 2012), p. 14. Cited in Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES 2(7) (2014) p. 135.

founded on the recognition of human rights, democracy and peaceful co-existence...'[5] Transformative Constitutionalism envisages a mechanism to bring in social change from an unjust past to a democratic future using the Constitution as a tool to achieve this objective.

INDIA AND TRANSFORMATIVE CONSTITUTIONALISM

India had grappled with not just colonialism, but also social ills such as untouchability, caste discrimination, gender inequality which has been prevalent in India since ancient times. The Indian constitution-making exercise was motivated by the need to overthrow its colonial past and to bring about a new social and political order, based on democratic values. The Indian constitution was constructed as a 'moral autobiography', which promised a new future while explicitly rejecting the colonial past.[6]

Various provisions under the Indian constitution exemplify the transformative goal of the constitution. The Preamble contains the aspirations of the people, with the cherished goals of liberty, equality, fraternity and justice. It establishes a secular, democratic, socialist state. Part III of the Constitution provides Fundamental Rights against the state, including the ideals of equality[7], non-discrimination[8], freedom of speech and expression[9], movement, association[10], freedom of religion[11] and personal liberty[12]. It abolishes untouchability,[13] feudal titles and *begar.*[14] Thus, the quest for the establishment of a new social order through political power is implicit in the constitution. Bhargava believes that the Indian constitution was 'designed to break social hierarchies' and open up a new chapter of freedom, equality and justice.[15] It was a revolutionary moment, especially for the deprived classes, who hoped to receive equal treatment in society after its adoption.[16]

[5] Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. p. 351-352 (2006). Cited in Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. CAL. INTERDISC. L.J. 109 (2016)

[6] *Supra note* 2 at p. 110.

[7] CONSTITUTION OF INDIA, 1950, Article 14.

[8] CONSTITUTION OF INDIA, 1950, Articles 15, 16.

[9] CONSTITUTION OF INDIA, 1950, Article 19(1)(a).

[10] CONSTITUTION OF INDIA, 1950, Article 19.

[11] CONSTITUTION OF INDIA, 1950, Article 25.

[12] CONSTITUTION OF INDIA, 1950, Article 21.

[13] CONSTITUTION OF INDIA, 1950, Article 17.

[14] CONSTITUTION OF INDIA, 1950, Article 23.

[15] RAJEEV BHARGAVA (ED.), OUTLINE OF POLITICAL THEORY OF THE INDIAN CONSTITUTION IN POLITICS AND ETHICS OF THE INDIAN CONSTITUTION, (Oxford University Press, New Delhi, 2008), p. 15. Cited in Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES 2(7), (2014), p. 135.

[16] Kamal Kumar, *Outline of Political Theory of the Indian Constitution in Politics and Ethics of the Indian Constitution*, IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE, 19(3), (2014), pp. 29.

TRANSFORMATIVE CONSTITUTIONALISM AND THE JUDICIAL ROLE: LOCATING THE 'PROPER'

The judicial organ of the state is tasked with the interpretation of the law. It ensures that a document as old as the constitution continues to hold relevance in modern society. In most postcolonial states that display transformative constitutionalism, the judicial role is not just confined to strictly interpreting the text as it is, but rather, the interpretation of the text must be in a way that furthers the constitutional ideals and goals, in a manner that resonates with the new changed society.

Yet, the judiciary cannot deviate too far away from the written mandate of the constitution. Thus, the judiciary has the twin role of upholding constitutional values by creatively interpreting the text while remaining within the ambit and respecting the constitutionally mandated separation of powers without overreaching its jurisdiction and venturing into forbidden fields.

When criticisms are levied on courts for being 'too activist', too interventionist or too powerful, the question arises as to what the role of the judges 'ought to be'. This question has been the subject of controversy since long. Even judges themselves have very different conceptions of what is the role of a judge, especially in case of a forward-looking transformative constitution.

Judiciary is said to be activist when the courts venture into areas that come within another organ's jurisdiction, such as in cases of judicial legislation. It may also occur 'when courts strike out a law that may be 'arguably constitutional', when courts creatively interpret a provision in sensitive issues, when the court deviates from a line of precedents and violates the doctrine of stare decisis, when it adjudicates upon polycentric issues etc.'[17] Again, the role of the judiciary in such cases is also debatable – whether the court should strictly adhere to the law as it is, or try to creatively interpret it to tackle the sensitive nature of the issue and bring it in line with the changed society. Should it be 'a transformative actor, a protector of constitutional rights, a facilitator of the democratic process, an organ of the state that adheres strictly to a separation of powers, or an institution that is above politics and

[17] Oscar Sang, *The Separation of Powers and New Judicial Power: How the South African Constitutional Court Plotted Its Course*, ELSA MALTA LAW REVIEW, Ed III, 2013, p. 99.

populism?'[18] All these situations call for the need to find the 'proper' role of the judiciary in a democracy.

Transformative constitutionalism requires that the judiciary comes up with a jurisprudence that resonates with that transformative vision. It requires an understanding of the constitution – its history and the struggle of marginalized groups. In this way, postcolonial constitutionalism is a demonstration of the judiciary taking rights seriously through taking human suffering seriously.[19]

The Indian judiciary has had a mixed record of upholding constitutional values and aspirations. By inventing the PIL mechanism and expanding the rule of locus standi through epistolary jurisdiction and *suo moto* cognizance of matters, the Supreme Court has tried to reach out to the common man. Through judicial creativity, it has expanded the scope of fundamental rights, most notably, Article 21 and has even read most of the Directive Principles into Part III.[20] Through continuing mandamus, it has assumed power to monitor the implementation of its orders.

Yet, this expanded role of the Supreme Court has been subject to criticism. Scholars have termed the Supreme Court as being an *imperium imperio*[21]. Judicial engagement beyond a point, it is often argued, may lead to judicial tyranny and transform the judiciary from being the weakest (since it has neither sword nor purse) to the strongest organ (by a very weak system of checks on the judiciary) amongst the three.

In effect, the Supreme Court in India has displayed inconsistency in its approach to constitutionalism. While in some cases, the Supreme Court displays a zealously activist approach[22], in others, it simply gives up all its responsibility and adheres to the strict letter of the constitution[23].

[18] VILHENA, BAXI AND VILJOEN (EDS.), TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (Pretoria University Law Press, Pretoria, 2013).

[19] Upendra Baxi, *The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Combat with the Production of Rightlessness in India*, in C. Raj Kumar and K. Chockalingam (eds) HUMAN RIGHTS, JUSTICE, & CONSTITUTIONAL EMPOWERMENT 3, 15. Cited in Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. CAL. INTERDISC. L.J. (2016), p. 124.

[20] *See* Maneka Gandhi v. Union of India, AIR 1978 SC 597.

[21] Gadbois, *Supreme Court Decision Making*, (1974) 1 BA NARAS LAW JOURNAL 10.

[22] *See for example* Maneka Gandhi v. Union of India, AIR 1978 SC 597; Vishakha v. State of Rajasthan, AIR 1997 SC; Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461; Bandhua Mukti Morchha v. Union of India, AIR, 1984 SC 802; NALSA v. Union of India, (2014) 5 SCC 438.

[23] *See for example* Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1; A. K. Gopalan v. Union of India, AIR 1950 SC 27; ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.

A contentious issue that this paper seeks to analyse is the way the Indian judiciary has dealt with the conflict between protecting religious freedom on the one hand, and upholding the constitutional aspiration of social reform on the other. By entering into the realm of religion, and sitting in judgement over what constitutes religion and what a religious text means through the formulation of the controversial Essential Religious Practice Test by the court, it has, in trying to balance the two conflicts, undermined secularism and further restricted the constitutional freedom of religion, much beyond what was constitutionally envisaged.

RELIGIOUS FREEDOM AND SOCIAL REFORM: A BALANCING ACT

The Indian society is a faith-based polity with different religions coexisting. The Indian constitution was drafted in the backdrop of Partition, due to which, the framers kept in mind one of the objectives as fostering trust and respect for all religions. Due to the deep religious entrenchment in the daily lives of the people, the constitution was not made to follow the 'strict wall of separation' model of secularism. Instead, it was one of 'principled distance'[24] and 'equal respect and tolerance for all'. However, the religions at that time, especially Hinduism, was fraught with social ills such as child marriage, sati, caste discrimination, untouchability etc. that needed to be abolished, in order to secure a new egalitarian social order.

Article 25 provides for the freedom to freely profess, practice and propagate religion subject to public order, morality and health. Article 25(2)(b) however makes an exception to the general rule – the State can make a law that provides for social reform or which throws open Hindu religious institutions of public nature to all classes and sections of Hindus. These two provisions, in practice, have often come into conflict with religious groups opposing legislations on grounds of violation of Article 25 and the state defending them as being a social reform legislation. So, the Indian constitution maintained three approaches to religion: 'religious freedom; state neutrality towards all religions; and reformative justice whereby religious freedom would be curtailed on grounds of public order, health, morality and religious practices and institutions could be

[24] Rajeev Bhargava, *The Distinctiveness of Indian Secularism*, T.N. SRINIVASAN (ED.) THE FUTURE OF SECULARISM (Oxford University Press, Delhi, 2006), p. 20.

regulated by the state in economic, financial, political or other secular activities'.[25]

The judges in India have to balance religious freedom, social justice and individual liberty.[26] If social reform had to be brought about, state intervention in religious affairs to some extent was required. But with every application of the ERP test by the Supreme Court, the freedom of religion gets further undermined, especially in term so of an individual's right to practice religion.

THE 'ESSENTIALLY RELIGIOUS' AND 'ESSENTIAL TO RELIGION' CONUNDRUM

Initially, the court began by stating that practices that were 'essentially religious', i.e. religious by their very nature, were protected under the constitution from intervention by the state. Only the religious denomination itself had the right to decide as to what were the essential rites and ceremonies of their religion and the state could only intervene in such practices, if they were against public order, health or morality or in violation of other provisions of part III[27]. Also, the state could legislate for social welfare or reform. The state could only regulate activities that are economic, commercial or political, though associated with religious practice. *Ratilal v. State of Bombay*[28] also reiterated the same.

According to the present understanding of the ERP test, only those practices are protected under the constitution from state intervention, which are 'essential to religion' and which are so fundamental to it, that any change to those practices would change the very character of religion itself. It is submitted that this requirement of the practice having to be 'essential to religion' is not one that is mentioned in the Constitution, nor can the Constitution be reasonably interpreted to mean so.

After assuming the power to decide as to which practices were 'essential to religion', the court further began to expand its powers by giving itself the power to interpret religious texts and adding additional tests to determine essentiality of religion, thereby undermining religious freedom, and secularism as a whole.

[25] *Supra note* 18.
[26] *Supra note* 18.
[27] The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282.
[28] AIR 1954 SC 388.

Through *Ram Prasad Seth vs State of Uttar Pradesh*[29], the Allahabad High Court confused 'essentially religious' with 'essential to religion' which truly crystallised the ERP test. This opened religion to the scrutiny of courts. The subsequent judgements began to interpret essential not as a qualification to the nature of practice, i.e., religious or secular, but rather connoted it to mean important to religion. The string of cases that followed since then are all examples of overreach by the courts. The courts have ventured into religious questions which the constitution forbids under Article 25.

INTERPRETING RELIGIOUS TEXTS

It was in *Venkataramma Devaru v. State of Mysore*[30] where the Supreme Court actively went into the interpretation of religious texts to hold that untouchability was not an integral part of the Hindu religion. The active intervention of the judiciary in matters of religion was criticized, especially since the court could have simply confined itself to holding untouchability unconstitutional on the basis of Article 17 and Article 14. A more sensible approach was followed in *Adhitayan v. Travancore Devaswam Board*[31] where the court held that appointment of only Brahmin priests was a violation of Article 17. Even in *Shah Bano* case[32], the court could have easily adjudicated upon the case based on the provisions in the Criminal Procedure Code rather than going into interpreting Verse 241 of the Quran. In the Shah Bano case, Justice Chandrachud, a non-Muslim, secular jurist trained only in secular law interpreted significant Islamic law principles, upon which there is no consensus even among trained Islamic legal scholars.

In *Sastri Yagnapurushadji and others v. Muldas Bhudardas Vaishya*[33], the petitioners claimed that they were not Hindus and hence, the temple entry legislations would not apply to them. The court went into a detailed exposition of the tenets of Hinduism and concluded that the *satsangis* were in fact Hindus. It further went on to hold that their views on temple entry were based on a mistaken and false understanding of the teachings of their founder Swami Narayan and superstition and ignorance. So, the court effectively tutored a religious group as to what their religion actually meant, which the judges were clearly ill-equipped to do, being untrained in theology.

[29] AIR 1957 All 411.
[30] AIR 1958 SC 255.
[31] AIR 2002 SC.
[32] AIR 1985 SC 945.
[33] AIR 1966 SC 1119.

The same was done by the Supreme Court recently, in *Nikhil Soni v. Union of India*[34], where the Rajasthan HC banned *santhara* on the ground that it does not constitute an essential religious practice and is hence, not protected under Article 25.

THE TEST OF OBLIGATION

It was this confusion that later got followed in *Qureshi v. State of Bihar*[35], where the Supreme Court held that slaughter of cows was not an essential practice of Muslims in Eid and was not 'obligatory' as they did have the option of slaughtering other animals. Again, the **test of obligation** got added here by the Supreme Court, further reducing the scope of religious freedom.[36] Similarly, in *Fasi v. SP of Police*[37], a police officer challenged a regulation that disallowed him from keeping a beard as violative of his freedom of religion. The court disregarded the evidence from Quran provided by the petitioner and instead relied on the argument that there are many Muslims who do not have beards and the petitioner himself did not have a beard earlier and thus, it is not essential. This shows the utterly whimsical approach of the courts to questions of religion.

Again, in *Ismail Faruqui v. Union of India*[38], the court was called upon to adjudicate on the issue as to whether or not the state can acquire a land over which the Babri Masjid stood. The court went into adjudicating upon whether or not praying in a mosque is an essential tenet of Islam and held that praying in a mosque was not essential as it could be done even in the open. Thus, it is not protected under freedom of religion.

This test of protecting a practice only if it is 'obligatory' and 'absolutely essential' severely curtails the freedom of an individual to practice his religion in his own way. As long as his way does not go against public order, health or morality, or is not violative of other fundamental rights, the practice must be granted protection.

THE TEST OF RATIONALITY

Justice Gajendragadkar in the *Durgah Committee, Ajmer v. Syed Husssain Ali*[39] held that certain practices may merely stem from superstition. Such practices need to be scrutinized carefully and rationally. An added

[34] 2015 Cri LJ 4951.
[35] AIR 1958 SC 731.
[36] M Mohsin Alam, *Constructing Secularism: Separating 'Religion' and 'State' under the Indian Constitution*, ASIAN LAW, Vol. 11, (2009) p. 39.
[37] (1985) ILLJ 463 Ker.
[38] AIR 1995 SC 605.
[39] AIR 1961 SC 1402.

test of rationality was introduced by the Supreme Court.[40]

Values such as 'rationality' and 'morality' are highly subjective. A judge has his own personal belief systems which shape his thinking. Only because a judge's idea of 'morality' or 'rationality' is different from that of a religious group, does not make the practice immoral or irrational. In fact, giving such powers to a few judges would lead to the imposition of their own ideas and elitist and majoritarian cultural values on the community, thus destroying diversity.

THE TEST OF ANTIQUITY

In *Acharya Jagdishwaranand v. Commissioner of Police, Calcutta*[41], the court held that *tandava* was not an essential practice of the Ananda Margi faith as it began in 1966 whereas the faith began in 1955. So, the court effectively added another **test of antiquity** to determine essentiality.

In *Bal Patil v. Union of India*[42], the court held that Jainism is not a separate religion but merely a "revolutionary movement within Hinduism", even when the two religions differ on the very basic principle of belief in God, and yet, the court found this difference to be insignificant. Many scholars criticised the judgement and held that law has no business in delineating the scope of religion.

So, the current position is that it is not enough to merely prove that a practice is religious, but to also prove that it is obligatory, rational and antique.

CONCLUSION: A NEED FOR RESTRAINT

The ERP test has been criticized variously by scholars and practitioners alike. The judges are trained in law and not in theology. They can never be competent to deliver informed judgements about religions. There is a looming danger that the court may arbitrarily use its power in its drive to modernize the Indian state. It makes the entire process arbitrary and subjective as per the judge who adjudicates upon the matter. Another argument is that the freedom of religion is a right guaranteed to an individual and not the community. Such adjudication violates the rights of those individuals who opt to practice their religion through varied practices. The judges may bring in their own ideologies and threaten diversity of religious belief in doing so.

Justice Iacobucci said: *"the State is in no position to be, nor should it become, the arbiter*

[40] *Supra note* 34.
[41] AIR 1984 SC 512.
[42] (2005) 6 S.C.C. at 690.

of religious dogma"[43]. That could involve a secular ideology dictating to a religious one, with a government or courts re-educating believers to show them their 'errors'.[44] Such a practice which allows courts to decide the contents of religions makes the state an insider into religion. And this transformation has given the judiciary a political role in 'secularism adjudication' – not only does it legitimise state intervention, it carries out the internal critique itself.[45] Even the widest and most liberal reading of the constitution does not allow for the tests of rationality, antiquity or obligation to be applied to define the scope of religious freedom.

It is one thing to shape religion in terms of secular public standards, and a whole other thing to 'attempt to grasp the levers of religious authority and to reformulate religious tradition from within'.[46] While transformative constitutionalism does require the judiciary to play an active and creative role to further the constitutional aspirations, and in the Indian case, to bring in social reform, the ERP test is a clear example of judicial overreach.

This is not to say that all kinds of religious practices must be allowed, howsoever violative they may be of constitutional rights. The best way would be for the judiciary to bring in social reform by testing religious practices on secular values such as equality, liberty and justice rather than becoming an internal critic of religion by itself. This would help in balancing the preservation of religious freedom on the one hand, and the constitutional aspiration of social reform on the other.

[43] Syndicat Northcrest v. Amselem, (2004) 2 SCR 581 (Canada).
[44] ROGER TRIGG, EQUALITY, FREEDOM AND RELIGION, p.45, (Oxford University Press, New York, 2012).
[45] *Supra note* 34 at p. 41.
[46] *Supra note* 43 at p. 284.