ALSD STUDENT JOURNAL VOLUME 8 DECEMBER, 2019

ISSN 2249-4421 Previously UGC Approved Journal No. 42016

STUDENT JOURNAL

A Journal of Amity Law School, Delhi

(A Peer Reviewed Journal)

Volume 8 DECEMBER, 2019

AMITY LAW SCHOOL, DELHI

ISSN 2249-4421 **Previously UGC Approved No. 42016**

ALSD Student Journal

A Journal of Amity Law School, Delhi

(Peer-Reviewed Journal)

Volume 8 2019

Founder

Dr. Ashok K. Chauhan
Founder President, Ritnand Balved Education Foundation

Patron-in-Chief

Dr. Atul Chauhan
President RBEF and Chancellor, AUUP, India

Patron

Prof. (Dr.) Dilip K. Bandyopadhyay
Chairman, Amity Law School, Delhi

BOARD OF EDITORS

Faculty Supervisory Editor

Prof. (Dr.) Arvind P. Bhanu
Acting Director, Amity Law School, Delhi

Faculty Advisory Board

Ms. Swati Bajaj
Assistant Professor, Amity Law School, Delhi

STUDENT EDITORS

Editor-in-Chief

Srishti Khindaria

Editors

Mitali Gupta

Neha Das

Pankhuri Bhatnagar

Ragini Juneja

Suhani Chanchaani

Nakul Jain

Arushi Sethi

Shreya Jha

Nominee Editors

Siddharth Dhawan

Tanya Aggarwal

Assistant Editors

Ragini Kanungo

Sharona Mann

Subha Chugh

Saloni Sharma

Sonjuhi Kaul

Editorial Advisory Board

Mr. Siddharth Mehta
Advocate, Supreme Court of India

Mr. Dhruv Chawla
LLM, Cornell Law School

Mr. Hardeep Singh Chawla
Deal Advisory (M&A and PE) Tax,
KPMG India

Mr. Sudipto Sircar
Advocate, Supreme Court of India

Ms. Neerja Gurnani
LLM, University of Oxford

Mr. Sachin Mehta
Partner
AZB & Partners

Published and Distributed by
ALSD Student Journal

ALSD Student Journal is published annually.

ISSN: 2249-4421
©2020 ALSD Student Journal

All rights reserved.

Disclaimer:
Views expressed in the ALSD Student Journal are those of the contributors. The Editors and ALSD do not necessarily subscribe the views expressed by the contributors. The Editors and ALSD disclaim all liability and responsibility for any error or omission in this publication. In the case of binding defect, misprint, missing pages etc., the publisher's liability is limited to replacement of the defective copy.

All enquiries regarding the journal should be addressed to:
Editor,
ALSD Student Journal
(An Institution of the Ritnand Balved Educational Foundation)
(Affiliated to Guru Gobind Singh Indraprastha University, New Delhi)
F-1 Block, Sector 125, ALSD Student Journal University Campus
Noida-201313 (U.P.) Tel: 0120-4392681
E-mail: alsdelhi@amity.edu Website: www.amity.edu/als

Electronically published at

https://www.amity.edu/als
(Amity Law School, Delhi website)
F-1 Block, Amity University Campus
Sector - 123, Noida 201301

ALSD Student Journal ISSN 2249-4421

A Journal of Amity Law School, Delhi Volume VIII
(Peer – Review Journal)

2019

CONTENTS

	PAGE NO.
About the Theme	**VI**
About the Authors	**VII**
ARTICLES	
Adopting UNCITRAL Model on Cross Border Insolvency, 1997 in India: Problems and Need for a Global Reform *Kashyap VS*	**1**
Investigation of Laws and Regulations for the Protection of GI: A Comparative Analysis in US, China, and India *Pooja Vikram and Sanjuktha A Yermal*	**11**
PMAY, GST, and Real Estate: A Handbook on the Advent of Affordable Housing in India *Tanya Agarwal and Tanya Patwal*	**23**
Competition Law and Data Protection: A Study in European Union *Pranjal Pranshu*	**38**
Development of Defence of Illegality in Context of Liability of Auditors *Manvi Khanna*	**53**
Evolution of Insolvency Laws in India *Jhanvi Grover and Reshma Nair*	**66**
Cross Border Mergers & Acquisitions *Shreya Chauhan and Vidusi Goel*	**80**
Economic Implications of the Code on Wages *Omkar Upadhyay*	**95**
Who owns the Moon? – Study on Extraterrestrial Real Estate *Shanmathi Raghupathy*	**116**

ARTICLES **PAGE NO.**

The Impact of Economic Policies on the Environment of India with focus on Liberalization and Globalization **125**
Karan Malhotra

The Effect of Commercialisation of Bycatches on the Marine Ecosystem: An Imminent Need for Implementation of Sustainable Fishing Practices **138**
Barani Bharathi B and R Divya Meenakshi

RESEARCH NOTE

Special Economic Zone – Critical Analysis **159**
Neel Vasant

About the Editor-in-chief & Editors i

ABOUT THE JOURNAL'S THEME

In the ***Student Journal , A Journal of Amity Law School Delhi***, the write-up was invited in the form of Articles, Research paper, book review and case comments on the theme **'Economic Laws'** for the upcoming Volume no. 8.

The theme was decided on the basis of numerous current economic scams in the market which have an impact on the growth and development of Indian as well as world economy. Like the latest PMC Bank scam, DHFL scam, UPPCL employee provident fund scam, INX media scandal, IMA ponzi scheme, *etc.* of 2019 and the very famous case of Punjab National Bank or Nirav Modi Scam, Vikram Kothari's Rotomac Bank Fraud case, *etc.* of 2018. These scandals have caused adverse effect on the economy.

Besides, economic scams, another reason behind the selected theme is that as the world economy is developing with new ideas and challenges such as the growing demand for digitalization, evolving technology in the form of artificial intelligence, innovations *etc.* it becomes crucial to appreciate the scope of regulators and laws covering such areas and to analyse their impact on Indian economy.

Economic laws such as competition law, security market laws, telecom sector law, banking and insurance laws, air and space laws, insolvency laws, environment laws *etc.* were enacted by the Indian government to regulate the functioning of these sectors keeping in mind the interest of public and economy at large. Hence, following sub themes were advised to the authors and researchers:

- Environmental Impact of Economic Policies
- Rise in Economic Offences: Need for a Stringent Regime
- National Interest Implications on International trade
- Revamping of the Insolvency laws of India
- Analysing existing trends in Mergers and Acquisitions and their challenges
- Regulation of Artificial Intelligence and its Intersection with Patent Laws
- Role of Economic Regulators
- Regulation of Air and Space Laws

ABOUT THE AUTHORS

Avni Kritika is an undergraduate law student from Amity University, Lucknow Campus. She is a legal blog writer and has extraordinary interest in conventional fields of law. The author has written many research papers and has bagged publication in both national and international journals. She has also contributed chapters in a few books. Apart from law, the author has special interest in literature and her love for Keats is endless.

Barani Bharathi B is currently a student pursuing his 3rd year in a BBA. LLB (Hons.) programme at School of Law, CHRIST (Deemed to be University). He is passionate towards understanding the intricacies in the areas of international law and public policy. He is an environmental law enthusiast. He has been an ardent participant in moot court competitions at the national level. He is a member of the Internships and Placements Committee at CHRIST.

Divya Meenakshi R is a student pursuing her 3rd year in a BA.LLB (Hons.) programme at School of Law, CHRIST. In the arena of legal studies, her primary interests lie in environmental law and animal welfare law. She yearns to pursue her post graduate studies in environmental law and aspires to engage herself in a career in this field. She is an active member of the Environmental Law Studies and Orientation Programme Committee at CHRIST.

Jahanvi Grover and Reshma Nair are final year LLB students at Symbiosis Law School, Pune who have co-authored the paper titled 'Insolvency Laws: The Past, Present and the Future' with their keen interest in the subject. Jahanvi Grover has studied Political Science at Delhi University and is extremely passionate about subjects like History and International Relations. She is an avid reader and has a knack for watching documentaries. Reshma Nair on the other hand, is from Bombay and studied B.Com at Mumbai University. Besides being a total geek she is a Bharatnatyam dancer.

Kashyab Venkatesh is a student from School of Law, Christ (Deemed to be University), Bangalore, India. He is currently serving as Student Convener of Alternative Dispute Resolution Board, School of Law, Christ 2019-20. His areas of interests include General Corporate, Commercial Contracts, International Commercial and Investment Arbitration and Conflict of Laws. He wishes to pursue Dispute Resolution in India. In his free time, he reads about Ancient Indian History and Civilization, Biographies and Economics.

Manvi Khanna is a 4th year law student pursuing BBA.LLB(Hons.) at National Law

University, Odisha, Cuttack. She is heavily inclined towards academics and legal research in my college life. She has a keen interest in writing on diverse areas of law especially with regard to corporate and commercial matters and has a few blog articles and essays to her credit. She likes to read and keep herself updated with all the latest happenings around the globe. After college, she hopes to pursue a career with a policy think tank or as a corporate disputes lawyer. Apart from reading, she enjoys travelling and watching movies.

Omkar Upadhyay is a 2nd year (IV Semester) student of Maharashtra National Law University, Nagpur pursuing B.A.LL.B. (Hons.). He has maintained a CGPA of 8.2 for the past three semesters. The author has an inclination towards research and writing analytical essays and has secured 3rd position in Weeramentary Centre's 1st National Essay Writing Competition and 7th position in National Essay Competition by Birla Global University (*Caste and Religion causes of Hate Crimes in India: A Human Rights Perspective*). These essays have also been published in the organiser's respective journals, the former being an international one. Also the author has other publications in Universities such as Rajiv Gandhi National University of Law (*Aliens being Alienated from Humanity: Human Rights of the Migrants*) and Calcutta University (*Analysing the Efficacy of Code*), apart from publications on online platforms such as 'Supremo Amicus' and 'Legal Services India'. Furthermore, the author has also presented paper in various National Conferences on diverse topics in esteemed Institutions such as Maharashtra National Law University Nagpur (*Efficacy of TRIPS Regime in Third World Countries*), Osmania University, Hyderabad (*Contradictions of Reproductive Rights and Human Rights: A Critical Analysis of Surrogacy*) and B.M.U., Rohtak (*Fate of MSMEs vis-à-vis Competition Law*).

Pranjal is a 5th Year Law student from KIIT Law School, Bhubaneswar. He has a deep interest in commercial and tech laws. He has consistently engaged in related work in his law school as well as at his internships, and wishes to further pursue work related to these fields. He has written this research paper to bring light to the nexus between privacy laws and competition laws, which are normally unrelated to each other, but have come to share some space in the advent of GDPR.

Pooja Vikram is presently a student of Alliance University, Bangalore, pursuing BA LLB(Hons.). She is a 5th year student of the above mentioned course. She believes that constant determination and will power can help to reach success and this motto has helped her to achieve many goals like a "Special mention" award in Samvaad, which was one of the biggest youth conferences held in Delhi. She has also completed internships in many reputed

firms and government offices such as the Additional Solicitor General of India. She has published articles in many reputed journals and has also published a chapter in a book forwarded by former Chief Justice of India, Dipak Misra. Apart from this she believes not only in excelling in a professional field but also giving her time to research and mooting.

Shanmathi R. is pursuing final year BA LLB (Hons) at Saveetha School of Law, Chennai. She has been a University Rank Holder for 4 consecutive years and has received various cash prizes. She is passionate about drafting and has undergone intensive research in the field of Space Law which led to the outcome of National Space Affairs Bill,2016 which was reviewed by Dr. Balakistha Reddy, Director of Centre for Air and Space Law, NALSAR University, Hyderabad and Mr. V. Gopalakrishnan, Policy Analyst ISRO, Bangalore. She also has experience of serving the post of Committee Chairman in drafting the Rights of LGBTQ+ Community (Job Reforms) Bill, 2019 in the Youth Parliament, 2019. Apart from this, she has various other publications and presentations. Exhibiting an entrepreneurial mentality, she also runs a home bakery in the name Bonne Bouche Chennai since the past two years.

Sanjuktha A. Yermal, is a final year student pursuing BA LLB and specialization in IPR Honors at Alliance University, Bangalore. Her interests include patents, copyrights, trademarks, media and entertainment laws.

Shreya Chauhan is a third year student of Amity Law School, Delhi. Her paper focuses on the challenges faced by mergers in India more specifically cross border mergers and acquisitions in India and their impact on the economy of the country. Her interest in research is mostly concerned in areas of criminal law and justice, arbitration, commercial law and insolvency law. She has worked with established legal firms and Human Rights Associations like PAIRVI(Public Advocacy Initiatives for Rights and Values in India).

Tanya Patwal and Tanya Agarwal are 3rd year law students at Amity Law School Delhi, GGSIP University. They have co-written several papers together and have also presented a few. They share a passion for research, reading, writing, mooting, trials and have a deep interest in Public International Law.

Vidushi Goel is a third year student of Amity Law School, Delhi. Her main areas of research interests are Family Law, Constitutional Law and Arbitration. Her research paper covers challenges faced by Cross Border Merger. She has interned at State Legal Service Authority, Chandigarh, The District and Session Court Ludhiana, The Punjab and Haryana High Court, The Delhi High Court under respectable Senior Advocates.

ADOPTING UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, 1997 IN INDIA: PROBLEMS AND NEED FOR A GLOBAL REFORM

*Kashyab Venkatesh S**

ABSTRACT

Transnational transactions and their presence across the globe have become common since a very long time. But, this has complicated insolvency disputes due to lack of unified laws to govern the Cross-border Insolvency. As the entities have their establishment across the world, if it becomes insolvent in any one country the assets of the company lying around the world should be considered for resolution or liquidation. Precisely, insolvency with foreign elements has made disputes difficult as countries have their respective insolvency law and not any unified model. So, UNCITRAL came up with a model law to address the issue in hand in the year 1997. Also, there is criticism since a very long time for not having adequate laws to deal with Cross-Border Insolvency in India. Even, IBC, 2016 didn't address the issue substantially. Recent proposal to adopt the model law on Cross Border Insolvency by India is the starting point to write this paper. In this paper the prime focus would be to identify the inherent shortcomings of UNCITRAL model law and how mere adoption in India wouldn't solve the problem. Also, the author has emphasised on different Cross-border Insolvency regimes and their functioning to elaborate on complexity in unifying these distinct systems. Also, the paper deals with the possible adoption India can make from foreign regimes to attract foreign investors.

KEYWORDS: *Cross-Border Insolvency, Reciprocity agreement, Modified Universalism, Territoriality, Public Policy, Uniformity*

I. INTRODUCTION

Insolvency is defined as 'inability to pay the debts to the creditors'[1] and Insolvency proceeding is a formal procedure to liquidate company assets or to rehabilitate an estate[2]. Cross-Border

* 4TH YEAR STUDENT OF B.A., LL.B AT SCHOOL OF LAW, CHRIST (DEEMED TO BE UNIVERSITY)

1 Black's Law Dictionary 811.

2 Insolvency proceeding, Black's Law Dictionary 812 (9th ed. 2009).

Insolvency is a form of insolvency in which the debtor has its assets in more than one jurisdiction and creditors exist in different countries.[3] The cross-border insolvency is more concerned about corporate insolvent rather than an individual insolvent. The conflicts in Cross-border Insolvency arise because of different countries following different methods to deal with disputes. Different forms of cross-border insolvency laws can be classified broadly into three categories, Territorialism, Universalism and Modified Universalism approach.[4] These regimes would be discussed in detail in this paper with specific reference to the countries that have adopted it and how is its functioning. In any cross-border insolvency dispute, the concerned parties would be residing in more than one jurisdiction [i.e. creditors from different countries, etc] which automatically creates a need for having reciprocity agreement among countries to decide on these disputes. Also, liberalization of economies made businesses take place across the world which further made the insolvency disputes complicated. Even judges were aware by the late 20th Century that there would be some or the other foreign element in each and every insolvency dispute.[5]

This realisation paved the way to constitute two joint international colloquia[6] by the United Nations to examine the need to have a common system among countries to deal with cross-border insolvency issues. The colloquia constituted various people from academia, judges, insolvency practitioners, lenders and other interested parties[7]. The colloquia came up with a consensus to form a UN working group to draft a model law for cross-border insolvency. Later in the year 1997, the constituted UN working group came up with UNCITRAL Model law on Cross-border Insolvency. The sole purpose of the model law was to create co-operation among courts while dealing with insolvencies which have foreign elements in them.[8]

---

[3] UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation.
[4] Ryan Halimi, “An analysis of three major Cross-Border Insolvency regimes” 47 International Immersion Program Papers (2017).
[5] Sir Peter Millett, “Cross-Border Insolvency: The Judicial Approach” 6:99 INSOL International Insolvency Review, 113 (1997).
[6] 28th Session Report on UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, (1995).
[7] S. Chandra Mohan, “Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?” 21:3, International Insolvency Review 202 (2012).
[8] Ian F Fletcher, “Insolvency in Private International Law” 2.129 (Oxford University Press, New York, 2nd ed. 2005); UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, [Texts, New York 2014] www.UNCITRAL.org (Last visited on Oct 31, 2019).

II. EVOLUTION OF CROSS-BORDER INSOLVENCY IN INDIA

A. Prior to Insolvency and Bankruptcy Code, 2016

In India prior to Insolvency and Bankruptcy Code, 2016 [hereinafter IBC, 2016], courts acquired jurisdiction to adjudicate on insolvency disputes as per the Provincial Insolvency Act, 1920. Section 3 of Provincial Insolvency Act, 1920 formally gives power the to adjudicate and consider any debtor as an insolvent, if the debtor is an ordinary resident of India[9] or carries on business in India[10] or personally works for gain in India or if he has been arrested or imprisoned and is in custody within the jurisdiction[11]. In that legislation there was no specific mentioning about Cross-Border Insolvency or recognition of foreign Courts for adjudication if the corporate-debtor is bound by more than one jurisdiction.[12] Since the inception of the UNCITRAL Model law on Cross-Border Insolvency, 1997, there were various committees[13] suggesting India to adopt the Model law for an efficient and effective mode of adjudicating insolvency involving foreign elements in it.

B. Ambiguity in Insolvency and Bankruptcy Code, 2016:

In IBC, 2016 the only two provisions relevant in the context of Cross-Border Insolvency are section 234 and 235. It says the IBC, 2016 shall apply to a dispute with trans-national interests. It can be recognised [or enforced] if and only if India enters into a reciprocity agreement with those "Respective countries"[14] and by acquiring "letter of request" enabling liquidator to take actions on corporate debtor's assets in those jurisdictions.[15]

1. *Complications with 'Reciprocity Agreement' & 'Letter of Request' as provision for Cross-border Insolvency:*

For instance, if a company fails in resolution process and goes through winding up according to the order of NCLT, an official liquidator will be appointed and he/she will be involved in the task of selling the assets of the company and pay off the creditors of the company in their

---

[9] Dina Nath Vaidya v. Krishna Dutt, AIR 1953 AJMER 8.
[10] Ellapa Naicker v. Sivasubramanian Mariagaran AIR 1937 MAD 293.
[11] Provincial Insolvency Act, 1920 (Act 5 of 1920), S 11.
[12] Ministry of Corporate Affairs, Justice V Balakrishna Eradi, 'The Report of High Level Committee on Law relating to Insolvency and Winding up of Companies' (July, 2000) 45.
[13] Ministry of Corporate Affairs, Dr. NL Mitra, 'Report of the Advisory group on Bankruptcy laws' (May 2001) 15.
[14] Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s 234.
[15] Ibid s. 235.

respective share[16]. But, if the company has assets in a foreign jurisdiction, the liquidator would be obligated to take into consideration those assets also for repaying the creditors and giving them the share, they deserve. In a paradigm with mere Reciprocity agreement and letter of request, the probability is very less that the country would agree for a bilateral agreement to let the NCLT decide on an asset falling in its jurisdiction. Also, if the assets are in more than one foreign jurisdiction, then as per present section 234 and 235, India should be entering into Reciprocity Agreement with each and every country in whose jurisdiction the assets are situated.

Also, if there are creditors in a foreign jurisdiction and winding-up proceedings takes place in India, those creditors are not stopped from enforcing their rights against the company's assets in that country in the appropriate courts, which ultimately becomes unfair for the other creditors. Only, if the assets are distributed through one liquidator, the share among the creditors will be fair. This wouldn't be possible, if there are two simultaneous liquidations taking place in two different jurisdictions. So, the paradigm with reciprocity agreement is complicated and would create chaos and confusion among everyone. Also, in certain instances, the proceedings will be abruptly stopped for not having enough assets within one or more jurisdiction and there is no way of entering reciprocity agreement with the country where the major assets are situated.

C. Proposal of a new chapter for IBC, 2016 and adoption of UNCITRAL Model law on Cross-Border Insolvency, 1997

Now, the committee reviewing IBC, 2016[17] has acknowledged that provisions dealing with Cross-border Insolvency [i.e., Section 234 and 235] are not comprehensive and has come up with a proposed draft of chapter on Cross-Border Insolvency in IBC, 2016[18] and it was based on UNCITRAL Model law. The adoption of the Model law has come as a counter to the criticisms persisting since the beginning of this century with respect to lack of competent Cross-border insolvency laws to govern trans-national interests in India.

[16] Ibid s. 5(18)
[17] Ministry of Corporate Affairs, Injeti Srinivas, 'Report of the Insolvency Law Committee, Reports' (March, 2018).
[18] Ministry of Corporate Affairs, 'Draft part on Cross-Border Insolvency for suggestions - Public Notice, Insolvency Section file no. 30/27/2018' (June 2018).

Now, the question is what would be subsequent to the adoption of Model law in India [if the proposed chapter gets added into IBC, 2016]. Is the adoption of model law enough to solve the entire problem? What is inherently a failure in model law?

III. PROBLEMS PERSISTING IN CROSS-BORDER INSOLVENCY DISPUTES AND COMPLICATIONS UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, 1997 FAILED TO ADDRESS

As already mentioned, the main objective to introduce the said Model law is to unify the system of Cross-border insolvency throughout the world. This would also reduce confusions and complications arising out of inconsistent laws in different jurisdictions. Since, its inception in the year 1997, the model law has been adopted only in 44 states across the world.[19] Even though various countries are having their distinct insolvency laws for the problem in hand, its objective wouldn't be that of model law which is co-operation among courts and to simplify insolvency dispute resolution mechanism for the larger benefit of 'Committee of Creditors'.

A. Inconsistency in the adoption of Model law among Countries

Even though model law has been introduced and countries have adopted, it does not mean that there won't be complications in insolvency dispute resolution.[20] The model law gives countries discretion to adopt partially or fully or make addition in their legislation while adoption[21]. Usually, countries opt for the approach that would better suit their economy and not verbatim as it is. Say for instance, UK had adopted the model law subject to some of its common law principles and public policies[22]. Also, there are countries which have adopted model law and impose the requirement of a reciprocity agreement with the country in dispute to co-operate with its proceeding.[23]

[19] Status, UNCITRAL Model law on Cross-Border Insolvency http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited on Oct 31 2019).
[20] Ian F Fletcher, 'Insolvency in Private International Law' para 2.129 (Oxford University Press, UK, 2nd ed 2005)
[21] United Nations, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, (January, 2014).
[22] Kannan Ramesh, "The Gibbs Principle: A tether on the feet of good forum shopping" (2017) 29 Singapore Academy of Law Journal 42.
[23] *Supra* note 7.

So, if India adopts the Model law it would be no different from the current situation.[24] One incentive would be proceedings in countries which have liberally adopted the model law [like USA] would be easier.[25]

B. **Public policy as an exception across countries**

Article 6 of Model law says:

"Public Policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."

If performing an action as part of co-operation with foreign courts goes against the public order of the country, the court shall refuse to do such actions. The interpretation of 'manifestly' contrary to the public policy determines the quantum of the exception. This being said, countries have the flexibility to interpret it both strictly and liberally depending on the legislators. But general interpretation would be public policy is nothing but 'fundamental principles of the respective countries'. For instance USA, where the model law has been verbatim adopted, narrows down the exception to 'constitutional rights, fundamental principles and constitutionality of the foreign order'[26] while reiterating Article 6 of the Model law.

C. **Public policy in Insolvency disputes in India:**

In the draft chapter for IBC, 2016 the draft committee has included an exception for public policy in a clever way. The clause (2) of Section 4 of the draft chapter reads:

"The Central Government may notify factors to be considered by the adjudicating authority in determining whether an action under sub-section (1) would be manifestly contrary to the public policy of India"

So, we can make out that the clause on 'factors constituting manifestly contrary to the public policy of India' is still under consideration. Also, there are various questions at stake for the legislators to answer before coming up with the factors. What would be the rights conferred to the Creditors through local laws in the light of foreign proceedings? What would happen in cases where the contracts are entered under Indian laws, if the foreign main proceedings court

[24] Insolvency and Bankruptcy Code, 2016, s. 234 & 235.
[25] *Supra* note 4.
[26] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), s. 1506.

imposes a moratorium on Insolvent Company? Can constitutionality of a foreign court's order enforceable in Indian courts be challenged in Indian courts?

Also, India should frame a public policy exception provision carefully taking into consideration the interest of creditors around the world by treating them equal to Indian creditors to avoid the purpose of the law getting compromised in the name of Public policy.

IV. COMPARATIVE ANALYSIS OF DIFFERENT INSOLVENCY REGIMES

A. Chinese Insolvency regime: An overview of Cross-border Insolvency system without UNCITRAL Model law

China has not adopted UNCITRAL model law on Cross-Border Insolvency, 1997 and has come up with its separate insolvency laws which is Chinese Enterprise Bankruptcy Law, 2006 [Hereinafter EBL, 2006][27]. Article 5 of EBL, 2006, enumerates the provisions for Cross-border Insolvency disputes. Many academicians[28] considered the provisions to be ambiguous and felt that the legislators haven't taken a steady stand between Territoriality and Universalist regime for their country. It, in many aspects gives discretion to the court to co-operate with foreign courts depending on reciprocity agreement and relevant International treaties China has acceded to. Also, the enforcement can be curtailed if it is against the public policy of the country and the scope of interpretation of public policy is wide and extensive.

The Courts have predominantly upheld Territorial approach in various instances and protected the interest of Chinese parties over enforcing foreign proceedings in Insolvency disputes[29]. Also, there were instances when the Chinese courts decided to benefit foreign interests. One such instance was when the court recognised foreign proceedings and co-operated with foreign courts because of a treaty it had entered into [Treaty on Judicial assistance in civil matters] with the respective foreign country.[30] There was also an important case where the court acknowledged equality among creditors irrespective of a different jurisdiction.[31]

B. UK Insolvency Regime: An overview of a Common law jurisdiction

27 Enterprise Bankruptcy Law of the People's Republic of China, 2006.
28 Rebecca Parry and Nan Gao, "The Future Direction of China's Cross-border Insolvency Laws" 27 Related Issues and Potential Problems International Insolvency Review 31 (2018).
29 Liwan District Construction Co. v. Euro-American China Property Ltd., 6 China Law & Practice 27 (1990)
30 *Supra* note 28 at 32.
31 Jingxia Shi, "Instance Analysis of the Extraterritorial Effect of China's Insolvency Proceeding" (2002) 3 TPSL 41.

Territoriality approach [in other words known as 'Grab rule'] is the system of territorial courts having jurisdiction to decide 'on the assets and for the creditors of the territory' and the orders from the foreign proceeding will not be enforced in any means.[32] This has been first held in an English case of *Antony Gibbs & Sons v Societe Industrielle et Commerciale des Metaux*[33] and it faces criticisms for its anachronism nature by various academicians, lawmakers, lawyers and judges[34]. Unfortunately, it is still good law in UK and courts are still reiterating that decision[35], even after the introduction of paradigms such as model law on cross-border insolvency.

However, UK has adopted the model law and the UK courts acknowledge foreign proceedings within the member states of EU regulation on insolvency proceedings, if the companies' centre of main interest [COMI] is any of the member states. So, in those instances the English court would even act as a secondary insolvency proceeding irrespective of the Gibbs' common law principle.[36] The Gibbs principle applies only in the case of forum shopping done by the parties, avoiding English courts.[37] Also, the common law rule is that 'the question of whether an obligation has been discharged should be governed by its proper law'[38] and the English courts would be bound by Gibbs principle [or territoriality] if such question is involved.[39] Otherwise, in all other instances the English Courts would uphold the Modified Universalism[40] as per their Insolvency Act, 1986 which is in alignment with the model law. Further, there have been various instances where English courts have acted as an ancillary jurisdiction for foreign courts in insolvency matters.[41] It has facilitated foreign courts in deciding on insolvency matters[42] and has accepted 'court's power to recognize and grant assistance to foreign insolvency proceedings' as common law.[43]

Even, India's current legal framework is in the nature of a territorial regime, whereby the countries would enter into agreement only with countries with which it has good relation and ignore other countries. So, this is more or less similar to the English common law system as stated above. But, India's Insolvency jurisprudence is not as vast as UK, as India is still in its

32 Gerard McCormack, "Universalism in Insolvency proceedings and the Common law", Oxford Journal of Legal Studies Vol. 32 No. 2 (2012) 327.
33 Antony Gibbs & Sons v Societe Industrielle et Commerciale des Metaux, (1890) 25 Q.B.D. 399.
34 Supra note 20 at para 2.129.
35 Bakhshiyeva v Sberbank of Russia & Ors, [2018] EWHC 59 (Ch).
36 Olympic Airlines SA Pension and Life Assurance Scheme Trustees v Olympic Airlines SA, [2015] UKSC 27.
37 Dubai Islamic Bank v. PSI Energy Holding Co [2013] EWHC (Comm.) 39.
38 Wight v. Eckhardt Marine, [2003] UKPC 37.
39 *Supra* note 22 at 42.
40 Singularis Holdings v. Pricewaterhouse Coopers [2014] UKPC 36, [2015] A.C. 1675.
41 Re HIH Casualty and General Insurance [2008] UKHL 21, [2008] 1 WLR852.
42 Re Bank of Credit and Commerce International S.A [No.10] [1997] Ch. 213.
43 Rubin v. Eurofinance [2012] UKSC 46, [2013] 1 A.C. 236.

beginning stage of establishing a Cross-Border Insolvency regime for itself and there have been no significant Cross-Border Insolvency disputes in Indian Courts.

C. **USA Insolvency Regime: An overview of Universalism approach**

One of the first few countries to recognise the importance of Cross-Border Insolvency disputes is United States of America. In the year 2005, they had adopted the Model law into Chapter 15 of their Bankruptcy Code.[44] It is nearly verbatim to the model law. Also, the US courts recognise foreign main-proceedings taking place in COMI [Centre of Main Interest] of the Company [or individual].[45] It would even act as an ancillary jurisdiction in an insolvency dispute, avoiding dual proceedings.[46] It allows foreign courts to decide on assets lying within its jurisdiction and is liberal in enforcing foreign orders against those assets or other allied dispute related orders. They also give maximum support to Foreign Representatives [Liquidators, Insolvency Resolution Professional, etc] to carry on the insolvency process in their jurisdiction.[47]

D. **Singapore Insolvency Regime: A promising Commercial hub and impacts post adoption of Model law**

In 2017 Singapore adopted the model law,[48] prior to which it had traditional Territorial approach to deal with Cross-border Insolvency matters. Though, before the adoption of the model law, the country was treated as a hub for International transactions and commerce. This adoption further affirms its investors to rely on the country for the certainty of its economic policies. The adoption fundamentally makes a paradigm shift from Territoriality to Universalism[49]. Now, the country could co-operate with any jurisdiction with respect to insolvency disputes. This move of the country also significantly reduces forum shopping for the best insolvency laws.[50]

So, comparing and analysing these countries gives us a fair idea of how differently model law has been adopted in different countries. In the case of China, we understood a system functioning purely without acceding to the model law. One thing we can understand out of this is flexibility in adopting model law based on convenience seems beneficial to its economy and public order, but countries do it at the cost of compromising the ultimate object of the model

[44] *Supra* note 26.
[45] *Supra* note 4.
[46] *Supra* note 7.
[47] *Supra* note 32.
[48] *Supra* note 19.
[49] *Supra* note 4.
[50] *Supra* note 22 at 42.

law. Even though adopting the model law based on their needs seems justified, the uniformity is for their benefits.

V. CONCLUSION

Mere adoption of the model law into IBC, 2016 will not be solving the entire problem in India and for that matter anywhere.[51] The countries are given the discretion to alter the model law and adopt it based on their convenience. So, even after adoption, insolvency proceedings may not be smooth due to lack of uniform system and every time it would be a hassle to deal with a jurisdiction which is not ready to co-operate.[52] Through the above comparative analysis of few cross-border insolvency regimes we could see the diversity in adoption, as some had different [and complex] compliance procedure[53] and others were extremely liberal in their approach.[54] In India, whenever an insolvency dispute arises and there is a foreign element to it, the plan of action should be varied depending on the jurisdiction at stake. Anyway, the adoption of model law won't go in vain. It will at least codify Indian regime and would provide certainty to the stakeholders involved.[55] It may even improve credibility in the legal system and encourage foreign investors to invest in our country, similar to Singapore's strategy.[56] The abovementioned complexities in the model law are few things the world community should look out for solving in the future. That would in turn help in achieving the goal of reducing complications in Cross-Border Insolvency disputes.[57]

[51] Ran Chakrabarti, 'India's Proposed Cross Border Insolvency Regime: Will It Trump the Gibbs Rule?' http://www.mondaq.com/india/x/721994/Insolvency+Bankruptcy/Indias+Proposed+Cross+Border+Insolvency+Regime+Will+It+Trump+The+Gibbs+Rule (Last visited on Oct 31 2019).
[52] Supra note 8 at para 2.134.
[53] Enterprise Bankruptcy Law of the People's Republic of China, 2006.
[54] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) Chapter 15.
[55] Dhananjay Kumar, "Indian Insolvency Regime without Cross-border Recognition – A Task Half Done?", https://corporate.cyrilamarchandblogs.com/2017/05/indian-insolvency-regime-without-cross-border-recognition-task-half-done (Last visited on 31 October 2019).
[56] *Supra* note 4.
[57] *Supra* note 6.

INVESTIGATION OF LAWS AND REGULATIONS FOR THE PROTECTION OF GI: A COMPARATIVE ANALYSIS IN US, CHINA AND INDIA

*Pooja Vikram & Sanjuktha A Yermal**

ABSTRACT

In today's era, the importance of Intellectual Property Rights is important economically and politically, and one such important IP is geographical indications. The term was introduced by WIPO in a discussion for the protection of goods having geographical origin. There are many international agreements governing GI such as TRIPS, Paris Convention, Madrid Agreement and Lisbon Agreement. Apart of that, each country has its own legislation. It depends on the technological advancement and the resources available in each country. The legal system of Geographical Indication which India follows is Sui Generis system. The legislation governing GI in India is "The Geographical Indications of Goods (Registration and Protection) Act, 1999" and "Geographical Indications of Goods (Registration and Protection) Rules, 2002". In US, the system is entirely different. The GI is protected under the trademark system. In China, GI is protected under trademark regime and Sui generis system. This paper explores the laws and regulations of USA, China and India. The authors have brought out the positive and negative aspects of each legislation and has concluded the paper by stating down the recommendations which can be included in the current legislation.

KEYWORDS: *Geographical Indication, sui generis system, Technology, Trademark regime*

* 5TH YEAR STUDENTS OF B.A., LL.B(H) AT ALLIANCE SCHOOL OF LAW, ALLIANCE UNIVERSITY, BANGALORE

I. INTRODUCTION

Intellectual Property protection is different in different countries. It is directly proportional to the economic and social development of a country. The protection also depends upon the technological advancement in the particular country. In the present condition, protection to geographical indication has been in news because of its high economic value. Geographical Protection is not just given to the reputation but to the quality of the product which is linked to geographical area. International agreements exist to deal with the protection of geographical indication like TRIPS agreement but each country has its own standards, registration and protection for geographical indications. Article 22 has given standard protection to geographical indications but still each country has its own laws to govern the geographical indication. Because of this reason, the regulation for geographical protection is different in all the countries. After the establishment of WTO, many countries have adopted sui generis system. This research paper mainly analyses the different regulations followed in US, China and India.

In India, even though we have lots of human and natural resources, we are not able to use it properly and increase the economic value of our country like other countries i. e USA, China etc do. Therefore this research is mainly to analyse why India is lacking behind in terms of commercialization of resources and this can be done by comparing India with other countries.

II. A STUDY ON US REGULATIONS AND LAWS ON GI

From 25th August 1970, US is a member of WIPO, from 30th May 1887 they are signatory of the Paris Convention and from 2nd November 2003, they are signatory of Madrid Protocol.[1] US is also a part of WTO from 1st January 1995.[2] Along with that US has many agreements with the European community with respect to spirit drinks and wine products.[3]

US has granted GI protection even prior to TRIPS agreement. GI is seen as a subset of trademarks in US. Therefore GI is protected in US under trademark regime as collective or certification mark.[4]

---

1 Wipo, Contracting Parties *available at*: http://www.wipo.int/treaties/en/ showresults.jsp?treaty_id=15 (Last Visited On 10 April 2019).

2 Wto, Members And Observers *available at*: http://www.wto.org/english/thewto_e/whatis_e/ tif_e/org6_e.htm (Last Visited On 10 April 2019).

3 Sumit Bhattacharjee, "Comparative Laws of US And EU on Food Products" Official Journal L 157, 24 June 1996 *available at* http://publications.europa.eu/resource/cellar/a244bdda-25a1-46c7- 80a8-4887dc86f0bf.0006.02/doc_1 (Last Visited On 10 April 2019).

4 US Trade Mark Act of 1946, S 4.

According to US legal framework, GI is protected under trademark regime because through that it can provide TRIPS plus level of protection to the geographical indications which is either of domestic or foreign origin.

The geographical indications are protected in US in the following ways:

A. United States Collective Marks

The US law protects GI under Collective marks.[5] It does not indicate the origin of the goods but indicates the organization it belongs to. In US, there are two types of collective marks[6]:

a. Collective Service marks
b. Collective membership marks

USPTO administrative tribunal and Trademark Trials explains the distinction between the above two things. A collective trademark is a mark taken collectively like an association, union etc so that its members can use the mark to identify goods and services and distinguish it from the non-members. Whereas collective membership mark is a mark for indicating the membership in an organized group. These marks can be registered in the same manner as that of the trademarks.[7]

B. United States Certification Mark

US Trademark Act, 1946 considers and has a space for the protection of geographical indication. This mark indicates that the goods have a particular standard and belong to an authorized user. Sources of the goods are not mentioned. The US certification mark, particularly for GI, certifies aspects like nature of origin of the goods or services which has been applied. The same mark can be used to certify other characteristics of the goods in more than one certification. To determine whether the geographical sign has been used as certification mark, they take into account the evidences and specimens.[8]

C. Protection Of GI in US

[5] 15 USC, 1946 S 1127.
[6] Justia ,Collective Marks, *available at:* https://www.justia.com/intellectual-property/trademarks/categories-of-marks/collective-marks/ (Last Visited On August 17th 2019).
[7] 15 USC, 1946 S 1054.
[8] 15 USC S 1051(A)(1).

As it is seen, GI is protected under the trademark law. Under the law trademarks which are geographically deceptive of the origin of goods are not registrable.[9] One of the features of US trademark system is that, if the product causes likely of confusion or deception in the minds of people then it gives the right to the owner of the product to prevent its use by the unauthorised user.[10] This gives a prior right to the owners on the similar products. According to the US law, the good part of protecting under trademark is that there will not be any additional resources to create a new GI registration.

D. **Trade Agreements Of US**

- **The United States Regulations of the Bureau of Alcohol, Tobacco and Firearms(ATF)**

  ATF is one of the regulations to protect the geographical indications.[11] Federal Alcohol Administration Act and Implementing Regulations is the pertinent law covering the GI.[12] This law is mainly to govern the wines and prevent the misuse of it. The authority is given to ATF to prevent the misleading use of GI with respect to spirits, beverages and wines. In US, there are regulations which prohibit the misleading use of homonymous GI for wines if it creates a false impression.[13]

- **North American Free Trade Agreement (NAFTA)**

  This agreement came into force on January 1st 1994 and was signed by many countries like United Mexican States, Canada and US. This agreement provides the highest level of protection on IPR.[14] Under NAFTA it is compulsory to have minimum protection and if countries needed they can have higher protection also. One of the principles under this agreement is National Treatment.[15] Many of the provisions like the definition of GI and other substantive provisions for the protection are similar to that of TRIPS agreement. GI is protected under article 1712 of this agreement.

---

9 15 USC S 1064.

10 15 USC S 1052 (D).

11 Atf, "About The Bureau Of Alcohol, Tobacco, Firearms And Explosives" *available at* : http://www.atf.gov/ (Last Visited On 10 April 2019).

12 *Ibid*.

13 Title 27 Code Of Federal Regulations S 4.64.

14 F J Garcia, "North American Free Trade Agreement - Chapter Seventeen: Intellectual Property" *Available At*: Https://Www.Nafta-Sec-Alena.Org/Home/Legal-Texts/North-American-Free-Tradeagreement?Mvid=1&Secid=B6e715c1-Ec07-4c96- B18e-D762b2ebe511 (Last Visited On 10 April 2019).

15 Nafta, 1994 Article 1703.

E. **Benefits Of Protecting Under Trademark Regime**

One of the main advantages under trademark regime is that it employs the existing trademark regime and it is already familiar to business working in both foreign and domestic jurisdictions[16]. Also to create a new GI registration, the government or the tax payer need not make any additional commitment of resources to protect GI. The process is the same like the applications, registrations, oppositions, cancellations, adjudication and enforcement. The system not only accommodates the place names but also includes the signs such as the words, slogans, designs, colours etc.

This system also complies with the TRIPS provisions like national treatment and self-policing.[17] If the private owners feel that there is an infringement then they can take immediate action and they are not forced to wait till the government comes into the picture. Also government will not put any additional enforcement resources.[18]

III. A STUDY ON CHINA'S REGULATIONS AND LAWS ON GI

China is a country having numerous products arising from different parts of the country with a vast population and a vast territory. The GI in fact protects these products both in origin and in its characteristics. If we trace the history of GI in China, it goes back to the mid 1980s when Paris Convention came up and China joined the convention[19]. China protected its products under GI in Paris Convention. In 1980, there was an issue with respect to the French GI which is Champagne as it was becoming generic and therefore SAIC (State Administrative for Industry and Commerce)[20] protected the product by issuing an administrative decree. This became the first event in China to protect the products under GI[21]. After this event the government and other agencies were trying to bring up a system to protect the GIs. Still, there is no particular system as such because GI is protected under both trademark regime and also they have a sui generis regime.

---

16 Uspto, "Geographical Indication Protection " *Available At:* https://www.uspto.gov/ip-policy/trademark-policy/geographical-indications-gi-protection (Last Visited On 10 April 2019).

17 *Ibid.*

18 George Williamson, "International Affairs And Geographical Indications" *Available At:* https://www.uspto.gov/learning-and-resources/ip-policy/geographical-indications/office-policy-and-international-affairs (Last Visited On 10 April 2019).

19 Paris Convention For The Protection Of Industrial Property, 883, 21 U.S.T. 1583, 828 U.N.T.S. 305.

20 State Administration For Industry And Commerce, *Available At* : www.saic.gov.cn (Last Visited On 10 April 2019).

21 Haiyan Zheng, "A Unique Type Of Cocktail: Protection Of Gi In China" *Available At* : https://www.cambridge.org/core/books/geographical-indications-at-the-crossroads-of-trade-development-and-culture/unique-type-of-cocktail-protection-of-geographical-indications-in-china/b9d09b0ee88f1609945c59968b1c5fca/core-reader (last visited on 11 april 2019).

This is also supplemented by laws on product quality, unfair competition and consumer protection. This system has its own merits and demerits. But here, the researchers are trying to analyse the positive aspects so that it can be implemented in India.

A. GI Registration and Protection Under Trademark Law

The rules and guidelines of China were amended to comply with the TRIPS agreement. SAIC administers the marks which include both collective and certification marks. China follows "register first" system of protection. In common law countries they see the use of the product whereas in China, it is not the scenario. GI in China should be registered as either collective marks or certification marks and after that they receive the trademark protection. Under China's trademark system, goods get GI protection once they comply with the definition of GI which is the identification of a particular good which is originating from a region having given quality and reputation which is attached with the product and also have human or natural factors attributable to it. The collective marks system in China gives registration to producers if they qualify the membership requirement. SAIC registers the marks of the producers who are either a group, association or any organization from the GI region.[22] Also during the time of registration, they should submit a proof about their qualification and standards and their capability to manage and control the product.[23]

B. Special Label System of China

This system is administered by the State Administration of Quality Supervision, Inspection and Quarantine (SAQSIQ) for the protection of GI. This system created a special protection of National Geographical Indication Products (PGIP) in 2005.[24] According to this system, geographical indication product is a product that utilizes the raw materials which are coming from a particular region and is produced in a particular geographical area by using traditional mechanisms for cultivation and other activities. This system is comprehended by government involvement.

[22] Chinese Trademark Law, 2001.
[23] Measures For The Registration And Administration Of Collective Marks And Certification Marks, 2003, Article 5.
[24] Provisions For The Protection Of Products Of Geographical Indication, 2005.

C. Several Other Laws

There are many other laws that can protect GI apart from the above legislations. Some of them are Unfair Competition laws, laws on the Product Quality, Protection of Consumer Right law etc. If any conduct happens infringing the lawful rights of any business, then such act is prohibited under the unfair competition laws.

D. Challenges Faced by China

In China, there are three ways in which one can seek GI protection- within the Trademark law, PPGIP and MOA. Each of the parallel ways is administered by different governmental agencies. There are also other laws which govern GI which are unfair competition laws, consumer protection laws and product quality laws. Still China faces challenges and some of them are:

- There is a conflict between the trademark system and GI with the Trademark regime in China. Thus two types of protection are unnecessary because it creates lots of confusion and conflicts. There is an overlap between the two system i.e. trademarks system and SAQSIQ system. The reason of conflict is because the GI is reviewed by the two agencies which are working independently and have different administrative procedures. This creates chaos in the State and it imposes great burden in the market.
- Sui Generis GIs v. Ordinary Trademarks: If the same entities own the GI under different system then there will not be much conflict. But if more than one unrelated organisation has same GI through different protection then there is a chance of conflict. If there is a conflict between different entities, then the court resolves the conflict and it is very costly and time-consuming. Therefore the current regime in China is ineffective.
- Sui Generis GIs v. GI registered trademark: The different administrative may confer the same GI to different entities and they have different GI boundaries and standards.

IV. A STUDY ON INDIAN REGULATIONS AND LAWS ON GI

India is well-known for its richness in terms of natural and agricultural products. It is therefore necessary to provide adequate protection for these items through geographical indication. Until the enactment of GI Act, India dealt with products renowned with their geographical names such as the Darjeeling Tea, Basmati Rice, and Alphonso Mango etc. However, the only means of according legal protection to these products were through the Consumer Protection Acts, by

bringing an action for passing off in the courts, and through certification marks. But clearly, these weren't adequate to effective protection of GI. A number of traders and foreign companies took advantage of this position and were successful in attempting to free ride on the reputation and goodwill associated with these Indian products. Finally in the year 1999, India adopted a separate legislation for the effective protection of geographical indication with the enactment of 'The Geographical Indications of Goods (Geographical Indications and Protection) Act, l999'.

A. The Geographical Indications Of Goods (Registration And Protection) Act, 1999

The Act makes it mandatory for the registration of GI, without which no protection will be accorded to an unregistered GI. The GI Rules consist of provisions for apex bodies that perform the function of overseeing and coordinating particular products of GI.[25] The Act lays down provisions for the registration and stronger protection of geographical indications in relation to goods produced in various parts of India. The term for which GI protection is granted is initially for ten years, which may be subject to renewal from time to time. Some of the salient features of this Act is that it defines certain important terms like "geographical indication", "goods", "producers", "packages", " registered proprietor", "authorized user" etc. It also provides for provisions relating to offences and penalties and prohibition of registration of certain goods as geographical indications.

There are two ways of enforcement of GI, i.e., civil and criminal.[26] Criminal remedies mainly deal with the offence of falsifying and falsely applying GIs to goods. Selling goods which apply a false GI, false representation of a GI product as registered, improper description of a place of business as connected with GIs registry and falsification of entries in the Register are some of the offences which attract a criminal remedy. Remedies for these offences are in the form of punishment that could either be imprisonment or fine. In case of civil remedies, when a party pleads that the registration of GI for the particular product is invalid, then the court shall stay the suit pending before the Registrar or appellate board, if any such suit is pending,[27] if no such proceedings are pending, then an issue regarding the same must be raised and the case must be adjourned for a

[25] TRIPS Agreement, Article 22.1.
[26] The Geographical Indications Of Goods (Registration And Protection) Act, 1999 ,S.66.
[27] The Geographical Indications Of Goods (Registration And Protection) Act, 1999 , S.48.

period of three months to enable the party concerned to apply to the appellate board for rectification of the register.[28]

B. **Limitations in the Statute**

On evaluating the statute, there are various limitations in the GI Act of India. The Act is not wide enough to safeguard the interest of certain groups like the craftsmen. The international protection given to GI under the TRIPS Agreement is of a much wider scope than in the national legislation enacted by India. The Legislature has not taken into consideration the crucial economic and employment benefits and incentives involved in the craft which this legislation attempts to protect. To provide further clarification to this, the following analysis of some of the legal provisions is attempted.[29]

The definition of GI is based on Article 22 of the TRIPS Agreement.[30] However, in the definition given by the GI Act, some expressions that are not included in Article 22 have been added. These added expressions have unnecessarily narrowed the scope, and moreover, they have created a conflict with another provision in the enactment that provides for the definition of the term goods. The definition of "goods" given in the GI Act seems to exclude handicraft goods, and is confined to agricultural goods, natural goods or manufactured goods. However, the language used in Article 22 is flexible enough to include handicrafts. The ideal option is to adopt the language of Article 22 which would encompass handicrafts as well.[31]

On a thorough and brief study of the GI Act 1999, the authors have pointed out certain lacunas. These are summarized as follows:[32]

(i) While the definition of GIs in the GI Act indicates that the term "goods" implies agricultural goods, natural goods or manufactured goods, section 2(1)(f) of the GI Act

[28] S. Vinayan, "Intellectual Property And The Handloom Sector: Challenges In Implementation Of Geographical Indications Act', Vol 17 (2007) Journal Of Intellectual Property Rights, *available at*: Http://Nopr.Niscair.Res.In/Bitstream/123456789/13411/1/Jipr%2017(1)%2055-63.Pdf (Last Visited On 11 April 2019).
[29] Mir, F. A & Farutal, "Legal Protection Of Geographical Indications In Jammu And Kashmir-A Case Study Of Kashmiri Handicrafts" Vol. 15 (2010) Journal Of Intellectual Property Rights.
[30] Trips Agreement, Art.22.
[31] *Ibid*.
[32] Sanjeev Singh, "Geographical Indication: A Case Study Of Kashmir Pashmina" Vol 1, Issue-11 (2014) New Man International Journal Of Multidisciplinary Studies, *available at*: http://www.newmanpublication.com/admin/issue/br/12%20sanjivsingh.doc.pdf (Last Visited On 12 April 2019).

defines "goods" to mean any goods of handicraft or of industry and food stuff as well.[33] This discrepancy has been overlooked by the lawmakers.[34]

(ii) Though several GIs have been registered in India, there is no provision for registration of authorized users in all cases. Definition of 'producer' under the Act includes persons who trade in or deal in production, exploitation, making or manufacturing of GI goods.[35] While the definition seeks to protect the traders and middlemen, it may be noted that the actual producers are marginalized going by the language of the Act.

(iii) The chances that a rural producer may challenge the infringement of GI are very poor. They are not interested in getting themselves registered as an authorized user.

(iv) Moreover, in cases where the producers are members who own the registered GI, they do not automatically get the right to use the GI unless they are registered as an 'Authorized User', which involves a registration procedure, payment of applicable fees and approval from the registered proprietor of the GI.

(v) Lack of awareness, capacity or resources are few of the major reasons why the legitimate producers of the GI product are precluded from registering.

(vi) The Act is silent as to what are the elements required to be satisfied for initial registration. It only talks about traits like quality, reputation and characteristics that should be maintained after the registration.

(vii) Section 9(f) prohibits the registration of GIs that are determined to be generic.[36] In a country like India, this exception is a major disadvantage to the producers, due to the fact that many traditional agricultural products obtain their peculiar qualities and characteristics from the particular geographical region where they are grown.[37]

(viii) The artisans like weavers, goldsmiths and other craftsmen may not be affluent or literate in English language, so the publication must be in the local language. Many a times, there are chances that the creators or makers of certain products are unaware of an application made for GI, therefore, steps must be taken so that their interests are protected.

[33] Geographical Indications Of Goods (Registration And Protection) Act, 1999 S 2(1)(F).
[34] Kasturi Das, "Protection Of India's 'Geographical Indications': An Overview Of The Indian Legislation And The Trips Scenario" 46 Ijil 39-73 At 50 (2006).
[35] Geographical Indications Of Goods (Registration And Protection) Act, 1999 S 2(1)(K).
[36] Geographical Indications Of Goods (Registration And Protection) Act, 1999 S 9(F).
[37] S. Escudero, "International Protection Of Geographical Indications And Developing Countries" (2001) *available at*: http://www.southcentre.org (Last Visited On 12 April 2019).

(ix) The advertisement in Section 13 of the Act, in the Trade Journal is of no use and will not serve the same purpose as a public notice akin to the Section 4 of the Land Acquisition Act 1894 notice.[38]

TRIPS Agreement gives the exclusive discretion to the country of origin to decide whether the name given to a particular GI product has become generic or not. With the already wide scope of the concept of 'genericide', it is in the interest of the country to keep its scope as narrow as possible. In order words, power should be given to the courts to determine whether a particular geographical name has become generic or not, based only on the situation in India (the country of origin) and not based on the status in the areas of consumption.[39]

V. CONCLUSION AND RECOMMENDATIONS

After the investigation of GI laws of US, China and India, it may be concluded that the legal protection accorded to GIs, differ not only from product to product but also from country to country. While the requirement of quality, reputation, or other characteristic of the good and a relationship with its geographical origin are the universally constant determinants for the protection of GI, there are other significant factors which vary considerably. The efforts made by various countries with an aim to achieve the objective of GI Act and to prevent its abuse has given rise to various forms of legal protection for GIs at both national and international levels. Although some uniformity may be observed in the implementation of the tests for GI in laws of different countries throughout the world, there are major differences when it comes to application of these tests. If the national laws were identical and effectively enforced then the issue of trade in GI products would not constitute any major problem. In case of the United States GIs are treated and protected under one of its existing intellectual property legislations, i.e., the trademark. This process of protecting GI as a trademark- certification mark or a collective mark is a much simpler process for all the producers to follow as all the requirements for inspection and verification in the in case of a certification mark are set by the certification mark owner himself and not the government. The system that the United States follows is fairly representative of the various approaches followed by most countries that are active in the field of protecting GI and that which can be served as a useful model.

---

[38] *Ibid.*

[39] J A Reddy And S Chatterjee, "A Critique Of The Indian Law And Approach Towards Protection Of Geographical Indications With Specific Reference To Genericide"12 JIPR 572- 580 At 576 (2007).

In many developing countries including India, the system of GI protection is mostly at its infant stage. The government has very limited knowledge and capacity to either facilitate their own GIs or to protect the foreign GIs. The GI system incorporated by China has undergone significant development over the past few years. Further the legislation adopted in China is very different from that of the United States under which a trademark registration is not granted if the trademark consists of a "well-known foreign geographic term" even if it is not recognized as indicating the place of origin of the goods.[40] Moreover, it is pertinent to note that while in India the law for the protection of non-agricultural GI products is given in a sui generis GI system, the products from China are protected under the sui generis GI system and the trademark law. The main issue that India faces today is with regard to clarity as to how we can tailor the GI regulations in order to promote their interests in the process of acquiring, developing and application of traditional products. No effort has been made by India to explore the flexibilities given in the legislation to the best of its advantage. Lastly, it is also important to note that the GI Act in India is only applicable to goods and not to services, while US and China extended its scope to services as well. Therefore it is highly argued to extend the scope of GI in order to bring services within the ambit of GI protection. After an overall assessment, it is noted that, there is a genuine and sincere need for the purposes of resolving the conflicts in the Act.

[40] *Supra* At 31.

PMAY, GST AND REAL ESTATE: A HANDBOOK ON THE ADVENT OF AFFORDABLE HOUSING IN INDIA

*Tanya Agarwal & Tanya Patwal**

ABSTRACT

Approximately 6-7% of the GDP is contributed by the real estate sector towards the Indian economy, which makes it important for the holistic development and growth of the nation. Recently, the Indian Government has increased its focus towards revamping this sector with schemes like "Housing for all by 2022", which caters to the need of providing affordable housing in the country. These projects require the Government to provide more than 2 crore houses by the year 2022. To achieve this goal the government has introduced schemes like the "Pradhan Mantri Awas Yojna". It is a highly ambitious project which may seem easy to the eye but the real question is how well it can be implemented. With the introduction of GST, the government has tried to reduce the burden of buyers and sellers however, there are several lacunaes that still persist.

It is necessary to understand the impact of such policies thereby making it comprehensible for the common man to access the market. Through this paper, the authors will try to analyse the government's focus on providing affordable housing and what are the developmental challenges for policy implementation along with a future roadmap so as to address these shortcomings.

KEYWORDS: *Affordable housing, GST, PMAY, Centre-State Relationship, Land Scarcity*

I. INTRODUCTION

Necessity of affordable housing as a basic human right has been recognised by the International community at large as an essential requirement so that the society can evolve.[1] Right to shelter has been recognised by the Apex court of the nation, although the court did not state anything regarding

* 3RD YEAR STUDENTS OF B.A., LL.B(H) AT AMITY LAW SCHOOL, DELHI (GGSIP UNIVERSITY)

[1] UNGA, Universal Declaration of Human Rights, art. 25, Dec. 10, 1948, 217 A (III).

affordable Housing, it has given consideration that it is an important element of right to life.[2] Almost 73 Years has been passed since India became Independent but according to the 2012 statistics we are still running behind almost 18.78 million houses from the targeted goal.[3] Therefore, the essential question is- what stops people from buying houses? The answer lies in affordability and this is where the idea of affordable housing takes birth.

The issue of affordable housing is filled with various challenges majorly revolving around demand- supply chain. At present majority of the country's population belongs to that sector of the society which belongs to prime house-buying age which is around 69 % of the entire nation's population [4] but due to several factors like unavailability of raw material like land, high rate of urbanisation leading to unequal distribution of land, the percentage of useable household income for affordable housing with that of the prevalent cost of the cost of the house is disproportionate.[5] Thus, in order to deal with the problem of affordable housing in the country and provide boost to the real estate sector, Prime Minister Narendra Modi took on a huge commitment in 2015 by launching "Housing for all by 2022". Under this project, schemes like Pradhan Mantri Awas Yojna have been introduced and existing ones have been revamped so that by the time we arrive in 2022 the government completes their project by building around 20-30 million houses in rural and urban centres.

II. THE CONCEPT OF AFFORDABLE HOUSING

With the advent of infrastructure development in the country, provisions for affordable housing have gained significant importance. Therefore, before dealing with any policy related to Affordable Housing, it is necessary to understand the terminology and appreciate its growing importance in the Indian economy. One of the most widely known definition describes affordability in particularly comparing it with the disposable household income available to be

[2] Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545 (India).

[3] *Report on The Technical Group on Urban Housing Shortage (2012-2017)*, MINISTRY OF HOUSING AND URBAN POVERTY ALLEVIATION, GOI (Sept. 22, 2012), https://smartnet.niua.org/sites/default/files/resources/urban-housing-shortage.pdf.

[4] Ms. Harshleen Kaur Sethi, *Affordable Housing in India*, 06 IJERT 754, 755 (2017).

[5] *Mainstreaming Affordable Housing in India: Moving towards Housing for All by 2022*, DELOITTE (Aug., 2016), https://www2.deloitte.com/content/dam/Deloitte/in/Documents/public-sector/in-ps-affordable-housing-noexp.pdf.

used for the purpose of housing.[6] The Government of India has referred to the term 'Affordable Housing' in the following words:[7]

> *"Affordable housing refers to any housing that meets some form of affordability criterion, which could be income level of the family, size of the dwelling unit or affordability in terms of EMI size or ratio of house price to annual income."*

Affordable housing is basically defined in three terms which are income level, size of dwelling unit and affordability. Income level and size of dwelling are independent parameters and the third parameter i.e. affordability, is a dependent parameter and is related to the income of the individuals and the property prices. Affordable housing has taken centre stage in the national agenda of the country. Nations economy depends largely upon its healthy and active citizens therefore housing becomes an important factor because it is a measure of index which promotes quality of life increasing Human potential thereby making affordable housing necessary for nation's growth.[8]

The importance and need of "Housing for All" have different aspects to them. The scheme impacts people in multiple ways including access to education and healthcare, an active role of women in society poverty index and such. A country's living standards and conditions can be improved on a mass scale only if it has better housing and facilities for its citizens while uncompromising on the economical aspect of it. Thus, affordable housing with better facilities is a solution the government must focus on and try implementing policies in furtherance of it.

III. EVOLUTION OF THE CONCEPT OF AFFORDABLE HOUSING

Affordable housing, as we understand it today, didn't always mean the same. It first grew from the concept of housing cooperatives. The early housing cooperative grew out of the global cooperative movement where the first cooperative was organized in 1844 in Rochdale, England as a self-help consumer group of urban workers. By the early twentieth century, working class organizations had

---

[6] K. Gopalan & M. Venkataraman, *Affordable housing: Policy and practice in India*, 27 IIMB Management Review 131, 133 (2015).

[7] *High Level Task Force on Affordable Housing for All*, REPORT OF THE HIGH-LEVEL TASK FORCE ON AFFORDABLE HOUSING FOR ALL GOVERNMENT OF INDIA (Dec., 2008), http://www.naredco.in/pdfs/report-high-level-task.pdf.

[8] Ernst & Young, *The growing crisis of affordable housing in MENA*, AFFORDABLE HOUSING INSTITUTE, http://www.affordablehousinginstitute.org/wp-content/uploads/2012/10/The-Growing-Crisis-of-Affordable-Housing-in-the-MENA-by-EY-and-AHI.pdf.

sponsored housing cooperatives throughout Europe but primarily in Germany and some Scandinavian nations.

In the United States, housing cooperatives got popular after World War I. During the war, society and cooperatives took two decidedly separate forms. For rich and economically sound and well-off families, posh and exclusive apartments were built while the ethnic-immigrant groups and middle-income groups, faced with economic crisis due to the war, had to do with affordable housing units[9]. This is how cities started getting divided to house the rich and the poor differently.

As Charles Abrams said,

> *"So far as housing is concerned, the whole world has remained under-developed. There is probably not a single major city in the world without some form of housing problem. In Los Angeles and in Tokyo, in New York and in Moscow, in Hong Kong and in Paris, in Stockholm and in Brasilia, housing is a serious issue*." [10]

Though housing co-operatives were organized in the year 1912 in India, the Government felt the urgency of helping the co-operatives to solve the problem of housing, from the year 1923. The Government of India started providing assistance for co-operative housing from the First Plan period.[11]

In India, the housing inadequacy was first felt in urban centres in 1901. This was turned to a surplus in 1911 by plague and famine which caused death on a large scale. But as census records show, after 1931 the situation changed entirely. Under the impact of the Great Depression, housing construction suffered a setback and housing provisions could not cope with household growth. During the Second World War, India's housing problem grew further by the settlement of workers who migrated to towns to work in factories producing ammunition and other war supplies. In 1947, the housing situation was further aggravated by the influx of 75 lakhs of displaced persons, on the wake of partition of India, who by and large preferred to settle in urban areas[12].

The economic slowdown of 2008-2009 changed the real estate scenario drastically. While developers always look forward to work on luxury housing, the slowdown made them re-evaluate their priorities and finances and pushed them towards affordable housing.

---

[9] Gerald W Sazama, *Lessons from the History of Affordable Housing Cooperatives in the United States: A Case Study in American Affordable Housing Policy*, 59 American Jour of Eco & Socio. 573, 608 (2000).
[10] CHARLES ABRAMS, HOUSING IN THE MODERN WORLD 53 (1964).
[11] A.P. SIVA SUBRAMANIAN, THE PRINCIPLES AND PRACTICES OF CO-OPERATION 120 (1992).
[12] *Housing - A Historical Perspective*, SHODHGANGA, https://shodhganga.inflibnet.ac.in/bitstream/10603/65583/10/10_chapter%202.pdf.

Before the slowdown, Indian real estate worked by financing a major load of its construction activity with the advances collected from the customers through pre-construction bookings. Thus, there was a direct relationship between the construction activity and the advanced booking by potential homebuyers. More the advance money, more was the amount of construction achieved. This working method was successful during economic boom but during slowdown and crisis, demand for real estate fell drastically.

As demand decreased, the finances for construction were crunched and thus, construction had to be stopped. Real estate developers saw massive losses as they now had to sell their estates at deeply discounted prices.[13]

With the problem of homelessness showing and decreased finances for building projects, a viable solution was reached- that of affordable housing. Affordable housing here didn't just mean housing that could be bought by the middle- and lower-income groups, in fact here it meant housing that was developed at a cheaper rate than other housing projects.

Affordable housing was easier on the developers' pockets and also served the purpose of being sold reasonably quickly as a lot of homebuyers were facing cash crunch yet, were in the need for shelters.

As homelessness grew and the government picked up on it, the issue became a political one and the government decided to introduce schemes to ensure that everyone is able to own a house by a certain time period. From a business point of view, the time is ripe for affordable housing projects as the middle-class income group is expanding and in need of houses to call their own. Coupled with the government's initiative of providing affordable housing, there is a lot of scope for the fulfilment of this goal.

IV. INTEGRATING POLICIES FOR AFFORDABLE HOUSING

In 2015, the Pradhan Mantri Awas Yojana (PMAY) was launched by the NDA government which targeted mainly the poor and the middle class. To ensure that this particular scheme leads to the fulfilment of its goal, taxes under Good and Services tax (GST) on Housing was also reduce to encourage buyers and developers to invest.

[13] *Affordable Housing in India: Budding, Expanding, Compelling*, INDIA BRAND EQUITY FOUNDATION, https://www.ibef.org/download/Affordable-Housing-in-India-24072012.pdf.

As per this scheme affordable houses includes flats that cost below 45 lakh INR approximately. In case of cities like Mumbai, Bengaluru, Hyderabad, Delhi that is major metro cities which have high density population due to urbanisation, the carpet area limit is around 650 sq. ft. in comparison to non-metro cities where it is 960 sq. ft. In case of GST which is an integrated tax system and the GST Council, which forms decisions on GST, has lowered the GST on affordable housing schemes from 12% to 8%. However, such a benefit is available only to those eligible under the PMAY Credit Linked Subsidy Scheme. Thus, anybody wanting to buy an under-construction property would pay a concessional GST on the property i.e. 4%, if the individual is eligible under the PMAY. This benefit remains unattainable for those not registered under the PMAY scheme. The flats which are already completed remain out of the purview of GST.

A. **Pradhan Mantri Awas Yojna (PMAY)**

Major groups that suffer from the lack of basic human necessity that is a house thereby diminishing there access to water supply, sanitation, electricity, one's ability to get a housing loan or rent a house[14], include economically weaker section which also include low income group who is in a dire need of a new house. PMAY is the flagship scheme introduce by the Government for achieving their goal of affordable housing. The scheme consists of four major plot points which are:

1. *In-Situ Slum Development*

Under this, private organisations are given an opportunity to redevelop the land occupied by slums into formal settlements by rehabilitating the existing slum lands and restructuring them with basic civic requirements. For the purpose cross-subsidising the development of the slum, the leftover land is given to the private enterprises.[15]

2. *Credit Linked Interest Subsidy*

This includes demand-based structure of the policy wherein EWS and LIG citizens who are seeking houses can get subsidised loans at the rate of approximately 6.5% for the tenure of 15

[14] Dag Ehrenpreis, *What is poverty? Concepts and measures*, INTERNATIONAL POVERTY CENTRE -UNDP (Dec., 2006), https://ipcig.org/pub/IPCPovertyInFocus9.pdf.
[15] Renita D'souza, *Housing Poverty in Urban India: The Failures of Past and Current Strategies and the Need for a New Blueprint*, 187 ORF Occasional paper 8,9 (2019).

years or during tenure of loan, whichever is lower. Credit linked subsidy is provided on home loans for acquisition and construction of a house. [16]

3. *Affordable Housing in Partnership*

It deals with supply side intervention in which states/UTs which initiate such projects on their own or in partnership with private entities are also eligible for central assistance at the rate of Rs. 1.5 Lakh per EWS house, provided certain stipulated criteria is fulfilled. Under this plan at least certain percentage that is 35% of the houses is reserved for EWS.[17]

4. *Beneficiary-Led Individual House Construction or Enhancement (BLC):*

This acts as a residuary structure of the policy, where after the production of the requisite documents, a beneficiary belonging to the EWS category wanting to restructure his dwelling or construct a new house can avail central assistance of INR 1.5 lakh. BLC is an innovative step introduced in the policy which encourages the potential for self-built houses.[18]

The scheme works by identifying beneficiaries eligible for assistance and their prioritisation is done using information from Socio Economic and Caste Census (SECC) ensuring total transparency and objectivity. Thereafter, these beneficiaries can contact a block officer nearby, who is usually a Gram Sabha officer, and submit their documents for forwarding their requests under any of the above verticals.

B. GST and Affordable Housing

The Goods and Services Tax (GST) is an indirect consumption tax, imposed on the supply of goods and services which include sale, transfer, purchase, import and export, barter and lease. It came into effect from July 01, 2017 through the One Hundred and First (101st) Amendment to the Constitution of India. It is a detailed form of tax which has replaced almost all forms of indirect taxes, including central excise duty, services tax, additional customs duty, value-added tax etc. It works by dividing the tax into two parts- the State GST (SGST) and the Central GST (CGST). For inter-state transactions, an Integrated GST (IGST) is placed. As a destination-based tax, it is

[16] *The Website of the Pradhan Mantri Awas Yojana-Housing for All (Urban)*, MINISTRY OF HOUSING AND URBAN AFFAIRS (GOI), https://pmaymis.gov.in/PDF/HFA_Guidelines/hfa_Guidelines.pdf.
[17] Id. at 9,10.
[18] Laura von Putt Kamer, *India: Slum-free by 2022? A people-centered evaluation of the Pradhan Mantri Awas Yojana Scheme*, ETH ZURICH, https://ethz.ch/content/dam/ethz/special-interest/conference-websites-dam/no-cost-housing-dam/documents/Puttkamer_final.pdf.

collected from the point of consumption and not point of origin like previous taxes. The tax slabs are 0%, 5%, 12%, 18% and 28%. While soaps are taxed 18% and commercial vehicles are taxed 28%, GST on movie tickets is based on slabs, with 18% GST for tickets that cost less than Rs. 100 and 28% GST on tickets costing more than Rs.100, However, petroleum products, alcohol and electricity aren't subjected to GST and are taxed like they were prior to the introduction of GST while dairy products, products of milling industries, fresh vegetables & fruits, meat products, and other groceries and necessities remain untaxed.

GST, as a tax form, applies to almost all industries, real estate being one of them. It works toward achieving transparency and process-driving. The transparency is expected to benefit developers and buyers as GST would provide more clarity on tax-credits for transactions and allowance of input credit would reduce the price of properties. By 2020, the Indian Real Estate Sector is expected to grow 12% annually. It is thus to be expected, that the taxation system would create ripples in the real estate industry as it does in other sectors.

In the real estate sector, GST is levied only on the purchase of an under-construction property. The various building materials used for the construction of houses fall under GST and are taxable from 5% (sand, marble rubble, etc.) to 28% (cement, etc.). After the inclusion of real estate under the GST regime, the applicable tax rates on commercial and residential transactions were 12%, valid till 31st March 2019. Now, the GST rates on residential real estate have been altered to 5% for non-affordable housing properties while for affordable housing properties, the levied tax rate is 1%. Moreover, ready-to-move-in property is not liable to attract any GST.

The biggest takeaway from GST is that all properties under construction will be taxed at 5 percent of the property value. Prior to the introduction of GST, developers were liable to pay customs duty, central excise duty, VAT etc. on construction material costs. Developers had to additionally pay a 15% tax on services like labour, architect fees, legal charges, etc[19]. Obviously, this tax burden was transferred on the buyer. However, under the new regime, this changed.

In its 33rd meeting, the GST Council[20], defined 'affordable housing' on the following parameters:

1. Carpet Area
2. Cost of Under-Construction Property.

[19] Nivedita S Karnawat & Asst. Prof. Harshita Ambre, *Study on Impact of RERA and GST on Construction Sector*, 06 IRJET 6116 (2019).
[20] Sathish AR, *34th GST Council Meeting: Key Decisions Taken*, QUICKBOOKS (Sept. 23, 2019), https://quickbooks.intuit.com/in/resources/gst-center/34th-gst-council-meeting-key-decisions-taken/

Thus, a residential house or flat would be considered an affordable house if it had (a) a carpet area of 90 m^2 in non-metropolitan cities/towns and (b) 60 m^2 in metropolitan cities. Additionally, a residential house or flat would be considered affordable housing if it is valued at up to Rs 45 lakhs, both for metropolitan and non-metropolitan cities

In the same meeting held, the promoters of ongoing real estate projects were given two options to implement the GST rates. These were:

- Continuing to pay tax at previous GST rates. Promoters would have to pay an 8% GST on under-construction affordable housing projects, while a 12% GST rate would be levied on under-construction projects which aren't affordable housing.
- To pay tax as per the new GST rates decided in the meeting. Under this option, the promoters would have to pay just 1% GST on under-construction affordable housing projects[21] while a 5% GST would be levied on other under-construction projects.

The above steps are huge leaps in providing affordable housing to everyone, as the government envisions to achieve by 2020. Low tax rates can help millions achieve their dreams of their own homes while the issue of homelessness will be eliminated.

V. CHALLENGES TO POLICY IMPLEMENTATION

During the financial year of 2016-2017, the government had allocated almost Rs.19,000 crore for implementing the scheme[22] but the stats depict that it has not be utilized to its full potential. Beneficiaries are registered through block officer services and at present, more than 1.1 crore beneficiaries have been registered, however, the construction of only 63% of the registered beneficiaries has been completed.[23] The data presented above gives an indication as to the growth rate of the policy, which is very slow when compared to the desired expected result. Although this is a proactive step taken by the government in the development of housing sector of the country however, they still face various challenges in its implementation which are given below:

[21] Housing News Desk, *GST on maintenance charges to be 18% for flat owners paying Rs7,500*, HOUSING NEWS (Sept. 23, 2019), https://housing.com/news/gst-real-estate-will-impact-home-buyers-industry/amp/.
[22] Sahithya Venkatesan & Avani Kapu, *Pradhan Mantri Awas Yojana - Gramin (PMAY-G)- Budget Brief*, 11 CPR 1 (2019).
[23] Aarefa Johari, The Modi Years: How close is India to affordable housing for all?, SCROLL.IN, (Feb. 20, 2019, 07:30 pm), https://scroll.in/article/913188/the-modi-years-how-close-is-india-to-affordable-housing-for-all.

1. **Scarce Land**
   - The availability of land for housing development is scarce within city limits [24] which is mainly due to the increasing rate of urbanisation in the country. Major commercial development has taken place in metro cities which is leading to high land prices in such premium areas which, in turn, is discouraging developers from participating, making the project inviable.
   - In case of In- situ development which provides additional incentives to the private entity participating in development projects through Transfer of Development Rights (TDR), it is however, restricting access to benefits for the citizens and giving discretionary power to the companies.

2. **Multiple project approval**
   - Another major reason for slow development is delayed project approval along with the absence of requisite knowledge about the necessary documentation required for approval. More than 30 clearances are required for each housing project, from multiple authorities.[25]
   - The application of the project is complicated which affects the slum dwellers' ability to actively participate and enjoy the policy benefits. For instance, potential beneficiaries of the housing scheme find obtaining property documentation cumbersome since property records come under the purview of an agency which is different from the one that is responsible for housing issues.[26]

3. **Complexity Under Input Tax Credit**
   - An input tax credit means slashing the taxes paid on inputs from taxes to be paid on output. When any supply of services or goods is supplied to a taxable person, the GST charged is known as Input Tax. While this existed during pre-GST era, its scope has now been widened. Earlier, it was not possible to claim input tax credit for Central Sales Tax, Entry Tax, Luxury Tax and other taxes. In addition, manufacturers and service providers could not claim the Central Excise duty. But under GST, since these taxes have been subsumed into one tax, there will not be the restriction of setting off this input tax credit. The conditions to claim Input Tax Credit under GST are very critical activities for every business to settle the tax liability.

[24] DELOITTE, *supra* 5, at 7.
[25] *Id.*
[26] Renita D'souza, *supra* 15, at 11.

- While affordable housing has become even more affordable due to the reduced GST on it, for other housing, the buyers depend completely upon the goodwill of the developer who may or may not choose to extend the benefit of input tax credit available to him for procurement of raw materials such as steel, cement, glass and services such as interiors and architectural work etc. Withholding the benefit of input tax credit from the homebuyers would increase profits for the developer and he can now earn more as he enjoys a credit all to himself.

4. **Issue regarding Private Sector Participation**
   - PMAY is a mass scheme and without private sector participation, it is difficult to accomplish its goal. While there are certain incentives under the policy to increase their participation, low profit margins, Restrictive FAR/density norms etc. make it a cumbersome process.[27]
   - Dearth of skilled manpower and insufficient external and social connectivity infrastructure by the concerned authorities makes this sector unattractive for private sectors.

5. **Centre- State Relationship**
   - To achieve successful implementation, a coordination between the state and central government is necessary which is however lacking in the present case. There exist certain ambiguities around availing central incentives, while ensuring compliance with the state policies.[28]

Case Study on PMAY Progress achieved in the State of Uttarakhand [29]

An individual can avail the benefits under PMAY by registering as a beneficiary with a block officer of a nearby local municipal body. Haldwani is a small urban town in the state of Uttarakhand where land ownership amongst people is quite significant. As per the interview conducted, it was found that several beneficiaries were registered in the city with the local

[27] *Affordable housing- The Next Big Thing*, A WHITEPAPER BY CBRE AND FICCI, CBRE LTD. (March 2018), https://assets.kpmg/content/dam/kpmg/pdf/2014/09/decoding-housing-for-all-2022.pdf
[28] *Id.*
[29] Obtained from the sources of Oriental Bank of Commerce, Haldwani Branch. An interview was conducted with the bank manager and local municipal corporation of Haldwani regarding the loan approval for building houses by individual land owner by availing the benefits under PMAY scheme.

municipal corporation for their project approval under the Beneficiary-led individual house construction or enhancement scheme of PMAY for constructing their own houses.

According to the data obtained from the bank regarding the loan approval of these projects which was forwarded by the Block officer, it was discovered that most of the applications were rejected due to inconsistencies in the documents of the applicants in terms of the requirements under the PMAY scheme. The Oriental Bank of Commerce handled the duty to an officer to check for these inconsistencies and after several days of looking through all the documentation, it was revealed that these projects were rejected because they lacked standardised house plans which are provided by the government under the scheme. Most of the house plans submitted were according to the builder's requirement which led to the rejections.

The major issue here is the standardised house plan provided by the government for developing the houses under PPP of the scheme. These plans are for the private players and builders, however, there exist no such plans for individuals building their own houses to guide them under the scheme, which is a huge setback for the success of this scheme. As per the statistics given earlier, we know that the growth is at a very slow pace so, it is the duty of the government to look into the scheme and rectify all the loopholes to achieve its goal.

VI. REVAMPING THE HOUSING POLICIES

Since these policies face several implementation challenges, it is necessary to overcome these issues so that they can gain necessary momentum to bring the required changes. Some of the suggestions and recommendations for the same are given below:

1. Increasing Centre-State Coordination

The first step the government can take is to simplify these schemes and take a more rational approach. Increasing the coordination and comprehensibility between the central and state governments in their policies can help eliminate the gridlock in availing central incentives as well as ensuring compliance with the State policies.

It is imperative to note that as per the Seventh Schedule of the Constitution of India[30], land, revenue relating to land as well as rent agreements and such are included in the State List. This means that the State governments reserve the right to formulate laws on this subject. Interestingly, PMAY is

[30] IND. CONST. sch.7.

a centrally conceptualised policy and the funds required for the implementation are shared between the Central and State governments with the Central government bearing the larger part of the finances and releasing a budget for the same annually. This points towards an unshakeable disparity between the responsibility of both the governments towards the commitment.

For an effective impact, PMAY needs inclusion of the municipal level, as well as a more decentralised approach. This can be done by transfer of knowledge and inclusion of NGOs and CBOs in the process of participatory governance.

2. **Extending the benefit towards affordable renting**.

The schemes implemented for affordable housing do not apply on renting apartments. Today, in an age of rural to urban migration in search of better work opportunities, lack of affordable housing forces individuals, who are temporarily locating from one place to another, to live in de-humanised conditions. Therefore, to ensure inclusive growth and success, the schemes should also extend to include affordable rental housing segment. This can be done by introducing the concept of such affordable housing which explores around the idea of build-to-rent and long-term rentals,[31] it can also give grants that are afforded to private players under Affordable Housing in Partnership to other stakeholders that provide low-cost rental home services.

3. **Dealing with the issue of Scarce Land**

Scarcity of land is a major issue as discussed above, therefore; the government needs to work on innovative ideas to tackle this problem. These can include regular release of land parcels and bringing in more peripheral land into developable limits of city authorities. Another major problem regarding land resource is the high cost of land. The government needs to increase floor area ratio i.e. the number units that can be built on a parcel land so that developers can make more profits due to high turnover even with lesser margins per unit.[32] More Floor Area Ratio means more saleable area or higher turnover for the developer.

4. **Improving the Labour skill and standard**

Project execution can be enhanced by launching programmes that can provide appropriate training and skilling the construction manpower. Developing and implementing certain certification programs to inculcate the skill of supervisory and managerial workforce in low cost. Introduction

[31] Making Affordable Housing a Reality in Cities, WORLD ECONOMIC FORUM (June 2019), http://www3.weforum.org/docs/WEF_Making_Affordable_Housing_A_Reality_In_Cities_report.pdf.
[32] Ms. Harshleen Kaur Sethi, *supra* 4, at 761.

of emerging new and advanced construction technologies can help kickstart the growth of the policy.[33] Investing in innovative construction technologies and promoting mass housing development at subsidized rates can further strengthen the policies.

5. Lesson to be learnt: Affordable Housing in Singapore

Singapore has successfully implemented the project of affordable housing in the country. Today, more than 80% of the population is living in public flats, with 93% of them owning their own flats.[34] The scheme is majorly regulated by Housing and Development Board of Singapore, which is the sole authority that acts as a comprehensive source for each and every aspect of the policy, making it less cumbersome and more successful. The same can be adopted in India by introducing regulatory changes by preparing guidelines and frameworks to assist implementing agencies at state/ city level in effectively managing/ executing affordable housing projects. To help reduce the complexities and delay in approvals, a 'single-window clearance' system can be developed which connects regulatory bodies at both the central and state levels. This can be done by advancement in technology to support it.[35]

To successfully achieve the desired result of the scheme it is imperative for the government to prepare a well-synergized approach to address concerns of all stakeholders in the value chain.

VII. CONCLUSION

In today's era, 'Housing for All' is necessary for living a healthy life and so, it is an ambitious project taken on by the government. India follows a mixed economic policy and real estate contributes significantly for the development of its economy. The schemes under this project are a positive step to encourage home buyers and developers as they provide various advantages like loans at subsidized rates, tax exemptions, and encouragement of public-private partnerships however, at the same time, they do not give sufficient margins to the developers so that they can successfully complete and deliver projects. Buyers are still unaware of the requisite elements of the schemes which makes it difficult to achieve the desired results.

---

[33] DELOITTE, *supra* 5, at 13.

[34] Affordable Housing in India Key Initiatives for Inclusive Housing for All, JLL (Feb. 2016), http://www.asiapacific.joneslanglasalle.com/india/Affordable-Housing-ICC.pdf.

[35] Decoding housing for all by 2022, KPMG.COM/IN (2014), https://assets.kpmg/content/dam/kpmg/pdf/2014/09/Decoding-Housing-for-all-2022.pdf.

The government has developed dominant strategy for dealing with the issue of housing poverty, but it needs to be more rational and comprehensive. A series of changes is required in the present project so that the Central and state governments can work together to provide more than 2 crore houses by the year 2022 and efficiently achieve their goal.

COMPETITION LAW AND DATA PROTECTION: A STUDY IN EUROPEAN UNION

*Pranjal Pranshu**

ABSTRACT

Traditionally, the authorities that regulate competition have set their focus on observing and addressing the conduct of the dominant companies, and ensuring that their behaviour does not harm the competition. Though they do not challenge the actions that harm an average consumer directly. Generally, establishing the point where a particular type behaviour becomes anti-competitive can be difficult, with the constantly varying market scenario as well as the potential changes in the companies' behaviour. It is a common assumption that the numerous services, available online, in this data driven economy are free and unlimited for common user, it is anything but such. Collection, storage, and distribution of private data are an ever-ongoing process, and as a primary source of funding for so many of these free online service providers, also provide them with a substantial competitive advantage. Thus, this data usage practice has become an activity of commercial nature. In the European Union, perhaps the biggest change of recent times in European data policy came by the advent of GDPR, after the world witnessed with shock was being unjustly appropriation of user data by the Social Media giant Facebook. GDPR came in force in May 2018, and is one of the biggest overhauls of the privacy laws in a long time. This paper illustrates and analytically assesses the role of various data protection rules in the EU regime, in the domain of digital market competition assessment. The primary focus would be on the intersection between extant data protection or privacy rules and the competition law in the EU in the modern era.

KEYWORDS: *Competition Law, Personal Data, Privacy, GDPR, Data Protection.*

I. INTRODUCTION

Privacy is the need of the hour. In the present century, as the violation of data privacy increases, the laws to combat such breaches are also taking shape and being enacted. The advantages personal

* 5TH YEAR STUDENT OF B.B.A. LL.B AT KIIT LAW SCHOOL

data offers to the big corporations are undeniably immense, being a major source of their revenue. But the extent to which the online user is exploited, with that user being unaware is a gross violation of the principles of equity; even before one considers the legal rules it breaks. These advantages sometimes also breach the realms of anti-competitive behaviour.

Competition law has the role of maintaining effective competition in the market; but it often does not take into account the extent to which the personal data is utilized, which provides undue advantage to the entity gaining such an access. While it is true that the principle of personal data is a concept that originated in the previous millennia, the general public is as yet, largely unaware of the advantages that the big corporations acquire, because of their personal data. Data protection has a long history, especially in the European Union, where the recent GDPR is acting as a model for other countries to make similar laws on Data Protection.

1.1 Evolution of concept of personal data protection in the European Union

Dating back to 1948, "*United Nations Universal Declaration of Human Rights (UDHR)*" was one of the first international legal instrument that could be said to be associated to any form of information protection. Though it had not visualized that information would one day be present in the online medium, accessible to any with necessary resources, or that there would be such an online medium to begin with, the declaration did speak of the right to privacy[1], making it an International Human Right.[2] Later in 1953, "*European Convention on Human Rights (ECtHR)*" was realized, which followed the privacy principles of *UDHR* in many ways. It extrapolated various rights given in the *UDHR*, while giving them legal effect in among the signatory countries of the European Union. Of course, the rights were not absolute and held some exceptions. Nevertheless, *ECtHR* had the jurisdiction to take any matter that was a consequence of the breach of the convention according to the Lisbon Treaty. This allowed the parties to utilize the wide jurisdiction of the *ECtHR* quite easily; extended as it was to all activities of the European Union. The treaty even granted individuals access to the court.[3] The "*Council of Europe Convention 108* (Convention 108)"[4] was one of the first multinational instrument that specifically concerned itself with data protection. It is still the only such legally binding instrument that applies to all the

1 Art 12; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948).
2 Oliver Diggelmann & Maria Nicole Cleis, *How the Right to Privacy Became a Human Right*, 14 HUM. RTS. L. REV. 441, 443-449 (2014).
3 EU PARLIAMENT, THE TREATY OF LISBON 4 (2018), http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.5.pdf.
4 ETS- 108, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981 (amended).

entities, public and private, that processes data; and has further been signed by all the member states of EU along with some Non-EU states. The objective of the instrument was to protect the populace from online privacy abuses. It did so by creating and ensuring distinct provisions on the processing of data in differing circumstances. It established the individuals' right to know his personal information that is being stored on the server. Furthermore, the convention also enforced restraint on the flow of data between multiple States. The Convention 108 though has undergone a modernisation to account the new technologies that have come up since 1980s, and now include provisions for biometrics, automatic processing etc.[5] The "*EU Directive 95/46/EC"* that dealt with data protection came into force in October of 1998. It was heavily influenced by the Convention 108. Though now repealed, it played an important role in development of personal data standards. It reiterated the same principle, viewing data protection as an integral part of the human right to privacy. As many countries had already developed national level legislations via implementation of the Convention 108, therefore, the main objective of this directive was to ensure that the data protection standards are harmonized in the Member States of EU. To achieve this, the main requirements of the directive expressed restricting the flow of data from one member state to another member state, as well as ensuring the protection of data. It established certain conditions for the parties to process data; like a bar on the processing of sensitive data.[6] Further, it prescribed an obligation on the processor to disclose the identity of the data controller to the data subject as well as the purpose for which such collection of data is being made. If the data collection does not follow these parameters, the data controller could be penalized. If a third country has no appropriate data protection in place, the member states are prohibited from transferring the data to that country.[7] As only Member States were addressed by the directive, it became essential to ensure that rights regarding data protection were respected by the various EU institutions. To accomplish the same, the "*European Data Protection Supervisor"* was created in 2004. It serves the role of advising on the legislations and the policies, while also cooperating with similar bodies in the member states as well as the third countries. The turn of millennia saw the proclamation of the "*Charter of Fundamental Rights of the European Union (CFREU*)". The CFREU not only provided for protection of the "right to privacy and family life",[8] but also recognized the "right to protection of personal data" as a separate right.[9] The distinction highlighted the significance of

[5] Infra note 11.
[6] Directive 95/46/EC, art. 8, European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) (repealed 2018).
[7] *Id*. Art. 25 & Art. 26.
[8] 2012/C 326/02, art. 7, of Charter of Fundamental Rights of the European Union, 2012, O.J. (C 326).
[9] *Id*. Art. 8.

data protection.[10] In 2018, "*Council of Europe Convention 108*" after many years or meetings and negotiations revised into "*Convention 108+*". The upgrade was to strengthen the implementation of the old covenant by taking in consideration the new emergent technologies.[11]

1.2 European Unions' GDPR

The "*General Data Protection Regulation (GDPR)*",[12] aims to harmonize the data protection in the EU. It introduces a definition of personal data as "*any information relating to an identified or identifiable natural person*" with the identifiable natural person being defined as "*an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".*[13] New rights for the data subjects are established via this regulation and existent rights are enhanced, with the objective to give the control and the knowledge of the way their personal data is being collected and used by the data processors back to the data subjects. For instance, it establishes, along with other perquisites, the obligation on the data controller to obtain an explicit consent if they seek to process the sensitive personal data.[14] Further, the processing of non-sensitive data would also require an unambiguous consent.[15] The burden of data protection is shifted to the data controllers and processors;[16] who are now responsible for data security,[17] as well as demonstrating that the data subject has given consent for the use of the personal data.[18] They now have to ensure the implementation of "data protection by design and by default".[19] Further, if any data protection breach occurs, they have to notify the data subjects[20] as well as the supervisory authority.[21] A new body called the "*European Data Protection Board"* has also been established to see the consistent application of the regulation.[22] Though the

[10] COUNCIL OF EUROPE ET AL, HANDBOOK ON EUROPEAN DATA PROTECTION LAW 19 (2018 ed. 2018).
[11] Council of Europe Newsroom, Convention 108+: The Modernised Version of a Landmark Instrument (May 18, 2018).
[12] Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 OJ (L 119).
[13] *Id.* Art. 4(1).
[14] *Id,* Art. 9(1), 9(2).
[15] *Id.* Art. 4(11).
[16] *Id.* Art. 4(7), Art. 4 (8).
[17] *Id.* Art. 5(f).
[18] *Id.* Art. 7(1)
[19] *Id*. Art. 25.
[20] *Id.* Art. 34.
[21] *Id*. Art. 33.
[22] *Id.* Art. 70(1).

ultimate enforcement powers would still remain in the jurisdiction of the national authorities. The GDPR being a recently enacted machinery, while increasingly being used as a base for national legislations worldwide; it still remains to be seen how its presence will affect the flow of data from and to Europe.

II. COMPETITION LAW AND DATA PRIVACY LAWS

The aspects of competition and privacy are conventionally different, and operate in majorly separate domains. The data privacy laws are novel and a result of the reaction to the penetration of the internet technologies, while the competition law had been in place since the time of market competitions, having its origins in the medieval ages itself, though the official study of the competition in the market began in the 1800s. The role of data has steadily grown in the providing a competition among the corporate entities in the market. The high demand for data has led to development of services that share and sell the personal data of its user. The objective of the data protection laws in hence to restrict the unauthorized use of personal data, with EU being a pioneer to the same. The unfair data use, being in violation of the nascent Data Protection laws, is also infamous for providing an imbalanced competitive advantage to the businesses.

2.1. Personal data and Competition in the digital world.

The changing market scenarios and conditions, due to the penetration of digitalization as well as rapid development in technology and technological standards has a pervading effect on the economic operators as well as the consumers. The understanding of the market and its intricacies is enhanced by the networked technologies that increasingly communicate with each other. The digital business models have given enhanced insight into the understanding of the products and the services market. This increased communication of the network devices necessitates creation of a mechanism of data collection, which often includes the internet usage activities. As the companies keep on attempting to benefit from the personal data, which they utilize in their business practices, the need to analyze the methodology of collection of data, and understand the processes to monetize it in the market is quintessential.[23] Playing a vital role in the international trade and business, data is also considered an essential factor is calculating the aspects of the modern

[23] Francisco Costa-Cabral and Orla Lynskey, *Family ties: the intersection between data protection and competition in EU Law*, 54(1) COMMON MKT. L. REV 1, 2 (2017).

economy. In the online marketspace, there are multitudes of entities that operate in huge profits, while seemingly offering their services free of charge. Such companies often utilize the personal data of the consumer, as a consideration of the product or service provided by them, providing them in return with discounted or free services.[24] The companies, by their constant data exploitation have shown that the personal data constitutes a valuable asset that can provide many advantages to the competing corporates. This has led to the development of the concept of revenue and new data related business models.[25] While the personal data has progressive economic dimensions, it is important to recognize that the concept has also grown to be included as a part of fundamental right of privacy in the multiple EU legislations and treaties.[26] Thus, it would be needed of the different law regimes of the EU to interact under the said treaties and legislations to regulate the data movement in the wake of this growing aspect. Private businesses have a need of personal data for business purposes, and so are developing models that allow them to information of individual customers, to better target them. This requires processing of large quantities of data that is present in the digital space.[27] That raw data needs specific techniques to be usable, which in turn creates issues in the form of economic and consumer related risks due to such commercial usage. This concept of treatment of raw data is called big data and is closely related to the challenges surrounding personal data, which makes it natural that the EU data protection norms are being established or getting a facelift.[28] This has led to an improvement in EU data protection standard.[29] "General Data Protection Regulation" of the EU being a product of more than four years of legislative process[30] has an established global impact on the use and movement of personal data.[31] Although the directive was developed for EU, it has a territorial scope that is not just limited to EU boundaries; further, the transnational nature of the directive would greatly ensure effective competition in EU.[32] With the development of the information technology and its inclusion in the business procedure, the processing and movement of personal data is bound to increase; this being

---

[24] Gianclaudio Malgieria & Bart Custers, *Pricing privacy – the right to know the value of your personal data*, 34 COMPUTER L. & SEC. REV. 289, 292-293 (2018).
[25] 68 INGE GRAEF, EU COMPETITION LAW, DATA PROTECTION AND ONLINE PLATFORMS: DATA AS ESSENTIAL FACILITY 129-130 (Wolters Kulwer, 2016).
[26] ANDREJ SAVIN, DATA PROTECTION AND PRIVACY, 266-268 (Edward Elgar Publ'g, 2017).
[27] Antonio Capobianco & Anita Nyeso, *Challenges for Competition Law Enforcement and Policy in the Digital Economy,* 9 J. EUR. COMP. L. PRAC. 19, 21 (2017).
[28] Michael Mattioli, *Disclosing Big Data*, 99 MINN. L. REV. 535, 536 (2014); see Scott J. Shackelford, *Polycentric Approach to Enhancing the Security of Things*, 2017 U. ILL. L. REV. 415, 474 (2017).
[29] PAUL VOIGT, VON DEM BUSSCHE, AXEL: THE EU GENERAL DATA PROTECTION REGULATION (GDPR) – A PRACTICAL GUIDE, 3-5 (Springer Int'l Publ'g 2017).
[30] Efrén Díaz Díaz, *The new European Union General Regulation on Data Protection and the legal consequences for institutions*, 1 CHURCH COMM. & CULTURE 206,209 (2016).
[31] Eduardo Ustaran*, EU General Data Protection Regulation: Things you should know*, 16(3) PRIVACY & DATA PROT. J 3, 3-5 (2016).
[32] *Supra Note* 29, at 22.

one of the fundamental characteristics in which the digital markets differs from the traditional markets of offline platforms and practices. The concept of digital markets is closely connected to that of a digital platform, and is an important characteristic of the digital business model involving interaction between the two user groups, such as buyers or sellers, or users and advertisers. The digital market is generally assumed to increase the number of competitions, and has also facilitated the proliferation of big data in the businesses.[33] The incumbency of big data in the economic sector, and the benefits that a company can derive from them has engraved the need for analyzing such data as part of the business firms' strategy. Some business industries have more concentration in these aspects of data analysis, like the search engines.[34]

Competition laws of the European Union are the regulators of corporate rivalry and competition in the European market framework. The laws aim to ensure fair and equitable competition, promote efficiency and effectiveness in resource allocation, as well as enhance consumer welfare. Even after the advent of personal data in online space, for quite some time, data was not seen as a necessary part of competition assessment. In fact, data protection originally dealt with the privacy rights of the individuals, thus they were deemed to pursue different goals. In fact, it is only as our lives get increasingly online and our data becomes available for monetization and utilization by the corporates does the need to involve the competition law enforcement when talking about data protection is being felt. Data controllers are often blamed for appropriating personal data and selling it for revenue, it being a major additional part of their profits.[35] A major issue is that most people are unaware of the online contracts that they make with these controllers, often willingly giving away their personal data in return of the services, or that simple settings can give these controllers access to more of the personal data than the person would have actually wanted. The fine wordings of the terms and conditions of the contract are often ignored. Further, many of the websites are infamous for not allowing one to use their services, or limiting the use of their services or features that they provide on not accepting their terms and conditions; with accepting such terms and conditions allowing those websites the utilization of the consumers personal data. Every so often, the consumer would acquiesce in the face of need to use that particular service or feature.[36]

---

[33] Daniel Sokol & Jingyuan Ma, *Understanding Online and Antitrust Analysis*, 15(1) NW. J. TECH. INTELL. PROP. 43, 50 (2017).

[34] Barbara Engels, *Data portability among online platforms*, 5(2) INTERNET POL'Y REV. 1, 13 (2016).

[35] RJ Frometa, *Social Media Vs. Privacy – Can You Maintain Privacy on Social Media?,* VENTS MAGAZINE (Feb. 11, 2018), http://ventsmagazine.com/2018/02/11/social-media-vs-privacy-can-maintain-privacy-social-media/.

[36] Susan Morrow, *5 Social Media Site Privacy Issues You Should Worry About*, INFOSEC (Jan. 30, 2018), https://resources.infosecinstitute.com/5-social-media-site-privacy-issues-worry/#gref.

It has already been pointed out that a dominant firm can think of infringing the privacy law of the person to gain an unfair advantage on the competition in the market.

The ongoing reforms related to the data protection and privacy in the EU will have a big impact in the market on the entities that engage in data processing, with the stricter data protection compliances increasing the administrative burden on their framework. As the boundaries up to which these entities can utilize personal data are being diminished, it might force them to look towards alternate sources of additional revenue. It would gravely affect those companies that seek to build a business on the user data resourcing. The scope of targeted advertising and the possibility of increased revenue through it would decrease. The new competition concerns are already emerging as a result of the awareness of data utilization by the controllers; the strict rules to govern the utilization of the data would make barriers over entry of new economic operators.[37] This may also force the companies to collect data in an organic manner that needs more resources to achieve, which would further make it harder for the new entity to enter the market. Further, if the companies were no longer allowed to divulge the information beyond its confines, this would lead to more vertical and horizontal integrations, to circumvent these restrictions. The new acquisitions that the companies would be involved in would not always be attractive for its prospects, but done merely to have a workaround through the new regulations.[38] In the online space, data often plays a role of currency being used as mean of payment, but it is not always easy to understand the true value of personal data in the digital economy.[39] One can take the example of interconnected devices via IoT (Internet of Things); the data generated through it can be indicative of user behaviour and habits, as well as give an insight into the lifestyle of the user of that IoT product and service. This can generate business opportunities through the means of smart and targeted advertising, and directed pricing. The requirements of businesses such as demand estimation, price optimization, pattern recognition, and analysis are fulfilled by the data processing entities so that the entities can make the best possible personalized price based on demand. The technological advancements will force more than just the data processing entities in taking permission, but would also create a challenge for the EU authorities who would have to balance the social, economic, and moral

[37] Chris Albers Denhart, *New European Union Data Law GDPR Impacts Are Felt By Largest Companies: Google, Facebook,* FORBES (May 25, 2018, 10:27AM), https://www.forbes.com/sites/chrisdenhart/2018/05/25/new-european-union-data-law-gdpr-impacts-are-felt-by-largest-companies-google-facebook/#64c472b24d36.
[38] *Supra Note* 25, at 296.
[39] Dylan Walsh, *How Much Is Your Private Data Worth — and Who Should Own It?*, STANFORD BUSINESS (Sep. 19, 2018), https://www.gsb.stanford.edu/insights/how-much-your-private-data-worth-who-should-own-it.

perspectives along with the fine balance of the law, especially with the enactment of the new GDPR and the Convention 108+.[40]

2.2 The Aspect of Intersection

Both the data protection laws as well as the competition law seeks to protect the consumer, thus in this regard the laws intersect in one of their common objectives. While the way they reach this objective is different, both can play a complementary role to each other to accord the consumer optimal protection. Competition law uses economic analysis tools to determine whether the consumers are being harmed due to market distortions that are a result of anti-competitive practices whereas the data protection laws seek to give the consumers the control over their own personal data, as well as have a say over how their data should be used. Data Protection seeks its validity on human rights principles, whereas competition law does the same based on the principle of equity in the markets.[41]

While this intersection has not been extensively analyzed by it, the "*Court of Justice of the European Union*" did describe and worded on this issue in the *Asnef-Equifax case* way back in 2006.[42] The case was originally a preliminary ruling by the Spanish Supreme Court. It analyzed the restrictiveness over the exchange of personal data in the form of information between the banks, by the virtue of then Article 81 EC (which is now replaced by similar Article 101 of Treaty on the functioning of the European Union).[43] The EU Court of Justice held that the " *any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection*". This indicated some refrain at that time from utilizing the aspects of the competition law and the data protection law in a unified manner. The statement though included the term 'as such', which does indicate that not all the cases of competition concerns that have the aspect of potential misuse of data protection, or data concerns having aspects of anticompetitive behavior would be excluded from a unified application of these two laws, or use of competition law to address privacy concern, and *vice versa* in the similar cases. One cannot assert that privacy is not relevant to competition,

[40] Alessandro Mantelero, *The Guidelines of the Council of Europe Data Protection Committee on the Protection of Individuals with Regard to the Processing of Personal Data in the Big Data Context*, 3(1) EUR. DATA PROT. L. REV. 88, 89 (2017).
[41] James Reynolds, *What's Data Protection Got To Do With Human Rights?,* HUMAN RIGHTS NEWS, VIEWS & INFO (Aug. 17, 2017), https://rightsinfo.org/whats-data-protection-got-human-rights/.
[42] Case C-235/08, Asnef-Equifax v. Asociación de Usuarios de Servicios Bancarios, 2006 E.C.R. I-11125.
[43] 2012/C 326/01, Consolidated version of the treaty on the Functioning of the European Union, 2016 O.J. (C 202).

or that competition law should not address the facts where the issues are privacy concerns. Rather, the laws have be applied in the pursuance of its goals, and if the elements that are necessary for its application are present, there should be then no bar from the application of that law, even if some other law has a parallel application on the subject. There is thus scope of application of application of competition law rules in a duly sensitive manner.[44]

In the paper named "*Competition Law and Data*" produced jointly by the "*Bundeskartellamt*" and the "*Autorité de la Concurrence*", which are respectively the competition law authorities of Germany and France, it was acknowledged that inclusion of competition law would not be precluded in issues that involve personal data concerns and are primarily under data protection laws. In fact, there should still be a competition law intervention.[45] EU Court of Justice has already dealt with application of various legal instruments in analysis of competition in the market in the case of *Allianz Hungária*.[46] In the case, it was found out that if there is a need to determine whether there is a restriction on the competition, the objectives of other national legislations could also be taken into account that shows a changing mindset, which indicates that consideration can be given to Data Protection laws. Also, the European Commission considers the general objectives established in the TFEU to deal with the concerns over competition. This is evident by the *Universal/EMI merger case,*[47] which addressed the concerns of the cultural diversity using the provision of TFEU that states "*The Union shall take cultural aspects into account in its action under other provisions of the treaties, in particular in order to respect and to promote the diversity of its cultures*"[48] Similarly, TFEU also established the right over data protection under the provisions of general application stating "*Everyone has the right to the protection of [their] personal data*".[49] Thus, it can be construed that any argument, which says that the competition law should not be used to look into the issues of data protection, as it is beyond its scope, or because other set of rules are there in place, is a dubious assertion. It has been argued by some that competition law should not be used to fulfil the need of protecting personal data in any circumstance, since it is the development of data protection rules that would lead to more

---

[44] Alec J. Burnside, *No Such Thing as a Free Search: Antitrust and the Pursuit of Privacy Goals*, COMPETITION POLICY INTERNATIONAL (May 29, 2015), https://www.competitionpolicyinternational.com/no-such-thing-as-a-free-search-antitrust-and-the-pursuit-of-privacy-goals/.

[45] AUTORITÉ DE LA CONCURRENCE AND BUNDESKARTELLAMT, COMPETITION LAW AND DATA at 23 (May 10, 2016)

[46] Case C-32/11, Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal, 2013 ECLI:EU:C:2013:160.

[47] Case No. COMP/M.6458 Universal Music Group/ EMI Music, 2012 EC.

[48] 2012/C 326/01, art. 167(4), of Consolidated version of the treaty on the Functioning of the European Union, 2016 O.J. (C 202).

[49] *Id*. Art. 16.

accountability of the data privacy rights of the individuals.[50] But as data protection is under the competence of the national authorities who choose which cases to pursue, and even the extraterritoriality clause can be little help in jurisdictions that have just started getting involved in data protection laws. Even if one considers EU, where potentially a coordinated action can be initiated, it has to be kept in mind that national authorities would always have a final say in assessment of the online space in light of the new regulations. Even accounting for the GDPR, the applicability of data protection has not been fully harmonized within the EU, and until that happens, competition law can play a significant role in the same. Competition law has intervened before and should not be precluded from intervening. Even after the data protection rules are harmonized, it would still play a critical part in data privacy concerns involving multinational and multilateral companies. For instance, competition law has intervened in the cases of tax law, or in the telecommunication market etc.[51] Competition law can also address the all these concerns in an efficient manner, as has also been said by the President of *Bundeskartellamt*, the German competition authority who contends, *"Maybe competition law is also a chance to prevent all this kind of regulation. (...) Competition law can do a good job here, because competition law is so lively. Here competition law is maybe faster, is maybe more adaptive. (...) I'm not going to say that competition law can cure everything there is, but I think we can cure some things."* [52] Competition law would generally not have an overlap with the data protection issues; still, the rise of online data business is creating the overlap. This can be resolved through the application of competition law, which should take into consideration the laws of data protection and privacy. [53] Only through considering data protection rules under competition law analysis and a harmonious application of both the laws in such overlapping issues can one achieve maximum fulfilment of the objectives of these legal domains.

III. CASES OF MERGER BETWEEN DATA HOLDING COMPANIES

[50] Joe Kennedy, *The Myth Of Data Monopoly: Why Antitrust Concerns About Data Are Overblown*, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION (March, 2017), http://www2.itif.org/2017-data-competition.pdf.
[51] Burnside, supra note 44.
[52] Melissa Lipman, *Facebook Data Antitrust Case Not Overreach, Enforcer Says*, LAW360 (Feb. 3, 2017, 4:05 PM), https://www.law360.com/articles/888145/facebook-data-antitrust-case-not-overreach-enforcer-says.
[53] Maurice E. Stucke and Allen P. Grunes, *Debunking The Myths Over Big Data And Antitrust*, 5(2) CPI ANTITRUST CHRON. 1, 7-10 (2015) (disproving believes on inapplicability of competition law in data protection matters).

There have been cases dealing with the multinational data driven companies that heavily rely on users' personal data for their revenues. In 2008, Google and DoubleClick merged, which was met by opposition. It was foretold by the opposition that Google being a search giant would be in a better position to analyze the consumer behavior after the merger, as the DoubleClick being an ad serving technology provider would enhance Googles technique. This scheme was nonetheless approved, with the EC holding that the companies operate in different fields of the online sphere, and there are still many other competitors that exerted sufficient influence.[54] The European Data Protection Supervisor iterated that more transparency is needed among search engines that collect personal data. For the consumer groups, the merger was a big threat to privacy, with the merged entity holding access to both the search ads and non-search ads. Nevertheless, the entities got the permission to merge at both the Americas as well as the European states. However, in future, it has to be kept in mind that companies may buy other companies for the data it potentially holds, or the data mapping expertise it has which may allow the buying entity. A closer scrutiny needs to be done in these types of cases of mergers involving companies engaged in data business. Scrutiny should not be solely based on these entities possessing the data, but also on the way, they may use the data. The companies should not shut out the competitors entirely from using data, or impose excessive conditions on the same. Ways to share data, such as data pooling has been suggested by the Commission which shares the data is such a manner that enhances competition and does not harm consumers' interest.[55]

In another case, the German competition law authority, the *Bundeskartellamt* investigated whether Facebook has dominant position in Germany and whether it is engaging in abuse of dominance. The assessment was started in 2016 and the result of the assessment was released in December 2017. The assessment focused on the terms and usage of Facebook, which indicated that the Facebook had the right to collect user data from third party sources as well as the permission to use them. The sources were twofold; firstly, on many websites, there was an embedded '*like*' button, and when the person clicked them, the Facebook collected data of his use of that website. Data was also collected whenever any websites option to '*login via Facebook*' or '*Facebook Analytics*' was used. Secondly, Facebook has bought other social media brands such as WhatsApp, Instagram etc. and collected data from users who are availing these services. The data collected

54 Mary Loughran & John Gatti, *Mergers: Main developments between 1 January and 30 April 2008*, COMP. POL'Y NEWSL. (European Commission), 2008.

55 Margrethe Vestager, *Big Data and Competition, transcript, European Commission*, EUROPEAN COMMISSION (Sep. 29, 2016), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition_en.

from these services would then be merged with the data collected from Facebook. Regardless of the setting parameter the person would have chosen, the collected data would be linked to the specific user account, which would then be shared to third party. The actions of Facebook to collect data from these sources and merge it with data obtained from Facebook, and then link it to a particular user account was not expected by the consumers. The only way for them to deal with the situation is to avoid the network completely and not create any account on any social media platform owned by Facebook.

The user was confronted with a 'take it or leave it' scenario where the person has no option but to succumb to the conditions set out by Facebook to access it, or they cannot use the Facebook network at all. Further, the users who had made their accounts beforehand were locked in. Facebook privacy policies had changed over time. Those who created their Facebook account when the terms were more privacy oriented are now having built their account, and done much work on it will find it near to impossible to switch to other social media platform without losing out on much of the data. This was held by the German authority to be an abuse of dominant position. The damage that has been suffered by the users is considered to be due to their lack of control over the use of their personal data. It is further in breach of their fundamental rights under the "*Charter of Fundamental Rights of the European Union*."[56] Though it is hard to set the criteria that can be used for qualifying the abuse, the said authority hints at both "biased consent" and "breach of expectations of the users" to qualify as their loss of control over the data. These notions seem to relate to the lawfulness ground of the processing of personal data according to the Article 6.[57] The *Bundeskartellamt* case is the first of its kind and while there were no penalties imposed on Facebook for this alleged breach of competition law, it was mandated to stop this conduct, as well as obtain explicit user permission when engaging in such type of behavior. The *Bundeskartellamt* decision has the potential to expand the scope of EU competition law. This decision brings competition law and data protection law together to ensure that data subject rights are protected and dominant undertakings cannot abuse their position to the detriment of data protection.

The EU Commission is gave more weight to data in competition law through the merger clearance process. The EU Commission have recognized that the merger of two businesses may cause competition concerns, especially where one or both of those businesses hold a lot of personal data

[56] 2012/C 326/02, art. 7 & art. 8, of Charter of Fundamental Rights of the European Union, 2012, O.J. (C 326).
[57] Charlotte Ducuing, *When competition law and data protection law embrace: the German Competition Authority investigates Facebook*, KU LEUVEN (Jan. 09, 2018), https://www.law.kuleuven.be/citip/blog/when-competition-law-and-data-protection-law-embrace-the-german-competition-authority-investigates-facebook/.

which is potentially very valuable, and further has the regulation where the companies merging have to provide correct information. Quite likewise to *Bundeskartellamt* case, on majorly the same allegations, Facebook and WhatsApp came under fire from the EU Commission after the investigation of their 2014 merger, where it had declared that it would be unable to combine the data from the two services namely WhatsApp and Facebook. Here, Facebook were fined €110 million for misleading the EU Commission.[58]

GDPR enables subjecting the organisations to fines of up to €20 million or 4% of global turnover, whichever is greater, for breaches of data protection law. Along with the large fines levied against organisations infringing competition law, this could lead to serious penalties for businesses. These findings serve as a reminder to businesses who rely heavily on personal data that not only do they need to comply with data protection laws but they should also be aware of the competition laws and the impact they could create on the way data is to be used.

IV. CONCLUSION

A balance between an effective data based innovation, fair competition and reasonably good levels of data protection is a hard challenge for any legal regime to obtain. For the EU, the application of the new data protection rules will be challenging in the online context. GDPR is still at the nascent stage, and until there are sufficient court decisions in the matter that involve the application of GDPR, one would have to deal with the data protection risks that would be caused by its some of the unclear and abstract rules. As the legal interpretations also vary, companies can potentially benefit from the most favorable terms in their business practice. [59] In the same way, most competition authorities can raid businesses and private premises in order to obtain documents that evidence presumed infringements of competition law brought about by an act that is a violation of the privacy and data protection rules.

Thus, the concept of data protection plays a part in the competition law, and its impact goes beyond the ancillary role it plays in competitive assessment; or the role when the authorities are expected to respect the data privacy rights of the users in the investigations. Rather, one can expect the role to be larger, as it slowly gains a material influence on application of competition law in online businesses. The laws should be taken together and constructed harmoniously, after all the

[58] European Commission Press Release IP/17/1369, Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover (May 18, 2017)
[59] Supra note 29, at 136.

fulfilment of the objectives of both these laws in their application in digital domain can only be a result of them adding to each other.

DEVELOPMENT OF DEFENCE OF ILLEGALITY IN CONTEXT OF LIABILITY OF AUDITORS

*Manvi Khanna**

ABSTRACT

The defence of illegality prohibits a party from seeking compensation from another party for its own loss, if its cause of action is based on its own illegal and immoral conduct. This article aims to provide an overview on the development of defence of illegality in common law jurisdictions and its application in the corporate contexts for determination of the liability of auditors. Auditors are appointed by the company to act as a watchdog for the company and keep a check on its accounts. The question of liability arises when an auditor fails to detect certain unlawful acts that ultimately cause losses to the client company. However when these unlawful acts are committed by a member or members of the company itself, the professional accountability of the auditors fall into a grey area. In recent past an auditor's potential liability has increased on account of judgements restricting the application of this defence. The article aims to highlight the suitable approach which can be adopted in India, where no such case has arisen, by striking a balance between company's claim and auditor's defence keeping in mind the contexts of the case.

KEYWORDS: *Illegality, Corporate claims, Auditor's liability, Public policy, Judicial confusion*

I. INTRODUCTION

The defence of illegality is a common law principle[1] which was defined in *Holman v. Johnson* by Lord Mansfield. *Ex turpi non causa oritur actio* is a well founded maxim in tort as well as contracts which means that *"no court will lend its aid to a man who founds his cause of action on an immoral or an illegal act."*[2] In relation to contractual obligations the two principles laid down in *Stone & Rolls Ltd. v. Moore Stephens* (hereinafter, *Stone & Rolls Ltd.)* by the House of Lords, were that

* **4TH YEAR STUDENT OF B.B.A., LL.B(H) NATIONAL LAW UNIVERSITY ODISHA.**

1 Gagen Sharma (as former Liquidator of Mama Milla Ltd.) v. Top Brands Ltd., Lemione Services Ltd., Barry John Ward (as Liquidator of Mama Milla Ltd.) [2015] EWCA (Civ) 1140 (UK).

2 Holman et Al' v. Johnson, alias Newland (1775) 1 Cowper 341 (UK).

firstly, the Court should not enforce contracts which are forbidden either expressly or impliedly or are formed with the intention of committing an are forbidden either expressly or impliedly or are formed with the intention of committing an act illegal in nature and *secondly,* the Courts should not assist a claimant to receive an advantage from his or her own wrongdoing.[3] This defence is grounded in public policy and is available in only in exceptional cases to preserve the integrity of justice system.[4]

The application of this defence is still uncertain, when there is a claim by a company, whose members are themselves involved in the unlawful act, against its auditors on their failure to detect unlawful acts. In recent past an auditor's potential liability has increased on account of judgements across common law jurisdictions restricting the application of ex turpi causa and on account of increased responsibility of auditors in relation to fraud reporting.

The test of attribution in case of companies was stated in *Lennards Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd*., that the active and directing will of a corporation must be sought in the person who may be called the agent and who is the directing mind and will of the corporation.[5] In *El Ajou,* it was held that "the directing mind and will could be found in different persons in respect of different activities" and it is necessary to identify the person who manages or controls in relation to the act at that point.[6]

In *Stone & Rolls Ltd.,* the knowledge of the chairman was attributed to the company and was held to be the directing mind and will of the company and claim against the auditor was rejected on the grounds of illegality.[7] This article aims to draw attention towards a suitable approach which can be adopted to neither allow the auditor to escape his or her liability nor the claimant to take advantage from his or her own wrongdoing if such a scenario arises in the Indian context.

II. APPLICABILITY OF THE DEFENCE IN INDIAN CONTEXT

No direct judgements exist in the Indian Jurisdiction on the application of this defence of illegality in corporate contexts, however the judgements from various common law jurisdictions around the world namely United Kingdom, Hong Kong, Canada give an

[3] Stone & Rolls Ltd (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).
[4] Vincent Hall v. Jean Hebert, [1993] 2 S.C.R. 159 (Can.).
[5] Lennards Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] AC 705 (UK).
[6] Abdul Ghani El Ajou v. Dollar Land Holdings Ltd. Factorum NV [1993] EWCA Civ 4 (UK).
[7] Stone & Rolls Ltd (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).

insight into the evolving jurisprudence of this defence and its application in various scenarios.

In *Patel v. Mirza,* it was observed by Lord Neuberger that it is always advantageous for all common law jurisdictions take up similar approach.[8] Moreover it has been held by the *FHR European Ventures LLP v. Cedar Capital Partners LLC* by the Supreme Court, that all jurisdictions should take decisions which favour harmonizing the common law around the world.[9] Thus, various common law judgements provide a basis for interpreting this defence vis-a-vis the liability of auditors in the Indian context.

A. Auditor's Duty To Report Fraud

Section 447(1) of the Companies Act, 2013 provides an inclusive definition of fraud, stating that "any act, or an omission, or abuse of position and concealment of a fact committed by any person with intention to cheat, deceive, to gain undue advantage from, or to injure the interests of, the company or its creditors or its shareholders or any other person, irrespective of the fact that there is a wrongful loss or gain."[10] To establish that the there has been breach of duty on the part of the auditor in detection of fraud, it is necessary to establish that *firstly* there existed a duty of care on his or her part and *secondly* that there has been a breach of this duty of care.

1. Existence Of The Duty Of Care

There should be a valid contract between the company and the auditors to show the existence of duty of care. When a careful audit could have easily detected the fraud and the company could have been notified regarding the same by the auditor, there is a breach of duty of care on his or her behalf. Section 143(12) to 143(15) of Companies Act 2013 contains provision relating to reporting of fraud by the auditors to be read along with Rule 13 to the Companies (Audit and Auditors) Amendment Rules, 2015.[11] The rule states that if the auditor has "reason to believe" that fraud which either involves or which could involve an amount of one crore rupees or more has been

[8] Patel v. Mirza [2016] UKSC 42 (UK).
[9] FHR European Ventures LLP & Ors. v. Cedar Capital Partners LLC [2014] UKSC 45 (UK). ; See also, Int'l Energy Group Ltd. v Zurich Insurance PLC UK [2015] UKSC 332 (UK).
[10] The Companies Act, No 18 of 2013, COMP. ACT, sec. 447(1).
[11] The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

committed against the company, he or she is mandated to report the matter to the Central Government within two months of becoming aware. Whereas when the fraud involves amount less than one crore rupees, the auditor is required to report the matter to the audit committee or the Board within two days of the knowledge.[12] Moreover, Ministry of Corporate Affairs requires it to be disclosed in the Board's Report which would contain the nature of the fraud and a description of the amount and parties involved and the remedial actions taken.[13]

In *Moulin v. Global Eyecare Trading Ltd. (In Liq.) v. Commissioner of Inland_Revenue* (hereinafter, *Moulin),* Lord Walker held that where an auditor had undertaken to use his reasonable professional skill to detect the fraud, the law should not absolve them of the contractual obligations. Internal fraud is the very thing from which auditors are supposed to protect the company from.[14] In *Caparo Industries Plc. v. Dickman,* it was held that the duties of an auditor are duties of reasonable care in carrying out the audit of the company's accounts.[15] In *CA Rajesh Dudhwala v. Disciplinary Committee* it was observed by the Court that since a number of stakeholders including the government rely on the findings of the auditors their duty increases manifold to be diligent, conscious and cautious.[16] Law has prescribed a very important role to auditors, they hold an obligation to the shareholders of the company to investigate and report the true and fair picture of the finances.[17]

2. There is a Breach of Duty of Care

Once it has been established that there exists a duty of care, the second step is to prove breach of this duty. Non-compliance of Section 143(12) read with notification it is punishable with a fine of one lakh rupees which may be extended to twenty five lakhs.[18] The requirement under Section 143(12) only ideals with frauds by the officers or the employees of the company and not any third parties. The Court in *Berger Sons and Company v. Adams* held that the auditors should not rely on uncorroborated evidence.[19] If any reasonable auditor with use of his professional skills could have

[12] The Companies Act, No 18 of 2013, COMP. ACT, sec. 12-15.
[13] Id.
[14] Moulin Global Eyecare Trading Ltd. (In Liq.) v. Commissioner of Inland Revenue, [2014] HKCFA 22 (H.K.).
[15] Caparo Industries PLC. v. Dickman & Ors. [1990] 2 AC 605 (UK).
[16] CA Rajesh Dudhwala v. Disciplinary Committee, Special Civil Application No. 10813 of 2012 (India).
[17] Price Waterhouse & Ors. relating to the case of Satyam Computer Services Ltd., WTM/GM/DRA 1/83/2017-18 (India).
[18] The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).
[19] Berg Sons & Co. Ltd v Adams [1993] BCLC 1045 (UK).

detected the fraud, it would be considered breach of duty if the auditor fails.[20] The standard of reasonable care and skill would depend on the circumstances of each case. [21]

Deloitte & Touche v. Livent Inc, is a landmark judgement regarding the potential legal defences available to an auditor in Canada. In this case receiver of Livent Inc., a live theatre production company brought a claim against its auditors, Deloitte for its failure to discover the fraud being perpetrated at the direction of the CEO and CFO. Livent had hidden its unprofitability by manipulating accounts which was later confessed by the Livent's accounting staff. The Supreme Court of Canada held the auditor responsible for the losses suffered by the Company and rejected the illegality defence for public interest reasons.[22] It held the negligence as a foreseeable and proximate cause of the losses.[23] In *Re: Kingston Cotton Mills,* Justice Lopes said that an auditor is a watchdog and not a blood hound, he is not bound to be a detective nor he has to approach with a conclusion that there is something wrong.[24] The negligence is required to be established on the part of auditor to make him liable. Moreover, the auditor is required to employ reasonable skill and care but not begin with suspicion.[25]

It is a settled principal in Indian jurisprudence as well that auditors must not be made liable for not being able to track carefully laid scheme of fraud when there was nothing to raise suspicion in their minds. In Indian scenario, the ruling in *Tri Sure* still holds persuasive, where the Court held that Company cannot sue its auditors for their failure to detect their own fraud.[26] Only shareholders who are not privy to this contract, between company and auditors can take action against the auditors in common law for breach of the statutory duty. The liability on auditors in such a scenario is miniscule and they get away with paying minimum statutory penalties.[27]

III. CORPORATE ATTRIBUTION VIS-A-VIS DEFENCE OF ILLEGALITY

The defence of illegality prohibits a party from seeking compensation from another party for its

20 Tri-Sure India Ltd. v. A.F. Ferguson & Co. & Ors., (1987) 61 Comp Cas 548 (Bom) (India).
21 State represented by CBI, SPE, Hyderabad v. Byrraju Ramalinga Raju, C.C.Nos. 1, 2, 3 of 2010 (India).
22 Deloitte & Touche v. Livent Inc. (Receiver of), [2017] 2 S.C.R. 855 (Can.).
23 Ibid.
24 In Re Kingston Cotton Mill Co. (No.2) [1896] 2 Ch. 279 (UK).
25 Ibid.
26 Tri-Sure India Ltd. v. A.F. Ferguson & Co. & Ors., (1987) 61 Comp Cas 548 (Bom) (India).
27 Ruchir Sinha & Nishchal Joshipura, *The Great Deception Satyam's accounting scandal offers salutary lessons to Companies* ,(Sep.29,2019,10:00AM),http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Ma%20Lab/AsiaLawSatyam.pdf.

own loss, if its cause of action is based on its own illegal and immoral conduct. The application of defence of illegality in corporate contexts is a novel concept and notwithstanding some judgements from various jurisdictions its scope in cases of auditor's liability remains a grey area. The first distinct application of this defence was in the case of. *Stone & Rolls Ltd.,* where the House of Lords majority denied the claim of the company against its auditors.[28]

The defence of illegality has two limbs, *firstly* that courts will not assist in enforcing illegal contracts and *secondly* that Courts will not assist the claimants to recover from their own wrongdoing. In context of companies, the first limb has a strict application and Courts do not enforce an illegal contract to which company is a party notwithstanding the presence of innocent directors or shareholders.[29] However, the second limb i.e. the court will not assist the claimants to recover from their own wrongdoing has been a contentious issue and does not have a strict application. The application of this defence in *Stone & Rolls Ltd.*[30] and *Safeway v. Twigger* [31] is an exception.

It has now been conceded that courts will only prevent claimants from recovering the benefits of their own wrongdoing when unlawful conduct is their own and is not conduct for which he is liable vicariously.[32] In so far as this defence prevents claimants from suing to recover from their own personal wrongdoing it cannot be made applicable to companies, as a company cannot function without acts of other individual on its behalf.[33] Lord Scott in his dissent in *Stone & Rolls Ltd.* also said that ex turpi causa is unnecessary in such corporate contexts.[34]

Corporate attribution is based on the principle of separate legal entity of companies and is invoked to ascertain identity of individuals within a company whose mental liability can be attributed to that of the company for purpose of foisting liability.[35] In *Moulin,* attribution was defined as a process of reasoning by which the conduct or state of mind of a natural person is to be treated as that of the company for purpose of determining the company's legal liability. An individual within a company may act on or know a wide variety of things but they will not be held as company's act

---

28 Stone & Rolls Ltd (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).
29 Ashmore, Benson Pease & Co. Ltd. v. AV Dawson Ltd. [1973] 1 W.L.R. 828 (UK).
30 Stone & Rolls Ltd (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).
31 Safeway Stores Ltd. & Ors. v. Twigger & Ors. [2010] EWCA (Civ) 1472 (UK).
32 Stone & Rolls Ltd (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).
33 Meridian Global Funds Management Asia Ltd. v. The Securities Commission, [1995] 3 NZLR 7 (P.C.).
34 Stone & Rolls Ltd (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).
35 V. Umakanth & Mihir Naniwadekar, *"Corporate Criminal Liability & Securities Offerings: Rationalizing the Iridium-Motorola Case: Iridium India Telecom Ltd. v. Motorola Incorporated & Ors"*, NLSIU REV. 144,148-149 (2013), https://www.jstor.org/stable/44283613.

in every such circumstance.[36]

A. A Critique of Stone & Rolls Limited v. Moore Stephens

This House of Lords judgement given by a bench of five judges is a landmark judgement in context of reliance of auditors on the defence of illegality to bar a claim by their client. Stone and Rolls was in essence a one man company used by Mr. Stojevic to perpetrate fraud on banks. When the company became insolvent and entered into liquidation, the claim was brought by the Company against its auditors for its failure to detect fraudulent transactions.

It was held by a 3:2 majority that Moore Stephens was entitled to the defence as the Company was a one man company. The majority arrived at this conclusion by attributing the fraudulent acts of the director to the one man company. Mr. Stojevic, the only shareholder was the controlling and directing mind of the company who perpetrated the fraud and hence the company too was vested with the knowledge of the fraudulent scheme. A company is a separate legal entity and being a fictional person can only act through individuals.[37]The decision of the Court was limited to puppet companies and non puppet companies could still claim against the negligent auditors or other potential harm causing parties. Even when the losses sought to be recovered had arisen with some wrong of the company, non puppet companies could claim against their directors, insurers, auditors etc. [38]

The House of Lords committed an error in first ascribing the special status to one man companies and then analyzing duties of auditors to such companies. There had been a failure to separate the auditor liability argument from ex turpi causa argument. It was held by the Court that since the damages would go either to the creditor bank (in case of insolvency) or to Mr. Stojevic (in case of solvency), if the claim is successful and both of them could not sue directly, therefore the company could not sue either to get an indirect benefit. This logic appears to be unsound as in such cases the audits of one man companies or insolvent companies becomes pointless.

---

[36] Moulin Global Eyecare Trading Ltd. (In Liq.) v. Commissioner of Inland Revenue, [2014] HKCFA 22 (H.K.).
[37] Patrick Perry, *The scope and development of the illegality defence – key issues for auditors and directors,* (Sep 30, 2019, 11:00AM), https://www.clydeco.com/uploads/Files/Updates/The_Scope_and_Development_of_the_Illegality_ Defence_%E2%80%93_Key_Issues_for_Directors_and_Professionals_(19.06.15).pdf.
[38] Jetivia SA & Anr. v. Bilta (UK) Ltd. (In Liq.) & Ors. [2015] UKSC 23 (UK).

An interesting observation made by *Sarah Worthington* in her paper *Corporate Attribution and Agency: Back to Basics,* was that the auditors had failed to detect that funds were going out of the company to Mr. Stojevic. There was disregard to the claim of the company as funds had been acquired illegitimately however the claim of company would have been the same even if those funds were acquired legitimately. Mr. Stojevic was defrauding the company and it wasn't a corporate fraud as no corporate benefit was going to accrue to the company. Thus, company was seeking no benefit from its own wrongdoing and the ex turpi argument should have failed.[39]

House of Lords allowed an admittedly culpable auditor to preclude himself from the liability for negligent audit practice which was at a detriment to the defrauded company and the creditors. Lord Neuberger said in *Jetivia v. Bilta*, that Stone and Rolls had no coherent ratio and should be put aside.[40] Thus the application of *Stone & Rolls Ltd.* can be restricted to the unique facts of this case.

B. Reliance of Fraud Exception in Stone and Rolls v. Moore Stephens

The fraud exception or the Hampshire Land Principle prevents the knowledge of an agent who intents on defrauding the principle in the same transaction to be attributed to the principal.[41] The rationale of this principle is to avoid injustice. The obvious purpose is to avoid directors or other members of the company to rely on their own wrongdoing and claiming against a company.

In *Moulin,* Lord Walker discussed the interaction between the rules of attribution and fraud exception. The distinction depended on the nature of the proceedings in which attribution has to be applied. For instance, if a company is being sued by a third party and if the company is responsible for the dishonest conduct of its directors, the fraud exception is of no application. The knowledge of the dishonest directors can be attributed to the company and they can be found liable to third party for its conduct. However, when the company itself is the victim or the liquidators want to hold its own dishonest directors accountable for the losses suffered by the company the exception will apply. It is because it would be unjust to allow a fraudulent director to make use of his own breach to his employer as a defence, as the director cannot say that his dishonest conduct

[39] Sarah Worthington, *"Corporate Attribution and Agency: Back to Basics"*, 133 L. Q. REV. 118, 124 (2017) https://doi.org/10.17863/CAM.7604.
[40] Jetivia SA & Anr. v. Bilta (UK) Ltd. (In Liq.) & Ors. [2015] UKSC 23 (UK).
[41] In Re Hampshire Land Co. [1896] 2 Ch 743 (UK).

is attributed to the company such that the dishonest company cannot bring a claim against him. Moreover he cannot be allowed to escape the liability for breach of his or her duty which had caused damage to the company when the claim is brought against him.[42] However in case of auditors which belong to neither of the category, Lord Walker said in Moulin that an auditor should not be absolved of his obligations if he had undertaken to use reasonable professional skill to discover a fraud.[43]

It is imperative to apply the rules of attribution in a correct manner which brings us to the conclusion, that individuals cannot benefit from the claim that their own acts can be counted as company's acts to give them a defence or claim against the company. Moreover when all elements of a claim by the company are being fulfilled and the resulting loss due to auditor's breach of duty is proved, the denial of company's claim would be unfair. Thus, in Stone and Rolls' claim against the auditors, this doctrine should not have played a role.[44]

C. Relevant factors to be considered for Purpose of Attribution

The factors to be considered to attribute or ascribe the acts, knowledge, intentions of certain persons to the company would differ from case to case basis, however the developing jurisprudence on this area has provided a certain factors which might be useful in all the cases Some of these factors are a) a legitimate and a genuine business, b) the context of the claim, c) non dependence on whether the company is a one man company or not and d) link with the fraud.

a) A Legitimate And A Genuine Business

In *Singularis Holdings Ltd. v. Daiwa Capital Markets* (hereinafter, *Singularis)* it was held that the company which carried on a legitimate and substantial business could not be said to be created for perpetuating fraud.[45] Unlike *Stone & Rolls Ltd.* which was created for perpetrating fraud and was throughout used as a vehicle to perpetrate fraud[46], in *Singularis* it was established that the company was formed to carry out a substantial and legitimate business, for which it had borrowed substantial sums of money under a variety of funding arrangements. Moreover the company had a genuine

[42] Jetivia SA & Anr. v. Bilta (UK) Ltd. (In Liq.) & Ors. [2015] UKSC 23 (UK).
[43] Moulin Global Eyecare Trading Ltd. (In Liq.) v. Commissioner of Inland Revenue, [2014] HKCFA 22 (H.K.).
[44] Supra note 39, at 128.
[45] Singularis Holdings Ltd. (In liq.) v. Daiwa Capital Markets Europe Ltd. [2018] EWCA Civ 84 (UK).
[46] Stone & Rolls Ltd. (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).

business which it carried for a number of years before the matter came to the court.

b) The Context Of The Claim

The next important consideration is to know that for attribution whose acts were "*for this purpose* to be counted as the act of the company.[47] This vital qualifier emphasises on two important requirements *firstly*, the separate legal entity of the company and *secondly,* the particular act for which attribution is required to be done. A person who works in a corporate firm may know or act on variety of things but they are not considered as company's actions or knowledge for all purposes. The context of the claim helps us in understanding what acts are relevant for the purpose of attribution.[48] In *Hall v Herbert*, the Supreme Court of Canada held that when the defendant did owe a duty of care, the illegal act of the plaintiff did not negate claim per se.[49] Thus legal claim in the issue is to be given paramount consideration rather than external factors such as identity of the parties or conditions of the market.[50]

c) Rules Of Attribution Do Not Depend On Whether The Company Is A One Man Company Or Not.

The defence of illegality is concerned with whether the company seeks to take advantage from its own illegal conduct.[51] The same can be analysed through rules of attribution which do not depend on whether Company is one man company or not nor on whether the company is solvent or not.[52] In *Singularis,* a one man company was defined as one in which whether there are one or more than one controllers, there are no innocent directors or shareholders.[53] In most of the cases applying the straitjacket formula of one man company leads to disregard for the shareholders or creditors of the company behind the veil. Moreover, the rules of attribution are policy based matters and when the company is in a precarious financial position the Court should consider the relevant constituencies which would ordinarily include the interest of creditors.[54] In *Jetivia v. Bilta,* it was held that whether the company is a one-man firm or has innocent participants will not make a difference to

[47] Meridian Global Funds Management Asia Ltd. v. The Securities Commission, [1995] 3 NZLR 7 (P.C.).
[48] Moulin Global Eyecare Trading Ltd. (In Liq.) v. Commissioner of Inland Revenue, [2014] HKCFA 22 (H.K.).
[49] Vincent Hall v. Jean Hebert, [1993] 2 S.C.R. 159 (Can.).
[50] Supra note 39, at 124.
[51] Holman et Al' v. Johnson, alias Newland (1775) 1 Cowper 341(UK).
[52] Supra note 39, at 128.
[53] Singularis Holdings Ltd. (In liq.) v. Daiwa Capital Markets Europe Ltd. [2018] EWCA Civ 84 (UK).
[54] Kinsela v. Russell Kinsela PTY Ltd., (1986) 4 NSWLR 722 (Austl.).

the outcome of attribution.[55] All the remaining claimants need to be given due consideration.[56] Moreover in issues of corporate attribution it is imperative to pay regard to the separate legal entity principle of the company. For instance in *Stone & Rolls Ltd.,* with or without few innocent directors, the Company could have still been directly responsible for its own illegal conduct. There should not be automatic attribution for one man companies.[57]

d) Link With The Fraud

Another important consideration for corporate attribution would be the link of the company's claim with the fraud. If the there is an inextricable link with the fraud then, claim of the company is bound to fail.[58] In *Stone & Rolls Ltd.* it was pleaded by Moore Stephens in their defence that claim advanced by Stone and Rolls was inextricably linked with its own dishonest acts, thus claim should be barred by the illegality defence.[59] When there is no prerequisite to rely on the facts of a case which disclose the illegality to bring out the claim and there is no inseparable link with between the relief sought and the illegal actions of the company and the directors, the defence of illegality would be of no application. When there is no causative relationship of illegality to the loss claimed and it is simply part of the background, there would be no close connection to the loss.[60] In *Saunders v. Edwards*, it was held that when the plaintiff suffered a genuine wrong and the illegality on his part is incidental the claim is likely to succeed.[61]

IV. DEFENCE OF ILLEGALITY VIS-A-VIS PUBLIC POLICY

The underlying reason for application of defence of illegality is that it would be contrary to public policy to allow a claim which is harmful to the integrity of the legal system. However, defence of illegality being a public policy tenet, should apply only in cases where there is requisite depravity to deny the wrongdoer his or her claim in the Court and should not be used unnecessarily. In *Patel v. Mirza,* the Supreme Court held that public interest would be served in the most effective manner if a principled and fair assessment of the considerations is made rather than a formalistic

[55] Jetivia SA & Anr. v. Bilta (UK) Ltd. (In Liq.) & Ors. [2015] UKSC 23 (UK).
[56] Stone & Rolls Ltd. (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).
[57] Supra note 39 at 125.
[58] Supra note 37.
[59] Stone & Rolls Ltd. (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).
[60] Gagen Sharma (as former Liquidator of Mama Milla Ltd.) v. Top Brands Ltd., Lemione Services Ltd., Barry John Ward (as Liquidator of Mama Milla Ltd.) [2015] EWCA (Civ) 1140 (UK).
[61] Saunders v. Edwards [1987] 1 WLR 1116 (UK).

application which would produce arbitrary and unjust results.[62] The dissenting judgement in S*tone & Roll*s *Ltd.* held that the delinquent auditors should not be relieved of their liability and it would be against public policy and would be a disproportionate response to the wrong done by them.[63] There are certain relevant factors to be considered to find whether the public interest is being harmed; *firstly,* to consider the underlying reason of the provision that has been transgressed and whether by denial of claim that purpose is being enhanced; *secondly* whether any other public policy is being impacted by denial of the claim and *lastly* whether the denial of the claim is a proportionate response to the illegality done.[64]

V. RECOMMENDATIONS AND SUGGESTIONS

Law on the application of defence of illegality in context of corporate claims has been inconsistent across common law jurisdictions and a matter of great judicial confusion. The door to this defence which was opened for auditors in *Stone & Rolls Ltd.* can be restricted to unique facts of that case, where the client company was a one man company.

The application of this defence in corporate claims has certain fundamental flaws and it is imperative that a due regard is paid to the rules of attribution and the principle of separate legal entity, which are fundamental to operations of the company. Corporate attribution focuses exclusively on identifying whose acts count as the acts of company. No straitjacket formula for automatic attribution can be adopted for one man companies as the rules of corporate attribution do not depend on whether it is a one man company or not. Moreover, Hampshire Land Principle is not a special rule of attribution but an obvious conclusion of the attribution rules that individuals cannot benefit from the claim that their own acts can be counted as company's acts to give them a defence or claim against the company.

It is imperative to understand that frauds can have a terrible impact on the operations of a company and its reputation. It would be crucial to assess whether fraud detection could have prevented the losses suffered by the company. Moreover when there are other innocent members in the management of the company and it is not per se a one man company, then to ascribe the acts, intention or knowledge of the acts of certain members to the company would be highly improbable.

[62] Patel v. Mirza [2016] UKSC 42 (UK).
[63] Stone & Rolls Ltd. (In Liq.) v. Moore Stephens (A Firm) [2009] UKHL 39 (UK).
[64] Patel v. Mirza [2016] UKSC 42 (UK).

It would not be easy for auditors considering the latest judgements to preclude themselves of their liability when sued for failure to detect fraud considering they cannot be considered to be wholly innocent third parties because of the duties imposed on them.

Law has prescribed a very crucial role to auditors in India, which influence the minds of a lot of stakeholders, they hold an obligation to investigate and report the true and fair picture of the finances. Moreover considering the corporate frauds which have already taken place, potential liability of auditors has increased and amendments in law have been made by the government as an attempt to ensure that frauds are detected at early stages. In the Indian context the issue regarding application of the defence of illegality by the auditors has not arisen yet, however if it arises the Courts would be required to preserve the reliability of the legal system and adopt a more context specific approach to produce results which are just, fair and a proportionate response to the wrongs committed by the auditors.

INSOLVENCY LAWS: THE PAST, PRESENT & FUTURE

*Jahanvi Grover & Reshma Nair**

ABSTRACT:

The paper titled 'Evolution of the Insolvency Laws in India' revolves around the metamorphosis of the previously existing scattered and fragmented laws to the enactment of the Insolvency and Bankruptcy Code, 2016. The authors attempt to analyse the compelling reasons behind such evolution and the trajectory of the implementation of the new law through its various judicial interpretations. The paper is divided into 7 parts in order to study the progression of the Code of 2016 and its asses its impact; first- Introduction to the paper, second-The insolvency resolution process, third- Time Period for insolvency resolution process , fourth- Committee of Creditors, fifth- Difference between Financial and Operational Creditors, sixth – Homebuyers included in the ambit of financial creditors, seventh – Conclusion of the paper. The author seeks to solve the problem of:

1. *Distinction between Financial Creditors and Operational Creditors.*
2. *Inclusion of Homebuyers under the ambit of Financial Creditors.*

Lastly, the authors conclude that the newly emerging law has a very strong foundation upon which various questions of law have arisen. However, the law is set to become stronger with its newly debated aspects with each passing case and its subsequent judgments.

KEYWORDS: *Insolvency and Bankruptcy Code, Insolvency Laws, Bankruptcy Laws, Financial and Operational Creditors*

I. INTRODUCTION

In the absence of a comprehensive law dealing with insolvency and bankruptcy in the country and a subsequent rise in the Non-Performing Assets in the industry made for two compelling reasons for the enactment of the Insolvency and Bankruptcy Code, 2016**("Code")**. The aim for the enactment of the Code was to amend and consolidate the previously existing scattered

* **IIIRD YEAR STUDENTS OF LL.B AT SYMBIOSIS LAW SCHOOL, PUNE.**

insolvency laws in the country to reorganize and formulate the insolvency resolution process in a manner which is effective and time bound. The Code was preceded by various provisions relating to insolvency and bankruptcy scattered across various legislations i.e. Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions At, 1993, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. Further, there was no single authority dealing with the issue wherein High Court dealt with issues of Liquidation and the Courts dealing with Insolvency. [1] This framework lacked effectiveness as it did not operate in a time bound manner therefore rendering itself to be inadequate. The insufficient laws further stood to impact the business and the investments in the country. The Code, additionally is a feather in the cap to facilitate 'Ease of Doing Business' and encouraging investments thereby leading to accelerated economic growth.

The Insolvency and Bankruptcy Code, 2016 is the bankruptcy law in India which has been formulated in order to effectively facilitate the resolution processes of indebted individuals as well as organizations in manner which maximizes the value of time attached to such processes. In India, the resolution process 4.3 years on an average which was higher than the time taken in countries like United Kingdom's (1 year), United States of America (1.5 years) etc.[2] Such delay was the result of the perpetual state of dubiety of the laws.

Further, it is a well-known fact that the economic development of a country is in direct positive correlation with the economic freedom in the country. It is therefore the duty of the State to ensure that its people are provided with the right institutional milieu and laws. It is the requirement of every market that they are provided with freedom at three stages i.e. free entry, free competition, and free exit. The existence of such laws ensures the economic growth of the country.[3] To enable such growth, the Government decided to make a paradigm shift and to now shift attention to the enactment of the Insolvency and Bankruptcy Code, 2016.

[1] https://ibbi.gov.in/uploads/resources/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf.
[2] http://www.prsindia.org/theprsblog/insolvency-and-bankruptcy-code-all-you-need-know.
[3] https://www.ibbi.gov.in/uploads/publication/IBBI_Newsletter_Web.pdf.

The Journey of IBC, 2016 has witnessed various milestones. It was the speech of the Hon'ble Finance Minister, Mr. Arun Jaitley, on the Budget in the year 2014-2015 (10.07.2014) that threw light on the need to create an entrepreneur friendly legal bankruptcy framework[4]. In furtherance of the goal being set by the Finance Minister, the Bankruptcy Law Reform Committee ***("BLRC")*** under the Chairmanship of Dr. T.K. Vishwanathan analyzed and studied the corporate bankruptcy legal framework in India and released the Interim Report for recommendations on February 11, 2015. The second time, Mr. Arun Jaitley, in his Budget Speech on (28.02.2015) for the year 2015-2016, described the importance of the legal framework with respect to bankruptcy laws which brings about legal certainty and speed. He further described the failure of the then existing laws of Sick Industrial Companies Act (SICA) and Board for Industrial and Financial Reconstruction (BIFR) to achieve their objectives.[5]After much discussion and debate, BLRC submitted its Report on 04.11.2015. Finally, the Code post being passed by the Lok Sabha and the Rajya Sabha was enacted on May 28, 2016.

II. THE INSOLVENCY RESOLUTION PROCESS ("IRP")

The inability to raise money to meet financial obligations or to pay off the outstanding debts to the creditors or lenders by an individual or an entity is the state of insolvency. It is a situation wherein the liabilities value more than the assets of an entity. The best solution to resolve insolvency is i) To modify the repayment plan in accordance with the creditors, ii) selling the assets to pay back the creditors or other lenders. [6]

As explained above, the insolvency and bankruptcy code explains the IRP as a process wherein the debtors in accordance with the creditors introduce a new repayment plan to pay off the debts.[7] The IRP can be initiated by creditors or debtors through an application as prescribed in the regulation. [8]

A) Initiation By Financial Creditors:

A financial creditor himself or along with other creditors or other people can initiate an insolvency process against the entity by filing an application on default according to the

[4]https://www.indiabudget.gov.in/budget2014-2015/ub2014-15/bs/bs.pdf (Para 106).
[5]https://www.indiabudget.gov.in/budget2015-2016/ub2015-16/bs/bs.pdf (Para 36),
[6]https://blog.ipleaders.in/insolvency-resolution-process/.
[7] Insolvency and Bankruptcy Code,2016 (Act 31 of 2016), Chapter III, Part III.
[8] Ibid.

regulations laid down by the central government. [9]The financial creditor along with the application form has to attach a record of the default made as an evidence, has to mention the name of the resolution professional as decided and furnish any other document or information as specified by the board. The adjudicating authority will within 14 days ascertain the default and if satisfied will initiate the process.[10]

The Code is silent on the degree of the proof required to ascertain the default by the NCLT/Adjudicating authority. However in two separate cases the Supreme Court of India stated that NCLT should account only to the extent of the outstanding debt and not an inch more than that of the default. [11] The code has also been taciturn about serving a notice to the debtor about the process entirely. However The Supreme Court of India ruled out that a notice has to be served to the debtor as soon as the IRP process has been initiated. [12]

B) Initiation by Operational Creditors:

To initiate an IRP, the operational creditors have to follow two basic steps. The first being, on default on payment by the debtor the operational creditor will have to *demand* the unpaid debt money.[13] The corporate debtor either will dispute the debt or pay off the debt within 10 days of the receipt of the demand[14]. However, if the Corporate Debtor denies paying off the debt the Operational creditor can initiate the insolvency resolution process.

However, existence of a dispute can act as a barrier to such application. The code defines the term "dispute" includes a suit or arbitration proceedings relating to: (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty.[15] **The Supreme Court in the case of *K. Kishan v. Vijay Nirman Company Pvt. Ltd*[16].** Stated that operational creditors cannot use IBC as a substitute for debt enforcement procedures.[17] An operational creditor cannot initiate an IRP under IBC unless and until all other statutory remedies have been exhausted by the parties.

---

[9] Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016) , sec.7.
[10] Ibid.
[11]SreeMetaliks Limited and Another vs Union of India and Anr, 7 April, 2017 W.P. 7144 (W) OF 2017.
Standard Chartered Bank Ltd. v Essar Steels Ltd, IA 153/2017 with C.P. (I.B) No. 39/7/NCLT/AHM/2017.
[12] Innovative Industries v IDBI Bank, Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017.
[13] Insolvency and Bankruptcy Code 2016, (Act 31 of 2016), sec.8.
[14] Insolvency and Bankruptcy Code 2016, (Act 31 of 2016), sec. 8 ss. 2.
[15] Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), sec. 5 ss. 6.
[16] CA No. 21824 of 2017.
[17] http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/A-Primer-on-the-Insolvency-and-Bankruptcy-Code.pdf.

C) Initiation by Corporate Applicant:

On default by a corporate debtor, a corporate applicant can initiate an IRP under IBC by filing an application, furnishing the books of accounts as an evidence and naming the Resolution Professional. The applicant needs minimum of three fourth of the votes of a shareholder or the partners to initiate the process. [18]

Stages of Corporate Insolvency Resolution Process:

i) Publication of Notice
ii) Processing of Claims
iii) Information Memorandum
iv) Meeting of CoC
v) Calling for Resolution Plan
vi) Extension
vii) Liquidation[19]

Upon the admission of IRP a moratorium is declared against all the proceedings and initiations against the debtor and a Resolution professional is appointed by the NCLT. The moratorium is in operation till the completion of the entire insolvency process. Once a Resolution Professional is appointed the board of directors and the management is suspended. The resolution professionals are required to initiate the insolvency process by taking over and managing the assets. The RP firstly determines the financial position of the debtor by assessing the assets and liabilities he then collates the claims of the creditors. According the new amendment of the IBBI, the RP has to determine the fair value of the assets of the insolvent company. The Resolution Professional also has to provide an evaluation matrix along with the resolution plan.

[18] Insolvency and Bankruptcy Code, 2016, (Act 31 of 2016) sec.10.
[19]http://www.mondaq.com/india/x/732186/Insolvency+Bankruptcy/Procedure+For+Financial+Creditor+Under+IBC.

The evaluation matrix refers to a set of parameters and the manner in which these parameters are to be applied while considering a resolution plan.[20]

III. TIME PERIOD FOR THE INSOLVENCY RESOLUTION PROCESS

The 'time-bound' structure of the Insolvency Resolution Process is indeed a 'stitch in time' saving many companies. The essence of the Code being captured in its Preamble states that the Code 'provides for re-organization and insolvency resolution process of corporate persons, partnership firms and individuals in a time-bound manner for the maximization of the value of the assets'[21]. The Code envisions various stakeholders in the process such as the corporate debtor, creditors, Adjudicating Authority, Insolvency and Bankruptcy Board of India, Information Utilities and Insolvency Resolution professionals and a specific role for each of them which must be performed complying to the various timelines provided by the Code. The National Company Law Appellate Tribunal in its decision in ***J.K. Jute Mills Company Limited v. Surendra Trading Company*** held that timeline of 180 days is mandatory and must be adhered to at all times.

The Code in ***Section 12*** provides for the time limit for the completion of the insolvency resolution process. The Section expressly provides that the CIRP must be completed within a period of 180 days from the date of the admission[22] of the application submitted to initiate the process under Section 12(1). Section 12(2) read with Regulation 40 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 also empowers the resolution professional to file an application to the Adjudicating Authority to extend the period of the CIRP beyond 180 days. However, this must be determined at the meeting of the Committee of Creditors by a vote of 66% of the voting shares.[23]"The period of 180 days for the completion of CIRP is mandatory and every effort should be made by the Resolution Professional and the Committee of Creditors to expedite the matter and try to finalize the resolution plan on the fast track mode and they should not preferably wait for the

[20] The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2016, s. 2(ha).

[21] Preamble of the Code.

[22] Herein, the date of admission of the application has been provided under Section 7(5) in case the application is filed by a Financial Creditor, under Section 9(5) in the application is filed by the Operational Creditor and under Section 10(4) in case the application is filed by the Corporate Debtor himself.

[23]Substituted by an Insolvency and Bankruptcy (Second Amendment) Act, 2018 for the words "seventy five"in Section 12(2) w.e.f. 06.06.2018.

completion of the statutory period of 180/270 days timeline permissible under IBC" as has been stated in ***SBI v. Jet Airways (India) Limited***[24]by NCLT, Mumbai bench. Also, NCLAT noted in ***Prowess International Pvt. Ltd. V. Parker Hannifin India Pvt. Ltd***[25]. The following; "thereafter, in case(s) where all creditors have been satisfied and there is no default with any other creditor, the formality of submission of resolution plan under section 30 or its approval under section 31 is required to be expedited on the basis of plan if prepared. In such case, the Adjudicating Authority without waiting for 180 days of resolution process may approve resolution plan under section 31, after recording its satisfaction that all creditors have been paid/ satisfied and any other creditor do not claim any amount in absence of default and required to close the Insolvency Resolution Process. On the other hand, in case the Adjudicating Authority do not approve resolution plan, will proceed in accordance with law."

However, a question often put forth the Authority is if the application for the extension of the time period so mentioned in Section 12 could be filed post the 180 day period to which the NCLT has formulated its opinion in ***Quantum Limited v. Indus Finance Corporation Limited***[26] wherein it has been stated that the application must be filed 'during' the 180 day period even if the resolution is passed on the 180th day, then the Adjudicating Authority may extend the time period by 90 days.

Further, it is to be noted that a certain time period may be also be excluded for the purpose of counting the 180 day period[27]. It was the decision of the Apex Court in the matter of ***Arcelormittal India Pvt. Ltd v. Satish Kumar Gupta & Ors.***[28]that in case of a resolution plan being upheld by the Adjudicating Authority, the time period taken in litigation must be excluded. Additionally, in the matter of ***Quinn Logistics, India Pvt. Ltd. V. Mack Soft Tech. Pvt. Ltd***[29], by the NCLAT that the Adjudicating Authority being satisfied of the reasons for the exclusion of a certain time period in counting 180 days.

In case of failure to comply with the timeline and the on the Resolution Professional failing to submit the said resolution plan, the Adjudicating Authority has the power to initiate Liquidating

[24]CP2205(IB)/MB/2019.
[25] [2017] 205 CompCas 294.
[26]Company Appeal (AT) (Insolvency) No. 35 of 2018.
[27]VandanaGarg v. Reliance Capital Ltd & Anr.Company Appeal (AT) (Insolvency) No. 603 of 2019
[28]AIR 2018 SC 5646.
[29][2018] 208 CompCas 432 (NULL).

Proceedings. Further, Section 33 of the Code also provides for serious consequences in case of non-compliance to the time line prescribed in the Code[30].

Lastly, it is imperative that the author takes note of the Insolvency and Bankruptcy (Amendment) Act, 2019 which has been enacted on August 6, 2019. Herein the amendment brought into force to Section 12 of the Code provides that the Insolvency Resolution Process must be completed within a time period of three hundred and thirty (330) days from the insolvency commencement date including the extension period that is granted. [31]

IV. COMMITTEE OF CREDITORS

The corporate debtors mainly owe money to their creditors and thus, to recognize their interest a committee is created. Therefore, after the NCLT approves a Resolution Professional, the RP constitutes a committee of creditors of the corporate debtors. The reasoning behind the creation of a committee of creditors is to collectively approve a resolution plan so as to incentivize all the creditors. [32] The committee further makes decisions about various tasks involved in the process and is also responsible for approving the resolution plans introduced by the resolution professionals. However, in order to approve any decision, the committee of creditors would require to be approved by a minimum of 51% of the financial creditors.

The committee of creditors is empowered with the right to:

i) Approve or reject resolution plans
ii) Extend the time limit of CIRP
iii) Liquidate the debtor
iv) Ratify the expense of the Resolution Professional[33]

Further, the code has embraced a practical approach by including only the creditors and excluding any other person to whom a financial debt is owed so as to prevent conflict of

[30] https://ibclaw.in/analysis-on-time-limit-under-section-12-of-the-code-for-completion-of-cirp/.
[31] https://ibbi.gov.in//uploads/legalframwork/630af836c9fbbed047c42dbdfd2aca13.pdf.
[32] Ibid.
[33] http://vinodkothari.com/2018/09/financial-creditors-committee-of-creditors-what-why-and-how/.

interest.[34] The code gives preferential treatment to Financial Creditors over the Operational Creditors. Even if the debtor owes both financial as well as operational debt, the committee of creditors will be constituted of Financial Creditors to the extent of the Financial Debt owed.[35] In order to recover the operational debt, the operational creditor can assign or transfer the right to a financial creditor to the extent of such debt.[36]

In addition, the resolution professional will have to seek approval of the committee of creditors even before convening a meeting in order to take any action such as making a repayment plan, amendments if any during the pendency of the Corporate Insolvency Resolution Process.[37]

Voting Power of the Members:

The voting threshold for approval of critical matters such as resolution plans etc. Is 66%. Therefore in order to pass any resolution this minimum threshold is required. In order to calculate this percentage only those creditors who are a part of the committee will be considered. Where a financial creditor submits its claim after the expiry then in such situation, the creditor will be considered a part of the committee after such submission. However such creditor cannot question any decision taken by the committee before his inclusion. It should be noted that those creditors who abstain from voting shall be considered to be as dissenting votes.

V. DISTINCTION BETWEEN FINANCIAL CREDITOR AND OPERATIONAL CREDITOR

The sole reason of this legislation is to solve the corporate insolvency in a time bound manner. [38] The code has defined the term creditor in a very exhaustive manner. It has been broadly classified as a financial creditor and an operational creditor, as opposed to the Companies' act 2013.The code not only defines these types of creditors but also provides various rights and remedies which the creditor can avail under the code. The maintainability of the application of

[34] Insolvency and Bankruptcy Code 2016, (Act 31 of 2016), sec. 5 ss. 24A.
[35] Insolvency and Bankruptcy Code 2016, (Act 31 of 2016), sec. 21 ss. 4.
[36] Ibid.
[37] Insolvency and Bankruptcy Code 2016, (Act 31 of 2016) , sec. 21 ss. 21.
[38] http://www.mondaq.com/india/x/607738/Insolvency+Bankruptcy/Financial+Creditor+And+Operational+Creditor+Under+The+Insolvency+And+Bankruptcy+Code+2016.

resolution depends on the applicant only after satisfying the Tribunal that it falls under the ambit of a financial creditor or an operational creditor as defined under IBC. It is important to first understand the meaning of both the type of creditors so as to draw a distinction between the two.

"*A person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred*"[39]is termed as a financial creditor. In order to ascertain whether a person is a financial creditor he should fall within the definition of a financial debt.[40] A financial debt means a debt which is disbursed against money. Similarly, "*any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred*" [41]is termed as an operational creditor. In order to ascertain whether a person is an operational creditor he should fall within the definition of an operational debt. [42]In ***Raghunath Rai Bareja v. Punjab National Bank***[43]the Supreme Court held that when the statue is unambiguous and unclear literal meaning of the statute is the only source of interpretation. Therefore, to be called an operational creditor an operational debt should be owed to him. Debts namely arising out of good and services or out of employment dues or payable to the central government constitute an operational debt.
In general parlance, the term debt refers to a liability or any financial obligation, due from any person. An important aspect of the term liability or obligation is that it should create a right to payment. Only when a right to payment is created will a person be entitled as a corporate debtor. Similarly, the person seeking right to specific performance like injunction etc. which don't give rise to payment, will not be considered as a creditor. [44]

The code further differentiates between a financial creditors and an operational creditors, financial creditors have a financial relationship which the defaulting entity, whereas an operational creditor's liability arises from transactions on operations. Loans or debt security would constitute a financial debt, whereas a debt arising out of non-payment of rent would constitute an operational debt. In case where a creditor has furnished both financial and

[39] Insolvency and Bankruptcy Code,2016, (Act 31 of 2016), sec. 5 ss. 7.
[40] Insolvency and Bankruptcy Code,2016, (Act 31 of 2016), sec. 5 ss. 8.
[41] Insolvency and Bankruptcy Code,2016, (Act 31 of 2016), s. 5 ss. 20.
[42] Insolvency and Bankruptcy Code,2016, (Act 31 of 2016), s.5 ss. 21.
[43](2007) 2 SCC 230.
[44]http://www.legalserviceindia.com/legal/article-295-interpreting-the-term-creditor-under-insolvency-and-bankruptcy-code-2016.html, (last visited on 20th October 2019).

operational transaction with a debtor, then he will be considered as a financial creditor to the extent of a financial debt and an operational creditor to the extent of an operational debt.[45]

The treatment of a financial and an operational creditor is not the same but is a case of primacy. The financial creditors have an upper hand over the operational creditors. Operational creditors are not permitted to be a part of the committee of creditors. The financial creditors have a right to vote, whereas the operational creditors irrespective of their claim size cannot be a member of the committee. The operational creditors are allowed to only attend meetings of the committee of creditors.

Further, it was in the case of ***Swiss Ribbons Pvt. Ltd. And Ors. V. Union of India and Ors.*** [46] **(Swiss Ribbons)** the division bench of the Supreme Court of India decided the constitutional validity of the distinction between the operational and financial creditor in the insolvency and bankruptcy code, 2016. The principle argument of the petitioner was that there was no *"intelligible differentia"* between the creditors and hence the distinction was discriminatory in nature. The court while pronouncing the judgment decided various crux and essence of the code. However, the main point of law was the distinction between the operational and financial creditor and the court was of the view that there was no apparent intelligible differentia between the two in the code. The basis of the entire petition was due to the unjust and unfair treatment towards the operational creditor during the corporate insolvency process. The court in order to explore the relationship between the two, dissected the code and various commentary on IBC to understand and pronounce the microscopic difference between the two types of creditors. After thorough analysis the court held that there existed numerous distinction between the two, however, the main distinction between them was the exclusion of operational creditor from the committee of creditors while assessing the viability of the corporate debtor. The court justified that the financial creditor can engage in the restructuring and reorganizing the business of the corporate debtor which is under financial stress, which is beyond the scope of operational creditors.

In summary, the SC found sufficient *intelligible differentia* justifying the differential treatment accorded to financial and operational creditors and concluded: "***it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be***

[45] Bankruptcy Law Reforms Committee, Para 5.2.1.
[46] AIR 2019 SC 739.

***protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail*".**[47]

VI. HOMEBUYERS INCLUDED IN THE AMBIT OF 'FINANCIAL CREDITORS'

The question of the status of 'homebuyers' under the Code has been puzzling both the authorities as well as the Supreme Court in various cases. At last, the Apex Court did resolve to direct that the interests of the homebuyers must be protected under the Code.

The Supreme Court empowered by Article 142 of the Constitution of India has set precedence on August 9, 2018 by delivering a decision in the case of ***Chitra Sharma v. Union of India & Ors.***[48] and in the connected matters of ***IDBI Bank Limited v. Jaypee Infratech Limited***[49]**.**The Supreme Court has made this landmark decision an year after the decision given by the National Company Law Tribunal, Allahabad **("NCLT")** wherein the petition filed by IDBI Bank was admitted to initiate Corporate Insolvency Resolution Process against Jaypee Infratech Limited **("JIL")**. Being aggrieved by the order of the NCLT, the Homebuyers who had invested money in the residential projects of JIL and its parent company Jaypee Associates Limited **("JAL")**by way of writ petition before the Supreme Court. Their main concern was despite of their money being at stake, they had no locus in the CIRP and therefore, their interests are not protected under the Code, 2016. In furtherance to the writ petition, the Supreme Court stayed the NLCT Order vide its order dated September 4, 2017. Taking into consideration the failure of the company in delivery of the flats and the repayment of the loans, the Stay Order was lifted and the CIRP was initiated[50]. It was the submission of various stakeholders that the liquidation of the company would not protect the interests of the 'homebuyers'. However, the Court had concluded that the 'homebuyers' must be included under the ambit of the term 'financial creditors'. The researcher notes that the decision of the Supreme Court has created a paradigm shift i.e. it has caused a change from 'debtor in possession' to 'creditor in possession'. This portrays that the CIRP is now a market driven process wherein commercial viability of a decision is of prime importance along with homebuyer's rights being represented in the Code.

[47]http://www.mondaq.com/india/x/781154/Insolvency+Bankruptcy/Swiss+Ribbons+And+Its+Implications+The +Supreme+Court+On+The+Constitutionality+And+Key+Provisions+Of+The+Insolvency+Bankruptcy+Code.
[48](Writ Petition (Civil) No. 744 of 2017).
[49]CA. 495(PB)/2019.
[50]W.P. (C) 744 of 2017. September 11, 2017.

Subsequently, what may be understood to be the current stand of the SC would be to include homebuyers and allottees in the scope of IBC. To give effect to the same, an amendment has been brought about on June 6, 2018 i.e. Insolvency and Bankruptcy (Amendment) Ordinance, 2018 read with RERA, 2016 which amends Section 5(8) (f) to include the amount raised by an allottee[51] under a Real Estate project shall now be a financial debt. The status quo has been cleared by the Apex Court backing the homebuyers' fight against the builders. Responding to a batch of 140 petitions filed by various real estate companies questioning the constitutional validity of the amendments in IBC, the SC stated that there is no illegality in the inclusion of homebuyers in the status of financial creditors[52]. The amendment in the IBC has a corresponding change in Real Estate (Regulations and Development) Act, 2016. Such amendment brings the IBC in closer sync with the RERA (Section 18). The Section elaborates upon the return of amount and compensation wherein if a promoter fails to complete or is not able to give the apartment, plot or building in compliance with the sale agreement, or due to discontinuance if his business and the allottee doesn't wish to withdraw, then the promoter shall be liable to pay interest every month of the delay. The promoter shall also be liable to compensate the allottees in case of any loss caused to them due to defective land or if he fails to comply to the obligations imposed on him by the Act. Although, the homebuyers have been included, the implications of such inclusion are also dependent upon the stage of construction that has been achieved by the developer i.e. whether the agreement to sell has been executed or not, if only the allotment letters were given by the promoters or whether an association of the allottees have been formed.

The researcher notes that although the homebuyers are included in the ambit of the Code, there are multiple grey areas with the issue which still stand to be in scrutiny.

[51]Section 2(d), RERA, 2016: "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent.

[52]https://timesofindia.indiatimes.com/india/homebuyers-given-status-of-financial-creditor-under-ibc-to-protect-their-interest-centre-to-sc/articleshow/70147175.cms.

VII. CONCLUSION

In order for a country to grow, it is necessary that it has a strong credit system. An established credit market helps in the smooth functioning of the economy. Insolvency thus plays a very vital role in facilitating this growth of credit market. In order to keep a check, the government is leaving no stone unturned to reform the insolvency laws in India in order to improve the Ease of Doing Business in India. The insolvency and bankruptcy code, 2016 has tried to mend all the loopholes by plugging in various reforms so as to evolve the law rapidly.

In this paper, we undertake to understand and assess various implications of insolvency laws in India. Further, this paper identifies and distinguishes between the distinction between the operational and financial creditor and also identifies the scope of homebuyers in the process of Insolvency. The paper explains how during the process of corporate insolvency process, the financial creditors have more power than the operational creditor due to its power in the committee of creditors. The paper further presents various arguments for the need to recognize the scope of homebuyers and the reasoning behind the Supreme Court to now consider Homebuyers as a financial creditor. The paper raises several issues and at the same time explains the stance of the tribunal and the apex court at various junctures. The issues dealt in the paper are of grave importance in the context of personal as well as public insolvency.

CROSS BORDER MERGERS & ACQUISITIONS

*Vidushi Goel and Shreya Chauhan**

ABSTRACT

The growing popularity of Cross-border mergers and acquisitions are partly driven by the liberalization in the legal and regulatory regime around the world. Cross border mergers and acquisitions present considerable opportunities for firms which desire to diversify their activities geographically by learning new things and gaining access to valuable resources. They are on the increase in virtually every sector across the globe. Growing number and value of International mergers and acquisition deals show that Cross border merger and acquisition have gained more importance and popularity comparatively market expansion strategy through setting up of wholly owned subsidiaries in overseas market. They are quick pathway to enter into new market. A sudden growth in mergers and acquisitions activities has been witnessed. There are several reasons for such upswing in these deals, for example many companies need to find new sources of growth as their domestic markets mature. Other benefits to the company including reregulation, the globalisation of consumer and business markets, and a drive for sales, cost, and process improvement synergies. They present many challenges as well such as difficulty of evaluating target firms, cultural and institutional differences and the liabilities of foreignness among others.

KEYWORDS: *Mergers, Acquisitions, Cross-Border, M&As, International M&As*

I. INTRODUCTION

Merger refers to combination of two or more companies or entities to form an all new entity with a new name. Merger assists the companies in uniting their strengths, resources and weaknesses. Acquisition is the purchase or more often called as takeover of one entity by another entity. This can be done either by acquiring ownership over 51% of its share capital or by taking over the assets of the company. The concept of Cross Border Merger and Acquisition is the arrangement between the two different companies having the headquarters in two different countries. In a cross border

* 3RD YEAR STUDENTS OF B.A., LL.B(H) AT AMITY LAW SCHOOL, DELHI (GGSIP UNIVERSITY)

merger, the assets and operations of two firms belonging to two different countries are consolidated to establish a new legal entity. In a cross border acquisition, the control of assets and operations is transferred from a local to foreign country, with the former join the latter. The country of the acquirer is labelled as the "Home Country." The country of the target is labelled as the "Host Country." The headquarters of the newly formed entity can be in both countries or in only one.

Cross-border mergers and acquisitions is in increment trend in contemporary business environment. Generally it is specified that cross-border capital reallocation is partly the result of financial liberalization policies, government policies and regional agreements. The trend of increasing cross border mergers has become faster with the globalization of the world economy. The merger activities are both macro in scope the global competitive environment and micro in scope the variety of industry and firm-level forces and actions driving individual firm value. The main forces of change in the global competitive environment, technological change, regulatory change, and capital market change and create new business opportunities for Multinational enterprises, which they pursue aggressively. Many multinational enterprises undertake cross-border mergers and acquisitions for significant reasons. The drivers are strategic responses by Multinational enterprises to protect and augment their global competitiveness by

- Gaining access to strategic proprietary assets.
- Gaining market power and dominance.
- Achieving synergies in local/global operations and across industries.
- Becoming larger, and then reaping the benefits of size in competition and negotiation.
- Diversifying and spreading their risks wider.
- Exploiting financial opportunities, they may possess and others desire.

II. REGULATORY FRAMEWORK OF CROSS BORDER MERGER IN INDIA

In India, Cross Border Merger Deals are regulated under

- The Companies Act , 2013
- Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
- Competition Act, 2002
- Insolvency and Bankruptcy code, 2016
- Income Tax Act, 1961
- The Department of Industrial Policy and Promotion.

- Transfer of Property Act, 1882
- Indian Stamp Act, 1899
- Foreign Exchange Management Act, 1999 and other allied laws as may applicable based on the merger structure.

III. PROVISION OF CROSS BORDER MERGER

According to section 234 of Companies Act, 2013 a foreign company may with the prior approval of Reserve Bank of India, merge into a company registered under this act or vice versa. Among other things the terms and conditions of the scheme of merger shall have provision for the payment of consideration to the shareholders of the merging company in cash, or in depository receipts and partly in depository receipts, whatever the case may be, as per the scheme to be drawn up for the purpose. This provision came into existence from 13th April 2017 by notification issued by Ministry of Corporate Affairs (MCA).

IV. EMERGING OF CROSS BORDER MERGER

If we trace the history of mergers and acquisitions in India, there were very rare occasions of mergers and acquisitions due to change in government policies in post-independence period and passing of MRTP Act, 1969. In 1984-85 there were only 15 takeovers but this figure increased to 91 in 1985-86 to 1989-90. Chapter III of MRTP Act places a bar on mergers and acquisitions, within and outside India which was liberalised in 1991 by the Indian Government.

According to research by FICCI in between 2000 to 2006 there have been 307 acquisitions amounting to more than Rs. 90,000 crores which proves that there has been an improvement in economic reforms of India after liberalization after 90's. According to Deologic, Indian Companies had spent $20 billion to refund the 147 mergers and acquisition deals abroad in 2006 in comparison with 2005 which accounted for less than $5 billion.

Talking about statue governing mergers and acquisition, earlier Indian Companies Act, 1956 only permitted inbound mergers or mergers of foreign companies with Indian Companies.[1] It was silent on outbound mergers, or those of domestic companies with foreign firms.

[1]Barkema, H.G., Bell, .J.H. And Pennings, J.M., Foreign Entry, Cultural Barriers, And Learning. Strat. Mgmt. J. 155,166 (1996)

In 2017 Ministry of Corporate Affairs amended Companies Act, 2013 by notifying Section 234 of the Act to implement appropriate provisions governing cross border mergers[2] with special reference to outbound mergers to be in pace with economic development. Subsequently, Reserve Bank of India, issued draft regulations to govern cross- border mergers and invited suggestions and objections on same. After taking into account such objections and suggestions, the RBI notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018.

V. IMPORTANCE OF CROSS BORDER MERGER

Cross Border Merger is to reconstruct industrial assets and production structure on worldwide basis. It authorised the global transfer of technology, capital, goods and services and integrates for universal networking. Cross Border merger leads to economies of scale and scope which helps in gaining efficiency. It benefits the economy as helps in increase in the production of host country, increase in economic growth and development particularly if the policies used by the government are favourable.

A. Capital build up

Cross Border mergers and acquisitions deals are responsible for capital accumulation on a long term basis. In order to expand their businesses it undertakes investment in plants, buildings and equipment's and also in the intangible assets such as the technical know-how.

B. Employment creation

At times it is seen that the M&A's that are undertaken to drive restructuring may lead to downsizing but would lead to employment gains in the long term. This curtailing is sometimes essential for the continued existence of operations. When in the long run the businesses expand and becomes successful it would create new job opportunities.

C. Technology behaviour

When the companies across the countries come together it sustains positive effects of transfer of technology, sharing of best management skills and practices and investments in intangible assets of the host country. This leads to innovations and has an influence on the operations of the company.

---

[2] R. D., Hitt, M. A. and Vaidyanath, D., Alliance Management as a Source of Competitive Advantage, 28(3) J. of Management 413, 446 (2002)

VI. FACTORS AFFECTING CROSS BORDER MERGER

Through globalisation, Cross Border mergers are becoming consistent trend in business cycle. It is possible for businesses in different countries to come together as a one entity with the common aim to extend their business in the global market. The success of Cross Border Merger depends on a number of factors that ought to be fully met in order to guarantee that success will be maintained throughout the operation of new market. These include:

A. Proper management:

Cross Border Merger demand that it should be taken with proper techniques of management in all the aspects involved in business areas which include market analysis, human resource aspect and product integration and development. In market analysis, it is necessary that either side of the border where merger take place should exist unique markets with demands and structures. Market Analysis needs a comparative approach that both the involved businesses have their markets fully analysed and comparisons are drawn with an aim of explaining their demands and structures. Proper management must include the features of human resource. In fact, Cross Border Merger Will rely on a very large scale on human resources is to attain the sustainable success. Human Resource aspects directly give a notion of employees who work for the involved firms. To increase the participation of employees which result in the proper productivity of business, it is demand to have proper management to understand the plight of human resource aspects. Product development and integration is an area of concern when dealing with proper management in cross border mergers. Business are involved in a cross border merger has their unique products that they deal with. When such businesses will have merged, they will effectively become a single entity and in such a case, the products will need to be integrated in a way that will reflect that there actually a cross border merger has exercised. The most challenging task in the cross border merger is to integrate and develop the products. Thus, this can be done with proper management.

B. Cultural integration:

The topic of culture is always a complicated one in cross border merger. Cross border mergers are transactions involving large amount of money which take in widely varied cultures. The term culture involves different definitions from the view of the countries involved. One side of the border hold a different view of business culture while the other side of the border have their own

view. Entering into a cross border merger exercise without fully integrating differing views on business culture will be a mistake and cause the hard effects on business. In fact, business culture is a wide concept which include the market philosophies held by the two or more merging businesses in cross border transaction. It will be proper only when a team is set up to strategize on how cultural integration will be conducted and how it will handle the business philosophies and market strategic positioning. The team set for cultural integration purposes in cross border mergers will have to ensure that a new business culture is developed that will be inclusive of all the aspects. This will certainly be a tough task but the business involved ought to do everything in their power to ensure that a single but effective business culture is adopted which will help the newly born business entity to attain its ambitions as per to the terms and conditions of the merger.

C. Business policies

Every country has its own business policies. These policies outline how business should be conducted while in specified areas. The policies determine how successful or unsuccessful business becomes in the markets of merging countries.In cross border merger, the businesses involved come from different countries with unique business policies. For instance, Business A which has all along operated in a specified country, it may have learned to adjust itself in the best possible way in order to meet its own ambitions as per to the policies formulated and set in that country. The same scenario is for Business B, which has operated in a specified country. When these two businesses will merge and start operating in anyone of the involved countries, it is possible that business ambitions may be hindered given the fact that one of the businesses will not have effectively adapted to the new policies.

D. General business conditions in the country:

The success of the business will be examined by a number of conditions in the countries where the business has been set up. However, the conditions include guaranteed provision of security and availability of reliable and convenient insurance policies. It is a demand that these conditions are availed without any form of delay. Delays in the provision of such condition in cross border mergers may prove threat to the acquiring firm. The large amount of fund that are invested in the cross border merger should be guarantee of their security at all times and any threat should be eliminated. The conditions of effective business should ensure that there is a guarantee of returns

on investment in cross border transactions. In reality, cross border mergers are expensive ventures that demand the best of conditions on and off the market. In addition to the business strategies, there should be an assurance from the authorities in the new country that the involved business will be safe. This is a necessary obligation given the fact that cross border mergers and acquisitions had often provided economic benefits that such countries require for the development and growth of their countries. Therefore, before initiating cross border mergers, the involved business should ensure that the conditions of practicing business in whatever countries where the merger will be performed ought to be obstruction free all through during business practice.

VII. TYPES OF CROSS BORDER MERGER

A. Outbound Merger

Outbound Merger is exactly the opposite of an Inbound Merger that is a foreign company acquiring assets and liabilities of an Indian Company. While it is assumed that the law applicable in the jurisdiction where the Foreign Company is situated will regulate such Cross Border Merger, the Merger Regulations also stipulate certain conditions such as guarantees or outstanding borrowings of the Indian Company which shall become guarantees or borrowings of the Foreign Company.[3] However, this is subject to the Foreign Company which does not acquire any such guarantee or outstanding borrowing, in rupees payable to Indian lenders, which is non-compliant with the relevant foreign exchange law in India. Considering that rupee borrowings from Indian lenders by Indian borrowers might not always be compliant with Applicable Law,[4] such a restriction will need to be examined by the foreign company from a balance sheet perspective. The guarantees or borrowings of the Indian company shall be repaid as per the scheme sanctioned by the National Company Law Tribunal. Further, they must not take up any liability in conformity with the Act or regulations as prescribed. A no objection certificate for this effect must be obtained from the lenders in India of the Indian company. With this any asset which is acquired can be transferred in any manner as permissible.[5] In cases in which it is not allowed to be held or acquired by the resultant company, it shall be sold within two years from the date of sanction of the scheme by the NCLT and the sale proceeds shall be delivered outside India immediately through banking

[3] H Donald Hopkins, International Acquisitions: strategic considerations, 15 International R. J. of Finance and Economics (2008)
[4] Kusewitt, J. B., An exploratory study of strategic acquisition factors relating to performance, 6 Strat. Mgmt. J. 151, 169 (1985)
[5] The Companies Act,2013

channels. Repayment of Indian liabilities from sale proceeds of such assets or securities within the period of two years shall be allowed.

The companies involved in the cross-border merger shall be required to furnish reports as may be prescribed by the Reserve Bank of India (RBI), in consultation with the Government of India, from time to time. It is pertinent to note that at the time of sanctioning the merger of a foreign transferor body corporate with an Indian transferee company, the National Company Law Tribunal shall consider the rationality of the merger as per the laws of the country in which the foreign body corporate has been incorporated, and any transaction on account of a cross-border merger undertaken in accordance with Cross-Border. Merger regulations shall be assumed to have prior approval of the RBI.

B. Inbound Merger

Inbound Merger means where an Indian company acquires assets and liabilities of a foreign company. Regarding this case, the Merger Regulations can allow the transfer of securities to a foreign shareholder, subject to compliances which are applicable to a foreign investor under the foreign direct investment regulations which constructively means that such Cross Border Mergers cannot result in any contravention of any restriction applicable to foreign direct investment into India. The Merger Regulations states that a Cross Border Merger resulting in transfer of securities of a joint venture or a wholly owned subsidiary of an Indian Company, situated in a foreign jurisdiction, shall be subject to compliances such as pricing of shares in a specified manner, any outstanding's owed to the Indian company being clear prior to such transfer, etc.[6]

One such condition requires among other things the Indian Company shall (a) be regulated by a financial sector regulator (b) have earned net profit during the preceding three financial years from the financial services activities if such step down subsidiary is situated in a foreign jurisdiction is engaged in the financial sector.

The Merger Regulation has also set forth certain regulations for the Indian Company, on overseas borrowings which has to be acquired by the Indian company in relation with such Cross Border Merger. One such compliance has required the Indian company to ensure that the overseas borrowings of the foreign company proposed to be taken over by it, are compliant with the provisions of the overseas borrowing regulations under Indian law within a period of 2 years from the date of sanction of the scheme pertaining to such Cross Border Merger by the relevant

[6]The Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004

authority. However, the Indian Company cannot remit any money from India for repayment of such overseas borrowings, as part of ensuring compliances with Overseas Borrowing Regulations, during such 2-year period.[7]

While the intention is to ensure smooth transition, it might probably bring the right parties to the drawing board as the interest rates and maturity etc. stipulated in the Overseas Borrowing

Regulations may not be in relation with the commercial intent of such borrowings. Secondly, there is a slight possibility that the restriction on repayment of such overseas borrowings during the 2 year period might create hurdles for the Cross Border Merger

VIII. CHALLENGES UNDER CROSS BORDER MERGER ACQUISITION

A. Political uncertainty and its effects :

It is often seen that political uncertainty tends to change the bargaining power between acquiring and target firms. Higher is political uncertainty in a country, more will be the unpredictability of such country's returns on cross border merger.[8] Foreign acquirers use their great bargaining power in those countries which have high political uncertainty and thus it results in more favourable outcomes. When political uncertainty is high then acquiring firms enjoys more acquisition gains than target firms.

Election timing plays a great role in measuring political uncertainty in a cross-country merger. It captures changes in government policy and government leadership. There is a strong evidence that political uncertainty affects the volume, characteristics and outcomes of cross-border acquisitions.

In countries with great expropriation, risk suffers a drop in the volume of inbound foreign acquisition mostly prior to national elections which suggests that fear of expropriation is an important channel through which a target country's election discourages inbound foreign acquisition.

B. Culture obstacles and its effects:

[7]Sharma S and Irani A.,Acquisition Financing in India, Global Securitisation and Structured Finance, Juris Corp 105, 108 (2008)
[8]Pradhan, Jaya Prakash and Abraham, V., Overseas Mergers and Acquisitions by Indian Enterprises: Patterns and Motivations, 33 Indian Journal of Economics 365, 386 (2005)

Culture is defined as collective programming of the mind which differentiates the members of one human group from another. According to a research, firms which actively managed their corporate cultures has annually experienced a 682% increase in revenue and 756% increase in net income. In comparison with those firms which did not manage culture, revenues increased only by 166% and their net income by 1%.

When there is failure to address the cultural differences of the two international organisation and create a new (and unique) culture embraced and recognised by both the parties then it results in failure of whole merger and acquisition deal. It is discovered fact that in a company, inability of senior executives to bridge culture differences of the two companies can undermine most scrupulously planned mergers and acquisitions.[9]

For instance, different attitudes to gender, minorities and diversity are issues that can cause potential differences between the partners.[10] The cross-border merger and acquisition are equivalent to marriages between individuals from different countries and hence without empathy and a sense of understanding, these ventures will not work.

C. Employment and labour laws' effects :

Such issues can be quite complex because of the differences in local jurisdiction requirements or customs and practices. Many countries restrict itself to fire employees and some may have such labour laws which impact or regulate employee work hours and benefits including overtime, vacation and severance.[11] The approximate impact of labour regulations on the profit of cross-border acquisitions is huge indicating that strict labour compliances in the target country results in making post-merger integration more costly and reduce the manifestation of synergies.

D. Diligence in conducting merger and acquisition deals:

In an acquisition, the process of conducting an effective legal due diligence ("LDD") is an essential step. It is crucial for a company to undertake a comprehensive assessment of the business, regulatory, environmental and legal risk factors involved in acquiring the company. Even if deal closes, failure to conduct through due diligence may make or break the deal

E. The Human Factor and its effects:

[9] Cross Border Merger Challenges, The Wall Street Journal (2013)
[10] Singh, H., & Montgomery, C., Corporate Acquisition Strategies and Economic Performance, 8(4) Strategic Management Journal 377, 386 (1987)
[11] Melicher, Ronald W & Rush, David F., Evidence on the Acquisition-Related Performance of Conglomerate Firms, 29(1) Journal of Finance 141, 149 (1974)

The human factor is biggest challenge in a cross border M&A. Ignoring or minimising the people part of an international merger or acquisition can result in obstacles. In a research study it has been found that an average of 50% of managers are reported to leave a year after international M&A and approximately 70% of cross border deals are thought to have no influence on increasing shareholder value.[12]

F. Mismatch in Communication styles

Language differences may cause effect on cross border M&A as it can result in huge misunderstandings and frustrations for organisations integrating two nationalities into one workforce. One can fail to work in another language even if he has good language skills particularly at the times of uncertainty when important decisions are being made. Sometimes when both the companies are using same language, the difference in communication styles and expectations can result in a mismatch with respect to level of directness, Formality, display of emotion, amount of detail shared, frequency and method of communication.

IX. CASE STUDY IN INDIA OF SUCCESSFUL DEALS OF CROSS BORDER MERGER AND ACQUISITION

TATA STEEL'S ACQUISITION OF CORUS

The Tata Steel Limited (Tata Steel), one of the leading steel producers in India, acquired the Anglo Dutch steel producer Corus Group PLC for US $ 12.11 billion. The process of acquisition(Merger) completed only after nine rounds of bidding against other bidder for Corus – the Brazil based Companhia Siderurgica Nacional(CSN).

In October, Tata Steel made an offer of 455 pence a share in cash valuing the acquisition deal at US$ 7.6 billion to which Corus responded positively. The acquisition was the biggest overseas acquisition by Tata Steel an Indian company, which thereafter emerged as fifth largest steel producer in the world after the acquisition. The acquisition benefited both the companies as Tata Steel got access to Corpus strong distribution network in Europe and Corus got Tata Steel's expertise in low cost manufacturing of steel. Among the benefits provided to Tata Steel was the

[12]Moshfique Uddin & Agyenim Boateng, An analysis of short-run performance of cross-border mergers and acquisitions: Evidence from the U.K acquiring firms, Review of Accounting and Finance, 8(4) Emerald Group Publishing 431, 453 (2009)

fact that it would be able to contribute semi-finished steel to Corus for finishing at its plants, which were located closer to the markets which had large value.[13]

Before the acquisition, the major market for Tata Steel was India as 69% of company's total sales was in Indian Market. Also at least half of Corus's production of steel was sold in Europe (except UK).After the acquisition, the European Market (including UK) would consume 59 percent of the merged entity's total production.

Though there were potential benefits in Tata Corpus deal but there were some doubts regarding Tata Steel's performance as it was identified that Corus earnings before interest, tax, depreciation and amortization) at 8 percent was much lower than that of Tata Steel which was much lower than that of Tata Steel which was at 30 percent in the financial year 2006-07 that is before merger happened.

RANBAXY'S ACQUISITION BY DAIICHI

In 2005 Daiichi Sankyo was established by the merger of Sankyo Co., Ltd. and Daiichi Pharmaceutical Co., Ltd which emerged as Japan's 3rd largest pharmaceutical company, established by the merger of Sankyo Co., Ltd. and Daiichi Pharmaceutical Co., Ltd in September 2005. Daiichi was mainly a brand in a form of R&D oriented pharmaceutical company with revenues of 880 billion yen ($8.8 billion) in FY 2007-08. The company was quite rich and had acquired around 574 million in cash and cash equivalents. Its portfolio included pharmaceuticals for hypertension, hyperlipidemia, and bacterial infections. It was also engaged in the development of treatments for thrombotic disorders and focused on the discovery of novel oncology and cardiovascular-metabolic therapies.

Ranbaxy Laboratories Limited was India's largest pharmaceutical company which was an integrated, research based, pharmaceutical company. It produced a wide range of quality, affordable generic medicines, used across geographies. The Company served customers in over 125 countries and had an expanding international portfolio of affiliates, joint ventures and alliances, operations in 56 countries.[14]

In June, Daiichi Sankyo made a offer to purchase more than 50.1% voting right in Ranbaxy which included 34.83% stake of promoters, preferential shares and an open offer. Daiichi offered a share price of INR 737 with a transaction value of around $4.6 billion by increasing value of Ranbaxy

[13] Dr. R. Kanakarathinam, Tirupur Textile Employee's Quality of Work Life and Job Satisfaction at work, 5(1) IJARCSMS 126, 133 (2017)
[14]Kenneth Smith and Alexandra Reed Lajoux, The Art of M&A Strategy, 94 (2012)

at $8.5 billion.[15] By November 2008, Daiichi ended up acquiring 63.92% shares of Ranbaxy. Including transaction costs the deal costed Daiichi $4.98 billion and they recorded goodwill of $4.17billion. With the acquisition Daiichi came in favourable position by getting access to Ranbaxy's basket of 30 drugs for which the company had approvals in the US, including 10 drugs for which Ranbaxy had exclusive sales. This deal gave Daiichi an access to best FTF 180 day exclusivity pipelines in the industry. Ranbaxy had already de-risked its FTF pipeline through a series of settlement with innovator companies which in-turn lowered the litigation expense and removed uncertainty with regard to the launch date of these generic drugs. It also became useful tool in a finer planning of inventory, launch quantities and supply agreement.

Ranbaxy had a strong hold in markets such as Africa, where Daiichi had never ventured. By utilising Ranbaxy's network, Daiichi Sankyo could make its global reach twice as from 21 countries to 56. As growth would have slowed down in the developed markets, Ranbaxy gave a good position to Daiichi to expand their businesses in emerging markets including India, China, Russia and Brazil. Emerging Markets became a strong geographic component of Ranbaxy's revenues. India was undoubtedly the biggest market that Daiichi would get access to as the Indian market was supposed to triple by 2015 from its 2005 size. Ranbaxy with its strong division reach and excellent brand recognition was well positioned across the Indian metro and other urban areas.

VODAFONE'S ACQUISITION OF MANNESMANN

Vodafone had shouldered a series of alliances and mergers and acquisitions (M&A) activity as a strategic pursuit for growth. On the basis of exchange of shares between UK-based Vodafone Air Touch, the world's largest mobile phone group and Mannesmann AG, Vodafone announced a takeover bid on the Mannesmann on November 13,1999. This offer marked as the largest unsolicited takeover bid at that time. Each Mannesmann shareholder received 58.964 % share which gave them 49.5% stake in the new company. This merger created the world's largest mobile phone operator which has 42.3 million customers in Britain, The United States, Germany, Italy, France and other markets. The new combined entity having a market capitalisation of $350 billion.[16]

[15]Kay, J. A. and Fairburn, James, Mergers and merger policy (James Fairburn, John Kay ed. 1989)
[16] Dr. CharlesByles , Vodafone Air Touch: The Acquisition of Mannesmann case analysis, Virginia Common Wealth University (2006)

The integration of culture and skills of Mannesmann was one of the Vodafone AirTouch's greatest challenges. The strategic focus of Mannesmann had been reorientation of the company from industrial firm to service and telecommunication provider.

During the merger, period, Vodafone was in superior financial position compared to its competitors. After Mannesmann acquisition, Vodafone doubled its size. The new company formed was headed under Vodafone Air Touch. Furthermore, Vodafone split off Mannesmann's engineering and automotive operations into a separate company. The total value of the Vodafone group on the stock market, after paying $ 183 billion for Mannesmann in shares, will be $ 365 billion, making it by far the largest company on the London stock market and fourth largest in the world.

X. CONCLUSION

A cross-border merger means any merger, amalgamation or arrangement between an Indian company and a Foreign Company as per with the Companies Act, 2013 and the Companies (Compromises, Arrangements, and Amalgamations) Rules 2016. The Ministry of Corporate Affairs notified Section 234 of the Companies Act, 2013 thereby enabled cross-border mergers with effect from 13 April 2017. Cross Border acts as an advantage to companies to increase its share price. It has become one of the leading aspect for firms to gain access to global markets. The rise in cross border merging activity is growing competence of Indian business entities and their desires to expand business globally. The described factors ought to be fully considered before any decision of whether to allow the transaction or not is made. Failure to consider the factors may lead to hard complications. Every cross border merger transaction tend to vary to ensure the need of every such transaction is analysed as per its unique demands.

Earlier, inbound mergers have generally been implemented for consideration in the form of shares.[17] Now, the new corporate law provision permit payment of consideration in the form of depository receipts and cash. In the absence of specified tax provisions for taxing such transactions, the tax implications on the merging company and shareholders remain ambiguous. The present framework of Indian tax laws does not provide a taxation mechanism for outbound mergers unlike inbound mergers. Taxation of outbound mergers can be more difficult than that of inbound mergers because of the fact that the merging company is not an Indian company or the

[17] Olie, R., Shades of culture and institutions in international merger, 15 Organizational Studies 381, 405 (1994)

shareholders might not always be Indian residents. However, it can be provided for adjudication and payment of Taxes prior to the dissolution of the Indian Company. In cases of outbound mergers, the draft Reserve Bank of India guidelines provide that such outbound mergers shall be presumed to be approved by the RBI if they are in accordance with the Foreign Exchange Management (Transfer or Issue of Foreign Security) Regulations, the Liberalized Remittance Scheme, etc., as being allowed. Despite these flaws, to bring into effect new provisions is a progressive move which has the potential to bring global economies closer and open a host of opportunities by enabling global acquisitions, sale transactions, combinations and restructuring for Indian companies and providing greater ease and flexibility in making strategic business decisions.

A range of complex issues must have been navigated in an effort to complete cross-border mergers. Each cross-border merger is complex and implementation of these issues would greatly depend on the facts, dynamics, scale and geographic scope of both the companies which are going to form a new company. The Cross-Border Regulations being fairly new, a lot of practical issues are yet to be recognized and shall be addressed as and when encountered in the due course of time.

ECONOMIC IMPLICATIONS OF THE CODE ON WAGES (2019)

*Omkar Upadhyay**

ABSTRACT

India has hitherto been a labour-intensive economy, with much production depending upon the manual workforce. The Indian labour market comprises largely of workers who are engaged in unskilled and unorganised sectors of the economy. These workers' lives depend upon the meagre wages they receive. The Indian government provides for certain minimum wages for its workforce. Since independence, being a labour centric economy, the government's policy initiatives have largely focused upon improving the lifestyle of the labour workforce. In furtherance of this, various legislations were enacted and are continued to be done so. After passing number of labour legislations concerning wages of the workers and finding them to be inadequate in meeting the socio-economic needs of the workers, the Parliament came up with a new legislation, 'The Code on Wages'. This legislation was brought to consolidate the existing wage laws to provide a better protection to workers. It is in this background that the researcher has undertaken this research work on the Code to trace its history in its present form. Further, the researcher has, with the help of experience of other countries' economies which have implemented statutory minimum floor wages, gauged the economic implications of the Code on Wages on the Indian economy.

KEYWORDS: *Wage Code, Labour Law, Economic Impact, Wages*

I. INTRODUCTION

Every economy in the world, irrespective of their nature, has primarily four factors of production namely: land, labour, capital and entrepreneurship. It is the collective use of these factors which enable a producer to produce a desired level of output. Out of these primary four factors of production, labour can be regarded as a prominent factor especially in developing countries like

* THIRD YEAR, B.A., LL.B (HONS.) STUDENT AT MAHARASHTRA NATIONAL LAW UNIVERSITY, NAGPUR.

India which are, still to a great extent, labour intensive economies; employing more labour over capital. The reward for labour given to a labourer, for the work done by him, is wage. Wages play a detrimental role in impacting the whole life of the labourer, ranging from the demand and supply of his labour in the labour market to deciding the living conditions of him and his family.

Wages, thus are of great importance both from the employer's side of view as well as the employee's side of view. The employer may alter his demand for labour with varying wage rates; decrease in case of higher rates and vice versa, while the employee would be seen to be more encouraged to be in the labour force thus increasing the labour supply. In every economy, the wages are generally fixed by the market forces of demand and supply and it is seldom that wages are statutorily fixed. However, it has been historically evidenced, generally in the developing labour dominated economies, that the government has intervened in the labour market to fix the wages. But it does not mean that all wages are influenced by the government.

Government intervention is evident principally while fixing the 'minimum' wages; the wages below which an employer cannot employ a labourer or worker or employee. Minimum wages have importance in ultimately deciding the living condition of the labourer and his family. Minimum wages, as an instrument of labour reform, must be carefully designed after giving consideration to factors such as labour market conditions, GDP level of the economy, employer's capacity to pay, living condition of the worker and his family and such alike. If properly implemented, minimum wages could lift out people from poverty and wage exploitation, but if the wages are set too high or too low, the economic implications would be worse off.

The enactment of 'The Code on Wages, 2019', setting a nationwide minimum wage floor and subsuming four of the earlier wage legislations, is seen with much appraise as well as with suspicion as to what economic implications would emanate from it. Thus, this research paper seeks to analyse the wage policy of India and the concept of minimum wages to see that whether the Code on Wages will have the desired effect with which it has been enacted.

II. HISTORICAL OVERVIEW OF WAGE POLICIES IN INDIA

India's economy is labour dominated with much work done manually. Indian economy is primarily divided into what can be described as formal or organised and informal or unorganised

sectors. Both the sectors employ labourers in large numbers. The population of India is a major factor for such an enormous workforce ready to take up work. This abundance of the workforce leads to unemployment with a large number of able and willing people denied access to these sectors of economy. In simple words while jobs are limited, job seekers aren't. However, this is not the only problem which the Indian population faces. Even those getting employment are often abused. This abuse and exploitation can be in the form of poor working conditions, hectic working hours, no security benefits etc. One such form of exploitation is the problem of wages. The problems of wages may be that sometimes they are paid late or may not even be paid. Thus, from the very inception of free India's economy, governments have tried to implement minimum wages for improving the living conditions of the workers and their families while at the same time ensuring economic development and progress. The policy initiatives have tried to include as many as possible number of the wage earners in its ambit. The first in line of such policy initiatives was the Minimum Wages Act of 1948.

III. MINIMUM WAGES ACT, 1948

The policy makers while enacting this piece of legislation had in their minds the objective of protecting the labourers from undue exploitation at the hands of low wages.[1] The Minimum Wages Act of 1948 (hereinafter referred as Act of 1948) was enacted to make provisions for fixation of statutory minimum wages in certain areas of employment which were then called as 'scheduled employments'. These areas were carefully chosen as being regarded as the most vulnerable ones where exploitation could be most possible. The inspiration for the act came from multiple sources which include the suggestions of the Royal Commission on Labour of 1929. Also, the Directive principles as enshrined in our Constitution lays down for setting up of such social structure wherein labour will live a life of dignity. Labour Investigation Committee, on the recommendations of Labour Standing Committee and Indian Labour Conference, was set up in 1943 with the objective of settling the questions of wages, working conditions and to come up with suggestions for a wage fixing machinery for the nation. The 1945 session of the Indian Labour Conference was important because it was here where the draft bill was proposed in

[1]Kumar, R.G.B. Bhagavath, *A Critical Study of norms Relating to Fixation and Quantification of Minimum Wages for the Exploited Labour under the Minimum Wages Act 1948*, 2001,(unpublished manuscript).

response to which in 1946 the Labour Standing Committee called for a legislation to include unorganised sector.

The culmination of the above was the introduction of Minimum Wages Bill in the Central Legislative Assembly on 11 April 1946 which provided for fixing and adjustment of minimum wages in scheduled employments by the Government bodies in consultation with employers' and workers' organisations. The act came into force in the year 1948. Though the act prescribes for setting up of minimum wages, what principles and criteria are to be adopted while doing so find no mention in the Act. The act is silent on the principles of fixing a minimum wage, though its preamble reads as, " *An Act to provide for fixing minimum rates of wages in certain Employment.*"[2] To fix the wages for certain employments, wage boards are appointed with representations from employer's as well as employees' side along with representation from the state itself.[3]

Though made with a welfare objective, there were various lacunae in the Act. For instance, the time provided for reviewing the Minimum Wages once fixed was five years. Now in an economy such diverse and dynamic like that of India, such a long-time gap in review procedure would do nothing but defeat the very objectives of labour welfare. It would lead to a situation where the prices in the market would go higher and higher while the minimum wages remain static thus further lowering down the sustenance capacity of the wage earners and their families. Moreover the International Labour Organisation's report 'India Wage Report' (hereinafter referred to as the ILO report) has critiqued the Act by stating that the minimum wages are not applicable to all workers and often they are set up arbitrarily by different authorities thus rendering it difficult to check and enforce such a plethora of minimum wages.

Also, the discretion given to the state governments to fix minimum wages as per their demography results in highly varied wages for the same employment in different states. The ILO report findings state that minimum wages for agricultural labourers varied from the lowest of INR 80 in Arunachal Pradesh to INR 269 in Kerala in the year of 2013.[4] This may even lead to a situation where the minimum wages of the state may be lower than the national minimum wage as has been generally observed in the case of Maharashtra. Under this Act, section 5 provides two

[2] Minimum Wages Act, 1948, No. 11 of 1948, Preamble.
[3] *Ibid.* sec.5.
[4] International Labour Organisation(ILO), *Indian Wage Report* ,78, 2018.

manners in which minimum wage is to be determined; one the committee method and other, the notification method. However, the issue here is that though the procedure is listed, no criteria has been specified, as has already been discussed above.

Thus, what can be conclusively said about the Act of 1948 is that though it was made with an honest motive, it failed to achieve what was intended. This failure can be attributed to ambiguity in the provisions and the resultant weak implementation by different bodies. With no provision of meaning and principle of minimum wages in the Act, the whole purpose of the Act seems defeated.

IV. COMMITTEE ON FAIR WAGES, 1948

The Committee on Fair Wages was a tripartite committee consisting of representatives from the employers, employees and the government. It was given the task which was lacking in the Act of 1948 that is, build a framework for determining minimum wages. The recommendations made therein are still regarded as important for fixing of minimum wages in India.[5] The committee report presented three kinds of wages, 1) living wage; covered food, shelter, education, clothing, old age insurance, 2)fair wages; subsistence plus standard wage, and 3)minimum wages; wage necessary for sustenance of life.[6]

However, it is only the third kind of wage, minimum wages, which has been adopted by various wage boards and governments. The guidelines provided herein try to fill the void created by the Act of 1948 to some extent. It states that minimum wages should not be fixed just to ensure sustenance of life but such wages must be fixed that ensure efficiency of the worker along with providing standard life to worker's family. The criterion thus provided was to look at the prevailing economic conditions of the country as well as of the employers to gauge their capacity to pay such wages.

Another innovation of the committee was its recommendation for setting up of wage boards across the country, for determining the minimum wages with representations from all the stakeholders.

---

[5] Ministry of Labour and Employment, Government of India ,Report of the Expert committee on Determining the Methodology for Fixing the National Minimum Wage, 2019.

[6] ILO, *supra* note 4 at 74.

V. 15TH SESSION OF INDIAN LABOUR CONFERENCE (ILC), 1957

Apart from the Fair Wages Committee, the 15th session of the ILC decisions and conclusions can also be regarded as providing a base for formulation of minimum wages. Several basic requirements were provided by the conference in order to arrive at a fair minimum wage. It gave five considerations to be taken into account for calculation purposes which included: a standard family of a worker, comprising of his wife and two children to be regarded as three adult consumption units, use of Dr Wallace Aykroyd's recommendation of 2700 calorie intake per day, clothing requirement of 72 yards for a family per year, minimum house rents as charged by the government and expenses on miscellaneous items such as electricity to comprise of 20 percent of the total minimum wages[7].

The above laid grounds have been accepted by many of the subsequent wage boards and committees, though not free from controversy. Dr Aykroyd's diet plan has been regarded as adequate but not optimum to sustain the efficiency of the workers.[8] Also, the conference's findings could not be uniformly applied to all States given their differences. Nevertheless, it was for the first time that the "need" which the minimum wages must satisfy was laid down in precise terms. Not only this, these needs were also converted into monetary terms.

WORKMEN V. REPTAKOS BRETT & CO.[9]

The Supreme Court in this case reaffirmed the need-based criteria as laid down in the 15th session to be the consideration while fixing minimum wages. It was stated that, "*Each category of the wage structure has to be tested at the anvil of social justice which is the live-fibre of our society today*".[10] While reaffirming the grounds of the 15th session, it suggested a new sixth ground; children education, medical requirements, minimum recreations including festivals etc. constituting 25% of the minimum wages.[11] It also stated that fixation on wages must depend on the prevailing prices. However, the criteria as laid down by Justice Kuldip Singh pertained much to the concept of living and fair wages rather than that of minimum wages.

---

[7] *Ibid.* at 3.
[8] National Health, Lung and Blood Institute, *Healthy Eating Plan*, (Oct.30, 2019) https://www.nhlbi.nih.gov/health/educational/lose_wt/eat/calories.htm.
[9] Workmen v. Reptakos Brett & Co. (1992) 1 SCC 290 (India).
[10] *Id.*
[11] Avin Jose & Derin Elsa Idiculla, *Minimum Wages: A Comparative Study*, https://www.scribd.com/document/62213343/Minimum-Wages.

Apart from the above laid down instances of whence criteria for minimum wages have been laid down, there have been many other attempts too. The five-year plans by the government were also aimed at reaching a minimum level of wages to achieve a subsistence level of living for worker and his family. Also, the 7th pay commission has affirmed the need-based criteria of the 15th ILC session. Inspired by these, a National Floor Level Minimum Wage was introduced by the by the National Commission on Rural Labour in 1996, however it was not given any statutory backing. However, many wage boards have at least tried to adhere to the national floor wage for determining state wise minimum wages but this has largely been unsuccessful.

VI. OTHER LEGISLATIONS ON WAGES

The Payment of Wages Act, 1936[12] is another piece of legislation in the series of Acts defining the wage policy of India. The provisions of the Act are aimed at guaranteeing payment of wages at time, without delay and without any deductions except for those provided under the Act (from section 7 to section 13). However, this Act also isn't free from discrepancies. The definition of wages as provided in section 2 (iv) only encompasses what amount has been agreed to by the employer and employee in the contract of employment. There is no mention of wages that are necessary for a worker or employee to sustain himself and his family. From a bare reading of section 3 which provides for 'Responsibility for payment of wages', it can be said that this Act is only meant for organised sector employments which are contract based. The Act doesn't cover those involved in unorganised sector of work and those in the domestic area. However, the Act has to be appreciated for its clear elaborations of fixation of time for payment of wages (section 4) and also stating the time limit of payment (section 5).

The Payment of Bonus act, 1965[13] is an Act which provides for payment of bonus to the employees out of the profits of the employer, if any. However, the definition of wages provided here varies from the Minimum Wages Act and Payment of Wages Act in the sense that the wages defined in this Act encompasses within it the provision for dearness allowances to account for the changing cost of living. This kind of provision has, though been suggested in various conferences and by various commissions, not been adopted in other legislations. Nevertheless, this Act also

[12] The Payment of Wages Act, 1936, Act 4 of 1936.
[13] The Payment of Bonus Act, 1965, Act 21 of 1965.

seems to be limited in its scope and applicability and therefore many employed in establishments which earn little or no profit, or those employed in the unorganised sectors or domestic work fail to enrich themselves of the benefit of this Act. The difference in definition of wages also proves to a matter of controversy as though they are legislations of the same nation, their provisions on same subject matter are different leading ultimately to ambiguity for both workers and their employers. Moreover, India has in place Equal Remuneration Act, 1976[14], which is to ensure non-discrimination on basis of sex for the purpose of remuneration. Though it provides for equal wages for men and women, no specific provision has been made to ensure equal minimum wages for men and women.

The issue at hand is not of the presence of such legislations but of the overlapping of them. The differences in provisions over the same subject matter prove to be chaotic and ultimately damage the economy of the nation. Also, varied minimum wages across the nation as per the Minimum Wages Act, 1948 leads to difficulty in ascertaining a national level estimate of consumption expenditure, a necessary element to calculate GDP. It also promotes disparities among various states that leads to migration of workforce from one state to another in hope of getting better minimum wages that causes shortage of labour in the sending region and excess of labour in the receiving state. This shortage and excess of labour in the labour market is a serious impediment to growth of the nation as a whole. Regional disparities in wages and absence of a national minimum wage also impacts the FDI. The foreign MNCs would be much encouraged to have their set up in regions which have low minimum wages as compared to other regions. In conclusion, regional variance, multiplicity of legislations, non-uniform laws, all leads to nothing but exploitation of workers and are a hindrance to the economic growth of the nation. Therefore, the need is to have a pan India legislation having uniform applicability and one which is free from errors of previous laws.

VII. CODE ON WAGES, 2019 BACKDROP OF THE CODE

The need to have minimum wage which is uniform throughout has been reiterated many a times. The first step in this regard has been by the 'Bhoothalingam Committee' of 1978 which moved the call for nationalisation of wages in order to remove differentials and disparities that exist in wages.[15] In 1996, the National Commission on Rural Labour also proposed minimum wages at

[14] Equal Remuneration Act, 1976, Act 25 of 1976.
[15] ILO, *supra* note 4 at 74.

the national level, but it did not receive any statutory assistance, so it existed only as a symbolic rule lacking binding power.[16] The objective has always been to ensure betterment and welfare of the workers and labourers. It was in this background, that the Code on Wages Bill was introduced by the Ministry of Labour and Employment seeking to simplify the laws governing the labourers by the means of amalgamating and merging the existing ones. The Code subsumes four of the earlier wage acts namely;

1) Minimum Wages Act,1948
2) Payment of Wages Act,1936
3) Payment of Bonus Act, 1965 and
4) Equal Remunerations Act 1976.[17]

In order to look into the possible implications of the Code, the Ministry of Labour and Employment formed an Expert Committee on January 17, 2018, to perform an in-depth analysis of the current conditions in order to arrive at the criteria for deciding the national minimum wage for all employees.

VIII. 43RD REPORT, STANDING COMMITTEE ON LABOUR (2018-19)

Before the present text of the code was finalised, it was presented before the Standing Labour Committee chaired by Dr Kirit Somaiya whose report was released on November 19, 2018. The report included various suggestions, recommendations and amendments to the provisions of the 2017 Bill, the major being simplification of the Bill's definition of wages. The report recommended for its simplification, showing concern about the length and vagueness of the definition of wages. Also the phrase "*at an interval of five years*" was changed to "*ordinarily at an interval not exceeding five years*" as regards to time period for the revision of minimum wages to ensure better compliance.[18] The report further showed concerns over the use of word '*facilitator*' which the committee sought to be replaced by '*inspector*', to ensure the enforceability of the provision. This fallacy was removed in the final Bill which included the word '*facilitator-cum-inspector*', and in this way a balance was reached.

---

[16] *Id.*

[17] Prerna Katiyar, *Wage Code Bill: What Code on Wages means for the 50 crore workers it aims to benefit*, The Economic Times, (Oct.30, 2019), https://economictimes.indiatimes.com/news/economy/policy/decoded-what-code-on-wages-mean-for-the-50-crore-workers-it-aims-to-benefit/articleshow/70515807.cms.

[18] Standing Committee on Labour, *43rd Report*, Ministry of Labour and Employment , p. ix., 2018.

The Standing Committee sought that a clarification be made that the minimum wages to be set, would be 'minimum wage at the time of entry/Initial wage'.[19] Therefore, whatever the expertise and number of working years, the minimum wages wouldn't be affected.

IX. REPORT OF EXPERT COMMITTEE ON 'DETERMINING THE METHODOLOGY FOR FIXING THE NATIONAL MINIMUM WAGE'

Under the chairmanship of Dr. Anoop Satpathy, the expert committee on 'Determining the Methodology for Fixing the National Minimum Wage' reported its findings in January 2019. It noted that the principles of 1957 Conference and 1992 judgement,[20] must be updated with existing labour conditions. A family's previous three units of consumption must now be updated to 3.6 units of consumption giving consideration to changing circumstances. After upholding ILC 1957 and 1992 judgment standards, the expert committee came to the conclusion that national minimum wages ought to amount to Rs. 375 per day (as of July 2018) which would be equivalent to Rs. 9,750 per month. The minimum wage must be set up irrespective of the jobs, expertise or rural or urban market.[21]

The Expert Committee in its finding has drawn upon a range of multiple sources in order to gauge the changing nutritional requirements, demographic structure, consumption and alike data which are and should be criteria for fixing a minimum wage.[22] Another suggestion of the committee was to divide the nation into five different economic regions for the purpose of fixing of minimum wages, considering differences in socio-economic factors of the distinct labour markets.

The committee also called for following the provisions of the ILO Minimum Wage Fixing Convention, 1970(No. 131). International experiences of the BRICS countries as well as other neighbours in the Asian region were also presented in the report to suggest ways as to how India could go further with national level minimum wages.

Conclusively, its recommendations could be summed as:

---

[19] *Id.*

[20] Workmen v. Reptakos Brett & Co. (1992) 1 SCC 290 (India).

[21] Ministry of Labour and Employment ,*Report of the Expert Committee on determining the methodology for fixing the National Minimum Wage*, Government of India, 68, 2019.

[22] Prashant K. Nanda, *Government suggests 9-hour working day, but avoids fixing a minimum wage in draft rule*, Live Mint, (Oct.31, 2019), https://www.livemint.com/news/india/govt-avoids-fixing-minimum-wage-in-draft-rules-suggests-9-hour-working-day-11572758439316.html. (Oct.31, 2019)

- The principles of ILC 1957, and SC judgment of 1992 must be upheld and minimum wages must meet working family's minimum expenditure required for food as well as non-food commodities.
- The calorie intake and consumption unit per family (3.6 as per the committee) must be taken into consideration.
- Division of the nation into five regions based on socio-economic differences and then the National Floor Minimum Wages be set accordingly to ensure the said socio-economic differences and needs be met accordingly.

X. THE KEY CHARACTERISTICS OF THE CODE AND THEIR CONSEQUEN-CES

The final Bill of Code on Wages, 2019 was introduced in the Lok Sabha by Mr. Santosh Gangwar, Minister of Labour on July 23rd, 2019. The Code has been notified in the Gazette of India on 8th August (the same day it received presidential assent), 2019 by the Ministry of Law and Justice. Its long title clearly lays down its objective which states that, *"An Act to amend and consolidate the laws relating to wages and bonus and matters connected therewith or incidental thereto*."[23]

The succeeding points elaborate the implications and consequences of the provisions of the Code;

1. *Scope and Application of the Code*- The code has been aimed to benefit about 500 million workers across the country.[24] The Act of 1948 was only applicable to the scheduled employments; however, this limitation has been removed by the Code, thus making it universally applicable in the territory of India. The economic implication of this would be that more and more workers being in the ambit of the Code, the consumption expenditure of the country would increase to a great extent which would ultimately lead to growth of nation's GDP. Also the earlier fallacy, that only contract based organised sectors of employment were protected, has now been done away with by covering even those employed in unorganised sectors which form a bulk of India's work force (about 92%).[25] This is largely beneficial as the workers who were till now a victim of

---

[23] Code on Wages,2019, No. 29 of 2019.
[24] Yogima Sharma, *Parliament Passes Wage Code Bill To Ensure Minimum Wage For Workers*, Economic Times, (Oct. 31, 2019), https://economictimes.indiatimes.com/news/economy/policy/rajya-sabha-passes-wage-code-bill/articleshow/70501009.cms.
[25]Ministry of Labour and Employment, *Report of National Commission on Labour*, http://www.prsindia.org/uploads/media/1237548159/NLCII-report.pdf.

exploitation would now be entitled to enjoy almost same benefits at par with their counterparts in the organised sectors.

2. *Wages and Workers Defined*- One of the prominent aim of the code was to consolidate different definition of 'workers' and 'wages', which were defined differently under different legislations causing difficulties in implementation.[26] The terms 'employee' and 'worker' received distinct definitions for them, which hitherto were treated at par in the previous legislations. However, Shri Tapan Sen, MP and member of the committee stated that this distinction would create confusion and provide the employers with a loophole which can be used by them to exploit the workers because of the ambiguities which may result.[27] Further to make matters more complicated, the Act itself uses both the terms interchangeably.

All India Trade Union Congress, posed similar arguments claiming that variation in meaning would result in discrimination between employees and employers. The Ministry responded by stating that 'employee' definition includes workers as a subset of employee in the Code.[28]The reason for providing two distinct definitions, as per the Ministry is because of the difference that exists between a mere worker and an employee, with the latter involved in supervisory, managerial and administrative works also.

3. *Fixation of Minimum National Floor Level Wages*- National Floor Level Wages have always been an aim to achieve by various governments to remove the variations and disparities. The Code has achieved this goal. The Code stated that Centre would fix a National Floor Level Minimum Wage below which an employer cannot pay to his employee. However, the issue arose when the final Code bill did not accept the recommendation of the Expert Committee which set up minimum wages at Rs 375. Also, the recommendation that the country be divided into five regional zones has not been accepted thus still allowing the states to fix minimum wages as per their specific conditions. Though provisions have been made stating that the state governments who have minimum wages above the floor wages must not reduce it, many changes have not been brought by the Code. Yet still, the benefit here is that this time the national floor level minimum wages have received statutory backing unlike the case of 1996.

[26]Wage Code 2019,(Oct. 31, 2019), http://pib.gov.in/newsite/PrintRelease.aspx?relid=192114.
[27]Standing Committee on Labour, *43rd Report* , Ministry of Labour and Employment, 13 , 2018.
[28] *Ibid*. at 25.

The controversy here is regarding the amount of floor level wage. While the committee recommended Rs 375, giving considerations to food and non- food essential conditions, the Code sets the minimum wages at a much lower level, at Rs 178. While the employers feel that this is too high the workers side still demands higher minimum wages, which goes to as high as Rs 700, as the 7th Central Pay Commission came up with in its recommendations.[29] There could be two implications of setting up minimum wages this low. First, the Code will suffer from similar fallacies as its previous counterparts. The conditions of workers may not be able to improve significantly. Furthermore, the consumption expenditure would not rise as planned. This is because many existing rates were already above the floor wage therefore there hasn't been much change brought apart from amalgamation of them. The Second implication could be that though the amount is low, but still it is uniform pan India and thus unlike other there are no different wages in different regions for the same occupation. This may prevent the problem of migration and the resultant consequences as has been discussed in the earlier parts of this paper. Also, with such low minimum wages, better compliance from the side of the employers can be accepted which would not have been possible if wages were set too high.[30] Apart from this, the nation would be freed from difficulties arising as a reason of existence of about 2000 rates of minimum wages.[31]

4. *Minimum Wage Fixation Mechanism*- For the process of setting and revising minimum wages, the previous two forms, i.e. the committee system and the notification method, has been retained. Under sections 6[32], 8[33] and 9[34] of the Code, further procedures as to the setting up of minimum wages have been laid down. Previously, the Bill of 2017 provided for the time interval for revision of minimum wages to be five years, however, this would have defeated the whole purpose of the Code in bringing efficacy in the wage revision system, as a presence of only an upper, and not a

[29]Amir Ullah Khan, *Why Minimum Wage Won't Fix India's Woes*, Live Mint, https://www-livemint-com.cdn.ampproject.org/v/s/www.livemint.com/news/india/why-minimum-wage-won-t-fix-india-s-w.html.
[30] Yogima Sharma, *Parliament Passes Wage Code Bill To Ensure Minimum Wage For Workers*, Economic Times, (Oct.31,2019)
https://economictimes.indiatimes.com/news/economy/policy/rajya-sabha-passes-wage-code-bill/articleshow/70501009.cms.
[31] PRS, Print Release,(Oct.31, 2019),
http://pib.gov.in/newsite/PrintRelease.aspx?relid=192114.
[32] Fixation of minimum wages, Code on Wages,2019, No. 29 of 2019, sec.6.
[33] Procedure for fixing and revising minimum wages, Code on Wages,2019, No. 29 of 2019, sec.8.
[34] Power of Central Government to fix floor wage, Code on Wages,2019, No. 29 of 2019. Sec.9.

lower limit would have made the revision of wages a bit static with response to the dynamic changes in the economy. Thus, in the final bill, it was iterated that wages be revised "at an interval not exceeding five years."[35] Additionally, advice from the Central Advisory Board consisting of all stakeholders must be sought before setting the floor wage which includes the employers, workers, government representatives and independent persons. The pay thus fixed should bear in mind a worker's minimum standard of living. The Minimum wages are to be fixed either for time work or piece work [Section 6(2)]. What it means is that wages are to be paid either for the time period he was engaged in the work and if his employment was on time basis; by hour, by day etc., he would be paid accordingly. Section 7 lists the 'Components of minimum wages', as including within itself a basic rate of wages and allowance (which are subject to adjustments by the government), along with, a basic rate of wages comprising of living allowances and cash values of essential commodities (computed by the government).

XI. INCORPORATION OF THE PREVIOUS ENACTMENTS

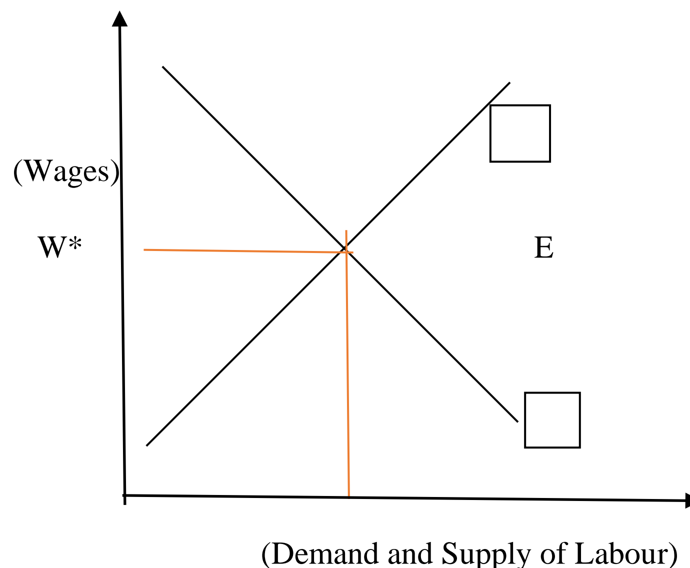
The Code on Wages subsumed the Minimum Wages Act along with three other enactments in order to further simplify the applicability and reduce contradictions within the provisions. Thus, what the Code did was to bring uniformity in the legislation concerning wages of the workers. By the way of section 3[36], the Code introduced the 'non-discrimination' clause, which is the reflection of the Equal Remunerations Act of 1976. The subsection (1) to section 3 states that there shall be no discrimination for work of similar nature. Moreover, the Code also, through its various provisions incorporated within itself the Payment of Wages Act, 1936 and Payment of Bonus Act, 1965. A new mode of payment, that is, electronic mode, was added in the Code, thus showing innovations from the previous archaic enactments.

XII. ECONOMIC IMPLICATIONS OF MINIMUM WAGES

Wages in the market are largely determined by the market forces of demand and supply. Here the demand and supply pertain to demand and supply of 'labour'. The general observation is that more the demand, higher will be the wages and lesser the demand along with excess supply, lesser will be the wages. Labour, being one of the four most important factors of production, plays an important role in the economy. Therefore, much emphasis is given to the contributors, that is, the

[35]PRS, Chapters at a glance, (Nov.01, 2019), http://www.prsindia.org/node/842679/chapters-at-a-glance.
[36] Code on Wages,2019, No. 29 of 2019,sec. 3.

labourers. India has hitherto been a labour-intensive economy. Thus, many incentives have been launched in order to protect their interest. Many other countries too have similar policy initiatives. The primary socio-economically favourable policy incentive for labour has been the concept of minimum wages. Minimum wages enforcement is both, an economic as well as political issue, thus formulation and fixation of minimum wages present challenges to both economists and policy makers alike. Though the social impacts of minimum wages are well known; better living standard, better facility affordability and alike, its economic implications similarly crucial. Therefore, the succeeding section will deal with the economic implications of minimum wages while discussing various varying views as to how it impacts an economy. The concept of minimum wages presents the economists and the policy makers with a paradox; low level of minimum wages would be insufficient to enable the workers to have a standard and sustainable living, while high level of minimum wages is opposed by the employers which would thus discourage hiring and would lead to unemployment. A usual labour market presents the following picture: -

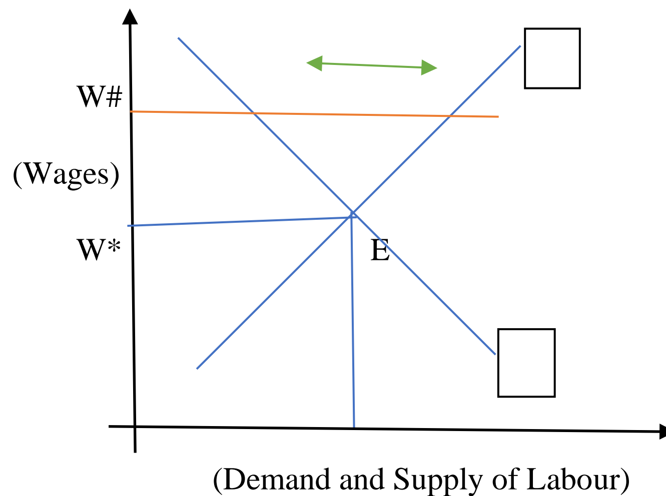


(Demand and Supply of Labour)

Here in the graph, X-axis denotes Demand (D) and Supply(S) of labour whereas Y-axis denotes wages. E symbolizes the equilibrium in the market where D=S. W* here refers to the equilibrium wage. It is at this wage the labourer or worker is willing to supply his labour and it is equal to what the employer is willing to pay. At this wage point, neither there is an excess nor a shortage. The labour market clears itself out.

A minimum wage is set up above the equilibrium price by adopting the economic tool known as flooring. Wage flooring implies that the employers are not to set wages below the decided rates.

The Code on Wages, 2019 similarly sets up a national level floor wage below which the employers cannot set their wages. Diagrammatically, how minimum wages are introduced in the labour market can be understood as below:



(Demand and Supply of Labour)

Here, W# is the minimum floor wage set up above the equilibrium wage W*. The implication here is that S>D, meaning there is an excess of supply over demand. Thus, this leads to a situation of surplus of labour in the labour market with not enough supply to absorb this excess demand. Thus, the first economic implication of introducing minimum wages is that it would lead to excess of labour (supply) in the labour market. The gap represented by the arrow represents unemployment.

However, the economic implications of minimum wages are more than that. The true economic implication of minimum floor wages could be best understood by looking at employment conditions of the economy. It is by testing changes in the employment level of the economy that one can gauge the efficacy of the minimum wages. In regard to this, two opposing views exist; it leads to unemployment and on the other hand, it rather promotes it.[37]

Earliest of the studies to study the effect of minimum wages was done by Minimum Wage Study Commission ,chaired by James G. O'Hara, Executive Director was Louis E. McConnell, which limited its work to United States and Canada. The Commission set up our various theories suggesting possible impact of minimum wages on employment.[38] The simplest of the theories is that as the wage is increased, employers will be motivated to employ fewer workers or they may

[37] Jared Bernstein & John Schmitt, (Nov. 01, 2019), *The Impact Of The Minimum Wage Policy Lifts Wages, Maintains Floor For Low-Wage Labour Market*, 2000, https://www.epi.org/publication/briefingpapers_min_wage_bp/.

[38] Report of The Minimum Wage Study Commission, Vol. 1, p.31, May 1981.

not reduce the number of workers rather reduce the working hours. The Commission brought out the fallacy of the policy of minimum wages that, "the minimum wage laws determine the lowest wage an employer can pay but leave the employer free to decide how many workers are desirable at that wage."[39] The Commission found out that the negative relationship between minimum wages and employment generally exists in case of low-wage workers. This finding also finds support in the report of Hon. Robert C. Scott submitted to Committee on Education & The Workforce Democrats.[40]

Minimum wage implementation has the most direct impact upon employment level of young and unskilled workers.[41] Economists studying the supply side of the labour market points out that raising minimum wages would lead to unemployment, while those on the demand side suggests that minimum wages reduces poverty and raises standard of living and thus reduces underemployment in the economy. Hristos Doucouliagos along with T.D. Stanley, in the year 2009 presented a meta study of earlier 64 studies on minimum wages published between the years of 1972 to 2007.[42] The focus of this meta study was on the impact which minimum wages have on teenage employment in USA.[43] The results of the study were that minimum wages had near zero employment effects.[44] After all, one thing can be concluded is that value of minimum wages has greater impact upon the demand side of the labour market.

In the International Conference on Technology Innovation and Industrial Management, Phuket, Thailand, in 2013, Anna Krajewska, Piotr Krajewski and Katarzyna Pilat presented a paper titled, 'The effect of the Minimum Wage on the Competitiveness of Economy'. The findings presented here were similar to earlier findings. High level of minimum wages may in particular case increase unemployment level among people with lower qualifications.[45] Therefore, the findings have proven that it is the group of unskilled labourers which are hit hard by the raising rate of minimum

---

[39] *Id.*

[40] Robert C. Scott, *Raising the Minimum wage: Good For Workers, Businesses, and the Economy*, Committee on Education & The Workforce Democrats, Factsheet.

[41] Owen E. Richa son, *Economic Implications of Minimum wage Implementation*, (Nov. 01, 2019), https://smallbusiness.chron.com/economic-implications-minimum-wage-implementation-4940.html.

[42] Eureka Fair Wage Act, Measure R, *Meta-Analysis: Raising the Minimum Wage Has Zero Disemployment Effect*, (Nov.03, 2019), https://eurekafairwageact.wordpress.com/2013/02/26/meta-analysis-raising-the-minimum-wage-has-zero-disemployment-effect/.

[43] John Schmitt, *Why Does the Minimum Wage Have No Discernible Effect on Employment?*, Feb. 2013, Centre For Economic and Policy Research.

[44] Doucouliagos, Hristos & T. D. Stanley, *Publication Selection Bias in Minimum-Wage Research?*, 47 British Journal of Industrial Relations 2, 406-428(2009).

[45] Anna Krajewska, *et al., The Effect of the Minimum Wage on the Competitiveness of Economy*, p.12.

wages. The reason here is that the unskilled workers are generally employed at lower rate of wages. The wage paid to them remains meagre because of them being not qualified and as skilled as the others in the labour market. Since wages paid to them are lower than the minimum wages set by the government, the employers find it discouraging to employ them at increased wages despite them being unskilled. Seeing increase in wages, the employer may see it beneficial to rather appoint skilled and trained individuals. Thus, this is the other face of change brought by minimum wage implementation that while it reduces employment for the unskilled workers, the employment level for skilled workers tends to rise.

Conclusively it could be said that low wage earners (whose wages are lower than the floor wages) are the sufferers when minimum wages are set high than the equilibrium wages. Hence it is pertinent to say that increase in the minimum wages or setting high minimum wages throws some workers out of the labour market, thus hurting the very people it is intended to help.[46] This however does not mean that minimum wages have bad impact upon the economy. It is the cost which is to be borne by low skill workers. The labour market adjusts itself with 'worker-worker' substitution. The economic evidences thus deny the existence of the oversimplified belief that minimum wages implementation leads to unemployment.

The other belief which the economists seem to uphold is that minimum wages implementation has positive employment effects. New studies of minimum wages effects have revealed that the already meagre negative employment effect which it had has further reduced to being zero or little. Empirical evidence has shown that minimum wage implementation does not impact the employment level of the trained and the skilled workforce. As has been stated, raising the national minimum wage would stimulate the consumer spending and would thus help the economy to grow. Minimum wages would also improve labour productivity and reduce absenteeism of the workers.[47] This conclusion has also been corroborated by other studies. Since absenteeism is a non-wage component of compensation, if minimum wages did reduce it, it would ultimately help the employers. In an economy, the employers have various options other than just cutting the jobs. The employers respond to the changes in the wage policies. Cutting the hours, employment benefits and number of jobs is one side of the response.

---

46 Jared Bernstein & John Schmitt, *The Impact Of The Minimum Wage Policy Lifts Wages, Maintains Floor For Low-Wage Labour Market,* 2000, (Nov.01,2019) https://www.epi.org/publication/briefingpapers_min_wage_bp/. (Nov. 01,2019)

47 Robert C. Scott, *Raising the Minimum wage: Good For Workers, Businesses, and the Economy,* Committee on Education & The Workforce Democrats, Factsheet.

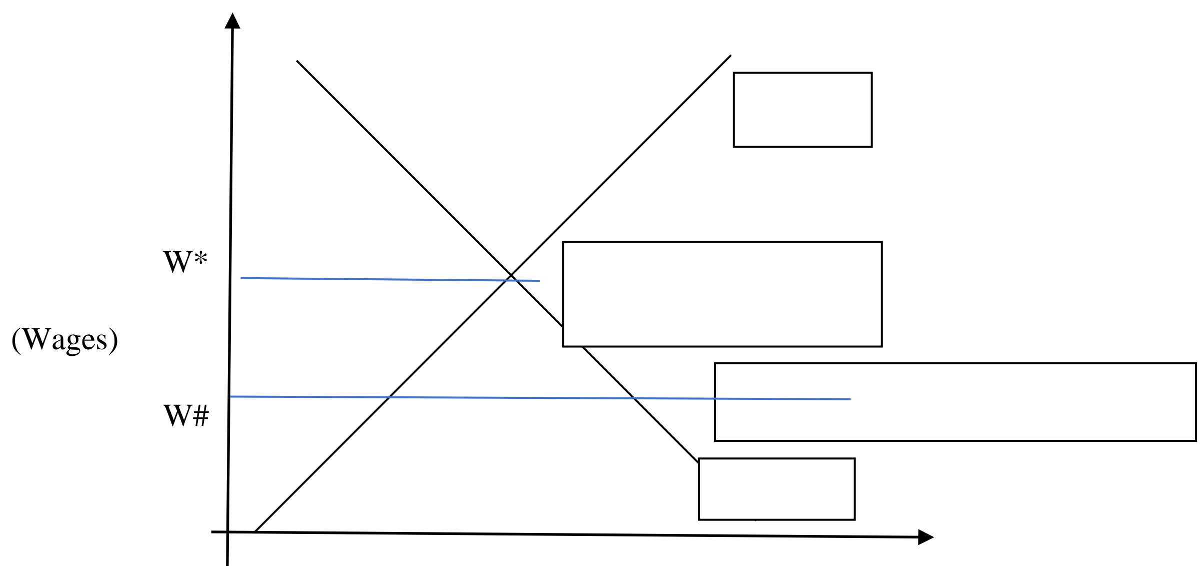
A paper by Barry Hirsch, Bruce Kauffman and Tetyana Zelenska titled, 'Minimum Wage Channels of Adjustment' presents with certain adjustment channels which the employer may adopt in response to implementation of minimum wages and their increase.[48] They divided their approach into three models namely competitive model, institutional model and the dynamic monopsony model. In the Indian economy, certain industries operate in the competitive model. Markets for agricultural products, daily wage labourers, or any daily use commodity are some examples where certain characteristics of perfect competition can be witnessed in the Indian economy. According to John Schmitt, employers in the competitive model generally adjust through declining employment. However, he has also proposed certain other adjustment channels that could well be adopted by the Indian employers after the Code on Wages, 2019. These are high pricing and reduction in non-wage benefits among numerous others.[49] Though these will not be socially favourable and even would increase the burden on the consumers, in the long term the increased minimum wages would nevertheless leave the workers with more money in the hand. This income would then ultimately be converted into consumption expenditure which would then restore the balance in the economy without reduction in employment level.

Since the Code on Wages would have effect only on low-wage earners (as far as minimum wages are concerned), analysing its effect on skilled workers earning sufficient wages and employed in organised sectors is an exercise in futile.

The sub-section here will now deal with how the National Floor Wage, set up under Code on Wages, 2019 will have effect upon Indian economy and its labour market.

EFFECT OF MINIMUM FLOOR WAGES SET UP UNDER CODE ON WAGES, 2019- The Ministry has laid down that the national minimum wage be set at Rs 178 per day.[50] Since equilibrium wage for the Indian labour market is difficult to arrive at, average wages would be taken to account. The average wages of India, according to the ILO report is estimated to be Rs 247 (Rs 122 in rural areas and Rs 384 in urban).[51] Diagrammatically, it could be presented as,

[48] Barry Hirsch *et al., Minimum Wage Channels of Adjustment*, 1,2011.
[49] John Schmitt, *Why Does the Minimum Wage Have No Discernible Effect on Employment?*, Feb. 2013, 12, Centre For Economic and Policy Research.
[50] Tomojit Basu, *Why the Wage Code is Unlikely to Improve the Conditions of Indian Workers*, (Nov. 02, 2019) https://thewire.in/labour/why-the-wage-code-is-unlikely-to-improve-the-conditions-of-indian-workers.
[51] ILO, *supra* note 4 at 13.



Generally, the minimum wages are set up above the equilibrium wages as a 'floor', however, the current floor wages are way below the average wages in India. Therefore, it can be said that it did not serve the purpose which it ought to. However, the effect of these minimum wages must be understood considering the prevailing wage conditions 'state-wise'. The ILO report findings state that minimum wages for agricultural labourers varied from the lowest of INR 80 in Arunachal Pradesh to INR 269 in Kerala in the year of 2013.[52] Thus it is in these cases that the current minimum wages would have positive impact. States which had minimum wages below this rate would largely be beneficial from it. Thus, theoretically it can be concluded that the Code on Wages, 2019 will not hamper the employment level of the economy.

52 *Ibid.* at 78.

Rather what we can expect from the Code is that it will encourage the employers to hire more, thus filling the vacancies. This would prove essentially true for the states which currently have minimum wages more than what is set now. With no harm to suffer, the employers would now employ more than the existing number. The situation would have been much different if the Ministry accepted the suggestions of the Labour Ministry panel which recommended the minimum wages to be set at Rs 375 per day. Implementation of Code on Wages is set to replace all the hitherto existing varied minimum wages in the nation. Uniform wages across India would, theoretically speaking, reduce inter-state migration which had till now happened due to difference in wages in different regions for the same occupation and employment.

XIII. CONCLUSION

First in the series of labour reforms (total being four) seeking to free the labour sector from the clutches of archaic laws, the Code on Wages, 2019 is seen with much anticipation and hopes in the Indian economy. The aim with which it is made reflects the Directive Principles of State Policies as enshrined under Article 43[53] of Part IV of the Constitution. However, its success will depend on its effective implementation and strict inspection of its enforcement. The idea of minimum wages is a sensitive issue having serious impact on the economy of the country, thus the policy makers have to set up the minimum wages after giving due consideration to the economic as well as welfare factors. As has been discussed earlier, minimum wages can also lead to situation of unemployment, thus the law makers must be ready to combat such problems beforehand. The process of revision and modification of the minimum wages on timely basis must be strictly followed unlike what has previously been done in order to effectively realise the objectives of the Code as well as the advice and suggestions of the stakeholders must be given proper place during formulation and fixing of minimum wages.

Formulation of minimum wages much less than what was suggested by the Expert Committee has led to many speculations and economists are sceptical regarding its success. But given the past experiences and contemporary situations, it would be observed that despite minimum wages

[53] Article 43- Living wage, etc, for workers The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

being low, supply would not decrease given the lack of alternative avenues of earning and thus workers would be forced to work on such level of wages.

The Code must be seen as the first step towards reforming the labour laws by way of simplification and rationalisation. Having subsumed the four older Acts which were more than fifty years old, the Code reflects the dynamic character of Indian economy. The following days will be testimony of whether the Code will fulfil the visions of the policy makers or not.

WHO OWNS THE MOON? A STUDY ON EXTRA-TERRESTRIAL REAL ESTATE

*SHANMATHI. R**

ABSTRACT

Anatole France in his book 'The Garden of Epicurus' rightly said that, "The wonder is, not that the field of stars is so vast, but that man has measured it." In that way as technology is getting advanced, nothing seems to be unreachable before the untiring efforts of man, of which space exploration and exploitation is a perfect example. Space law being an area that encompasses national and international law governing activities in outer space, has evolved and assumed more importance as humankind has increasingly come to use and rely on space-based resources. Particularly ever since moon became a place reachable by men, people have begun to claim property rights over it. Lunar property rights in simple words can be said as claiming of sovereignty over moon. Space treaties say that space and other celestial bodies must only be used for the peaceful purposes and that any such use must only be for the welfare of humankind. However none of the provisions of internationally adopted legislation are clear. Further, the legal regime concerning the use of moon and other celestial bodies is also largely unsettled and in recent days various nations including various private enterprises are showing huge interests over claiming of property rights over moon for the purpose of exploiting its indispensable resources. Though the moon treaty explicitly bars private property rights over moon, only 16 states are parties to it so far, in spite of moon treaty being one of the best framed space legislation. This is because most of the states don't agree with the principle of common heritage of mankind based on which the entire moon treaty is framed. In this paper I have done a detailed research on lunar property rights and have also done a study on extra territorial real estate with special reference to the story of a man named Dennis Hope who claims to own the moon and also have suggested some measures to avoid contradictions among nations in future in regard to usage of moon based resources for the betterment of humankind.

KEYWORDS: *Humankind, Sovereignty and Exploitation*

* FIFTH YEAR, B.A.LLB (HONS.), STUDENT AT SAVEETHA SCHOOL OF LAW, SAVEETHA INSTITUTE OF MEDICAL AND TECHNICAL SCIENCES, CHENNAI

I. INTRODUCTION

Space law is an area of the law that encompasses national and jurisprudence governing activities in outer space. The origin of the sector of space law began with the launch of the world's first artificial satellite by the Soviet Union in October 1957. Named Sputnik 1, the satellite was launched as part of the International Geophysical Year. Since that point, space law has evolved and assumed more importance as humankind has increasingly come to use and rely on space-based resources. These space based resources provide a compelling reason for entrepreneurs, investors, and governments to pursue space exploration and settlement. In recent days, many controversies have been raised in regard to claiming of property rights over the outer space, moon and other celestial bodies. However, none of the internationally adopted legislation paves way for claiming of such property rights over space and still the provisions of various treaties are not clear apart from being contradictory to each other. Further the legal regime concerning the use of moon and other celestial bodies is also largely unsettled and in recent days various nations including various private enterprises are showing huge interests over claiming of property rights over moon for the purpose of exploiting its indispensable resources. In this paper I have justified about the legality of claiming property rights over moon. And have also suggested some measures to avoid any contradictions among nations in future in regard to usage of moon based resources for the betterment of humankind.

II. EVOLUTION OF LUNAR EXPLORATION

During the 20th century the Cold War-inspired Space Race between the Soviet Union and the U.S. led to an acceleration of interest in exploration of the Moon. Once launchers had the required capabilities, these nations sent unmanned probes on both flyby and impact/lander missions. Spacecraft from the Soviet Union's Luna program were the first to accomplish variety of goals: following 3 nameless, failing missions in 1958. The first space vehicle to perform a thriving satellite soft landing was Luna nine and also the first pilotless vehicle to orbit the Moon was Roman deity ten, each in 1966. Rock and soil samples were brought back to Earth by three Luna sample return missions (Luna sixteen in 1970, Luna 20 in 1972, and Luna 24 in 1976), which returned 0.3 kg total. Two pioneering robotic rovers landed on the Moon in 1970 and 1973 as a part of Soviet Lunokhod programme. In the meantime, NASA's manned Apollo program was developed in parallel; after a series of unmanned and manned tests of the Apollo spacecraft in Earth orbit, and

spurred on by a potential Soviet lunar flight. In 1968 Apollo 8 made the first crewed mission to lunar orbit. The subsequent landing of the first humans on the Moon in 1969 is seen by several as the culmination of the Space Race. Neil Armstrong became the first person to walk on the Moon as the commander of the American mission Apollo 11 by first setting foot on the Moon at 02:56 UTC on 21 July 1969. The Apollo missions 11 to 17 (except Apollo 13, which aborted its planned lunar landing) returned 380.05 kilograms (837.87 lb) of lunar rock and soil in 2,196 separate samples. After the first moon race there were years of near quietude but starting in the 1990s, many more countries have become involved in direct exploration of the Moon. India, Japan, China, the United States and the European Space Agency each sent lunar orbiters, especially ISRO's Chandrayaan-1 that has contributed to confirming the discovery of lunar water ice in permanently shadowed craters at the poles and bound into the lunar regolith. Now in recent days NASA has once again begun to plan to resume manned missions following the call by U.S. President George W. Bush on 14 January 2004 for a manned mission to the Moon by 2019 and the construction of a lunar base by 2024. India has conjointly expressed its hope to send a manned mission to the Moon by 2020.

III. EVOLUTION OF SPACE LAW IN RELATION TO MOON

When it comes to the measures of protecting space environment, it involves ensuring security of lives of all people of the planet from any possible potential threats. It also involves the safety of the astronaut’s life and also protection from environment challenges. There are five international treaties that have been negotiated and drafted in the COPUOS. However these are not the only treaties pertaining to the protection of space environment. There are also other principles apart from the five important treaties that govern space law which encourage exercising the international laws, as well as unified communication between the countries. In regard to moon there are two main international treaties. Firstly, the Outer Space Treaty, formally the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, is a treaty that forms the basis of international space law. Among its principles, it bars states party to the treaty from placing weapons of mass destruction in orbit of Earth, installing them on the Moon or any other celestial body, or to otherwise station them in location. It solely limits the utilization of the Moon and other celestial bodies to peaceful functions and expressly prohibits their use for testing weapons of any kind, conducting military manoeuvres, or establishing military bases, installations, and fortifications. The outer space pact deals with

international responsibility, stating that "the activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing superintendence by the acceptable State Party to the Treaty" which States Parties shall bear international responsibility for national house activities whether or not distributed by governmental or non-governmental entities.

IV. WHY IS MOON SO IMPORTANT?

Moon compared to mars is closer and economically more interesting. Furthermore, moon being one of the largest natural satellite in the solar system, some scientists believe that the moon could prove a goldmine for future generations. This is because there are plenty of resources available at moon like oxides of typical engineering metals, such as iron, aluminium, magnesium, titanium and silicon are abundant on the lunar surface. The greatest concentrations of iron occur within the Maria (the flat plains). In these locations the concentration tends to be concerning 15 %, but can be as high as 25%. Iron on the Moon occurs in 2 main forms: combined with different components like mineral ($FeTiO3$), originating from Moon rock and there is free iron originating from meteors impacting on the Moon. The free iron is already in small-grained kind and could simply be collected using magnets. Iron together with different components would require some kind of mineral processing to liberate the iron. The lateral extent of iron on the Maria of the Moon is massive. One of the main things which will verify the viability of an iron extractive industry on the Moon will be the depth of the iron wealthy deposits. The other factors will be the ease or difficulty with which the deposits can be mined and then processed. It is unknown whether there are massive deposits of heavier components like lead, tungsten, chromium or uranium. Although the moon is especially composed of light elements, radioactive thorium has been evidenced to exist within the Compton–Belkovich Anomaly on the farther side. A greater challenge to a moon colony will probably be the absence of hydrogen and therefore water. Even the poles of the moon, which hold the most water, are drier than the driest deserts on earth. Nitrogen is also uncommon, which makes it hard to create a breathable and non-flammable atmosphere. Nitrogen is also used in metal surface treatments. Carbon is additionally scarce, however it has the advantage of being a dense solid at temperature, so it can be more easily shipped from earth than nitrogen or hydrogen. Both nitrogen and carbon are accessible in a few elements per million in Lunarregolith. Other challenges are the supply of energy in order to power the mining and process equipment and also the impact of the abrasiveness of Moon dust on such equipment. The instrumentality will have to be

compelled to work when needed, not be idle , and due maintenance along with overhaul issues resulting from excessive abrasive wear and tear will need to be dealt with. The equipment which can be used to mine and method iron will have to be designed and made to stop the fine iron dirt from short circuiting electrical elements.

V. LUNAR PROPERTY RIGHTS

Ever since spacefaring began in the 1950's, space enthusiasts have dreamed that the exploration of outer space would result in the colonization of outer space by human beings. From Arthur C. Clarke's visions of colonies on the Moon to the plans of the Mars Society these days, the goal of human settlements on celestial bodies has galvanized scientists and science fiction writers, and to a lesser extent politicians and entrepreneurs. Space contains valuable resources. These give a compelling reason for entrepreneurs, investors, and governments to pursue area exploration and settlement. Moon in the past few decades has become possible to travel to. Ever since moon became a place reachable by man, people began to claim for property rights over it. Lunar property rights in simple words can be said as claiming of sovereignty over moon. Though the various treaties say that space and other celestial bodies must be used for peaceful purposes only, at the same time it is also said that any such use must be for the welfare of humankind. Though these conditions have been stated explicitly, it binds only upon the states that are parties to it .Further nowhere do the treaties deal with the aspect of usage of space by private corporations except in the case of the moon treaty. In recent days private businesses are showing huge interests in exploiting the moon based resources as they have enormous value and huge rate of return. While some scholars argue that property rights can exist only under a nation's dominion, but most believe that property rights and sovereignty can be distinct. Although moon treaty has explicitly barred private property rights over moon, only 16 states have ratified it so far in spite of the moon treaty being one of the best framed space legislation.

VI. EXTRA TERRITORIAL REAL ESTATE- STORY OF DENNIS HOPE

Extra-terrestrial real estate is land on other planets or natural satellites or parts of space that is sold either through organizations or by individuals. Ownership of Extra-terrestrial real estate is not recognized by any authority. Nevertheless, some private individuals and organizations have claimed ownership of celestial bodies, such as the Moon, and are actively involved in "selling" parts of them through certificates of ownership termed "Lunar deeds", "Martian deeds" or similar.

These "deeds" have no legal standing. The topic of real estate on celestial objects has been present since the 1890s. A. Dean Lindsay had made claims for all extra-terrestrial objects on June 15, 1936. The public sent offers to buy objects from him in addition.

Dennis Hope, owner of Lunar Embassy, says he's sold 500 million acres as "novelties." Buyers choose the location except for the Sea of Tranquility and the Apollo landing sites, which Hope has placed off-limits. Dennis Hope, being an American entrepreneur, sells extra-terrestrial real estate. In 1980, he started his own business, the Lunar Embassy Commission. As of 2009 Hope claimed to have sold 2.5M 1-acre plots on the Moon, for around US$20 per acre. He allocates land to be sold by closing his eyes and at random point out to a map of the Moon. He claims two former U.S. presidents as customers, stating Jimmy Carter and Ronald Reagan had aides purchase them plots on the moon.

VII. PROVISIONS OF VARIOUS TREATIES IN RELATION TO LUNAR PROPERTY RIGHTS

Out of the five important treaties under space law, two important treaties explicitly deal with claiming of sovereignty in regard to outer space. They are:

1. **Outer Space Treaty:-**

   The Outer Space Treaty, formally the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies(hereinafter OST), is a treaty that forms the basis of international space law[1]. Important provisions of the treaty are,

   - The very important provision in regard to OST is Article II which states, “Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use of occupation, or by any other means”.[2] This treaty was framed before the first successful lunar mission itself. So hoisting of US flag over moon by Neil Armstrong was said to be meaningless even before he did so.

[1] Wayne.N.White , *Real Property Rights in Outer Space*, 40th colloquium on the law of outer space, (American institute of Aeronautics and Astronautics, 1998).

[2] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies art. 2, Jan. 27, 1967.

- Also Article VI of OST states, "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization"[3] This provision impliedly says that even participation of private corporation is under the roof of its nation to which it belongs and that it has to get proper authorisation before proceeding with any activities in regard to space.

- Article IX of OST states that, "In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty"[4] This impliedly states that moon is not a property for private use. Further it must be used by means of cooperation and mutual assistance among all states for the benefit of humankind.

2. **Moon Treaty:-**

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,[5] better known as the Moon Treaty or Moon Agreement, is an international treaty that turns jurisdiction of all celestial bodies (including the orbits around such bodies) over to the international community. Thus, all activities must conform to international law, including the United Nations Charter. The important provisions of this treaty are;

- Article II of the Moon Treaty states, "All activities on the moon, including its exploration and use, shall be carried out in accordance with international law, in particular the Charter of the

[3] *Ibid.*, Art. 6.
[4] *Ibid.*, Art. 9.
[5] The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18,1979.

United Nations, and taking into account the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interest of maintaining international peace and security and promoting international co-operation and mutual understanding, and with due regard to the corresponding interests of all other States Parties"[6] The statement promoting international co-operation and mutual understanding implies that no state can claim personal rights over moon as whatever they do must be for the benefit of humankind.

- Article XI, Section 3 of Moon Treaty states, "Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non- governmental organization, national organization or non-governmental entity or of any natural person".[7] Though this provision clearly prohibits the scope for claiming lunar property rights, its binding force is too low as this treaty has been ratified by 16 states only.
- Article XI, Section 7 of Moon Treaty states, "An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration".[8] This clearly states that benefits that arise out of any exploration shall not be used except for public gain.

These are the two important treaties that have various provisions which explicitly deal with the claiming of sovereignty in regard to outer space.

VIII. CONCLUSION AND RECOMMENDATIONS

"No national sovereignty rules in outer space. Those who venture there go as envoys of the entire human race. Their quest, therefore, must be for all mankind, and what they find should belong to all mankind."[9]

In order to use space and its celestial bodies including moon for the welfare of humankind certain prospective reforms have to be taken. Among which the first is to frame a new protocol that clearly

[6] *Ibid.* Art. 2.
[7] *Ibid,* Art 11(3).
[8] *Ibid,* Art 11(7).
[9] President Lyndon B. Johnson, *The President's News Conference at the LBJ Ranch*, The American Presidency Project , (May 2, 2016), http://www.presidency.ucsb.edu/ws/index.php?pid=27200 .

states the terms and conditions for usage of space based resources in such a way that is universally acceptable. Further it must also be friendly to private investments. The need for such new protocol is that the present existing treaties lack clarity and legal certainty.[10] Further there must be a strong social obligation norm that explicitly defines private property rights, their participation over space activities, their share over obtained resources and the legality of their claims. The norms should be framed in such a way that it should be for the benefit of all and must be for the welfare of humankind.[11]So, all steps that are about to be taken by any nation in this existing world in regard to space activities must be with an intention to serve the humankind, such that no unreasonable claim over space based resources should be made for personal gain. Further the ambiguities over the provisions of various treaties should be avoided either by amending the existing treaty or by framing a new treaty that is universally acceptable and it should be framed in such a way that benefits the whole humankind.

[10] International Institute of Space Law, Statement of the board of directors of the International Institute of Space Law (IISL), March 22, 2009 , (May 3, 2016), http://www.iislweb.org/html/20090322_news.html.
[11] White, *supra* note 1.

THE IMPACT OF ECONOMIC POLICIES ON THE ENVIRONMENT OF INDIA WITH FOCUS ON LIBERALIZATION AND GLOBALIZATION

*J. Karan Malhotra**

ABSTRACT

Environmentalism has moved from being an 'elite' issue discussed in seminars and conferences, to becoming a real issue affecting people's daily lives, health and livelihoods as the pressure on the environment increased with development. Since the era of liberalization, the economic reforms of incumbent government have done little to nothing to prevent the degradation of environment in lieu of the policies that were formulated to enhance economic growth and trade, after the Indian economy was revolutionized in 1991. Inspite of the fact, that a robust framework of laws exists to protect the environment, since before these policies had been implemented and the fact that the Indian Courts have been pro-active in their judicial capacity, it is very evident that pro-environmental policies have almost always been subservient to the policies made in furtherance of economic growth. There is a perception that our natural resources are available in bountiful amounts and everyone has access to it because you can turn a tap and that is very worrisome and a big problem. This paper focuses on how the economic policies have had a negative impact on the natural resources in our country as well as the common person, beginning from 1991 till today.

KEYWORDS: *Environment, economy, reforms*

I. INTRODUCTION

POST MODERNIZATION REFORMS

India now has started to depart from the 'mixed economy' model of development in an effort to integrate into the world economy in the early 1990s. The movement for liberalization of the economy had received a big boost when India adopted NEPs in July 1991. This proved to be a

* 4TH YEAR STUDENT OF B.A., LL.B(H), AT, AMITY LAW SCHOOL, DELHI (GGSIP UNIVERSITY)

turning point in India's social and economic development. India also adopted the WTO and the GATT. Both external as well as internal factors have played a key role in bringing about these changes. The pulling out by the state, cost-cutting measures in the social sector, getting rid of subsidies, and introduction of policies that were oriented towards exports are examples of increasing social cleavages in the Indian society.[1]

There has been a lot of competitiveness and efficiency in our economy due to an unrestricted play of market forces, which has further enhanced the growth of the economy. While the drastic measures introduced by the 'Social Safety Net Sector Adjustment Programme' led to the liberalization and structural adjustments in key areas viz. health, education, employment along with overall development. While this might have turned out to be compensatory in nature because, as of now, there are no corresponding measures for compensation due to the fact that the budget which had been allocated for the environment was reduced. Every major components of NEPs, viz., liberalization of trade, orientation towards exports, privatization and reduction in expenditures on the social sector have been detrimental to the environment and the common man, who depends upon natural resources to carry out his daily activities and for the fulfillment of his basic needs.[2]

II. EXPORTS

To increase earnings in the foreign exchange sector, the government placed heavy reliance on the export sector. This is very evident in sectors such as shrimp aquaculture, fisheries, cash cropping and flori-culture. The government has been permitting joint ventures in the fishery sector on a very large-scale. India has achieved an eleven-fold increase in the production of fish in just six decades, from 7,50,000 tonnes in the1950s to a staggering 96,00,000 tonnes during 2012–13. The growth rate of over 4.5 percent every year was unimaginable, and over a period of time this led India to come on the fore-front of fish production globally, second only to China. Apart from covering the domestic requirements and the dependence of over 1.5 crore people on activities related to fisheries for their livelihood coupled with earnings in foreign exchange up to a massive US$ 3.51 billion (2012–13) from fish related products. In total fish production, India ranks second in the world, with an annual fish production of about 9.06 million metric tonnes.[3] This has been detrimental to

[1] Supriya Guru, *New Economic Policies and the Environment in India,* YOUR ARTICLE LIBRARY, http://www.yourarticlelibrary.com/economics/new-economic-policies-and-the-environment-in-india/38434.
[2] Id.
[3] Fisheries and Aquaculture Department, *National Aquaculture Sector Overview: India*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, http://www.fao.org/fishery/countrysector/naso_india/en.

the conventional fish worker, at the same time the domestic supply of fish has decreased. The post-liberalization period gave a great boost to Shrimp aquaculture; however, it may lead to a catastrophe throughout the coastal ecology.

Another sector wherein export has been promoted through the industry on a large-scale is the mining sector. The National Mining Policy of 1994 introduced significant changes for the promotion of investment through the private sector. The earnings through export in Orissa have increased by 36% every year over the decade, wherein the list of items exported was topped by minerals; however, the fact that that this has been at the cost of dispossession of lands from tribal communities and large-scale deforestation has been ignored. It might be pertinent to note that the state changed the policies relating to exports in 1993. Approximately 140 items and sub-items had been categorically withdrawn from the negative list of exports, which included the export of vulnerable animal and plant species. Policies that are focused primarily on increasing export, do not leave any room for ecological aspects and the needs of local people. These policies are in furtherance of the interests of private stakeholders, which comes at the cost of the environment.[4]

III. TRADE LIBERALIZATION

The GATT and the WTO promote international trade, with their primary focus on the sectors of agriculture, textile, fisheries, forests, beverages and processed food. It might be pertinent to note that the 1994-95 Economic Survey conducted a few years after the trade liberalization of 1991 declared that India's current as well as potential competitiveness in export lies in these sectors. Not only that, India could potentially earn an extra US$ 2.7 to 7 billion every year. Furthermore, a boom has been seen in investments in automobile components due to delicensing the automobile industry and has led to plans for producing new cars. Thus, many big companies like Peugeot, Mercedes, General Motors, Rovers and Daewoo began joint ventures with Indian companies during this time. The survey, however, very conveniently ignored the aspect of pollution and the impact these policies could have on the environment.[5]

Centre for Science and Environment (CSE) which is an NGO based in Delhi, gave startling revelations about the rise in pollution levels, which has resulted in a corresponding rise in increase in diseases and deaths, especially in metropolitans in India post liberalization.[6] Not just that, the

---

[4] Supra Note 1.
[5] Id.
[6] Centre for Science and Environment. https://www.cseindia.org/.

importing of wastes that are toxic in the name of recycling of wastes presents a serious threat to the general health of the public as well as the ecosystem.[7] Liberalization of trade has affected the livelihood of small producers as well. In Andhra Pradesh alone, approximately 2 million weavers have lost their livelihoods due to free export of cotton being allowed and has taken access to cotton beyond the weavers. A study of the suicide epidemic in Punjab by cotton farmers showed that there is a direct link between the suicides and growing inflation due to the policies of the liberalization.[8] Another study conducted in Warangal district of Andhra Pradesh by the Research Foundation for Science, Technology and Ecology reinforces these findings.[9] The second study traces the problems that have emerged in cropping patterns after the seed sector was privatized, which is the shift towards cash rich crops as well the rise in dependence on high cost agro-chemicals. The culture is changing from traditional to cash-crop, which has led to a sharp increase in the risk factor. Nevertheless, the insurance sector is practically non-existent because the level of investments remains low, even co-operative societies fail to act as pressure groups on behalf of the common farmer. In case the lakhs a farmer puts in to raise the crop fails, there are no institutions or system a farmer can turn to. Foreign consumer goods have flooded the markets in India in the aftermath of liberalization of trade, and therefore are threatening the very basis of the Indian consumer industry.[10]

IV. PROMOTION OF TOURISM

since the era of liberalization, tourism has been promoted on a large-scale, while the negative impact of tourism on the locals have been ignored along with the irreparable damage it can cause to our ecosystem. Tourism has also been given the status of an export industry. Places like Andaman & Nicobar Islands, Lahaul Spiti, and Ladakh, which have remained relatively untouched, are now also being opened up for tourism. Resorts for tourists and hotels are being constructed in areas that are ecologically sensitive. It is as if our policy makers are refusing to learn from the experiences of the Central American countries wherein heightened impoverishment of the masses occurred at the same time when tourism was escalated. In a bid to earn fast and easy

[7] Supra Note 1.
[8] Paromita Chakraborty, 10/62/MS/025, Prof. Sudha Pai, *Agrarian Crisis and Farmer's Suicides in India: The Case of Punjab*., 183/M/2013, 02 August 2013.
[9] Supra Note 1.
[10] Id.

foreign exchange, the government has ignored the social and the environmental cost of promoting tourism in a highly globalized society.

V. THE RICH BIODIVERSITY

India is one of the twelve "mega centers of biodiversity" of the world. Many projects are being sanctioned for development in areas that are rich in biodiversity, but are also fragile ecologically. Wanton deforestation couple with the development projects are leading towards the quick depletion of our rich biodiversity. The Western Ghats come in the top ten biodiversity 'hot spots' of the world. However, the region has undergone rapid industrialization and the projects which are underway present a huge risk to the region's ecology. Our rich biodiversity is bound to come under pressure in the era of neo-liberal trade, in order to serve the global demand for dyed clothes and herbal products. This can be observed from the study of the Al-Kabeer slaughter house that the depletion of our living resources along with consequent social problems is a corollary of the transnational model of development. Invariably, the regions which are high are biologically diverse are inhabited by the poorer people in the country. Therefore, the proposition that the depletion of our biodiversity would further marginalize the poorest and most deprived people of our society seems most probable.

VI. RESISTANCE TO REFORMS

In the wake of liberalization, social activists and academics, and even the general public have started resisting the accentuation of environmental degradation. With intensification of liberalization and globalization, the resistance of people has increased, because they are losing their means of livelihood. This resistance sometimes takes the form of organized protest emanating from civil society, but they are largely scattered as sporadic and spontaneous protests mainly concerned with specific projects and issues. The agitation that took place against the deep sea fishing policy is a classic example. Fish workers all across India came together under the banner of National Fisheries Action Committee Against Joint Ventures (NFACAJV) and started a protest to get their rights enforced in the in-shore resources. Eventually, the government was forced to appoint the Murari Committee to review the policies of deep sea fishing. Another case is the resistance by the coastal communities against mushrooming shrimp aqua-culture farms along the

coastal regions of Orissa, Andhra Pradesh and Tamil Nadu. The concerned parties came together for the closure and removal of aquaculture farms from coastal areas in the movement that took place under the banner of National Action Committee Against Coastal Industrial Aquaculture (NACACIA). The end result of the efforts of these people came in the face of an order by the Supreme Court. It was ordered that the shrimp aquaculture farms along the coastline of the country be destroyed. Hon'ble Justice Kuldip Singh observed:

> *"The effluent generation from aquaculture farms in the east coast only, in absence of data on west coast farms, is to the tune of 2.37 million cubic meters per day, out of which Andhra Pradesh has the lion share of about 2.12 million cubic meters per day.... It may be noted that in all the States, in most cases, the effluent discharge is indirect (through estuaries, creeks, canals, harbors). It may also be noteworthy that the effluents from aquaculture farms are discharged directly/indirectly into the coastal waters practically without any treatment. For disposal of solid waste, on the other hand, open dumping and land filling is a common practice. Indeed, the new trend of more intensified shrimp farming in certain parts of the country - without much control of feeds, seeds and other inputs and water management practices - has brought to the fore a serious threat to the environment and ecology which has been highlighted before us."*[11]

These cases represent resistance taking the form of organized livelihood struggles. Indian NGOs like Vatavaran and Srishti have been joined by organizations like the Greenpeace International to condemn the increasing import of toxic waste, while also increasing awareness among people regarding the adverse effects of dumping toxic waste.[12]

"The severest human deprivation arising from environmental damage is concentrated in the poorest regions and affects the poorest people".[13] It is our duty to help in gyrating the wave of liberalization and globalization in favor of the weaker sections of our society so that there can be a sustainable development which raises the quality of life of these people, while also being in harmony with nature and the ecosystem. It is acknowledged that environmental issues can only be a part of the overall political theory of social and economic reconstruction; that it is not possible to construct a political theory that is based only on environmental issues.[14]

[11] S. Jagganath vs Union of India, (1997) 2 SCC 87, (India).
[12] Supra Note 1.
[13] The Human Development Report 1998.
[14] Supra Note 1.

Environmentalism or environmental activism should be regarded as an important aspect of the forces constituting counter globalization. This point is perceptively put forth by James H. Mittelman:

> "…it is important to resist the ontological distinction between humans and nature, a dualism rooted in modern thought since Descartes. By resisting this distinction, humankind and nature may be viewed interactively as 'a single causal stream'. The environment may then be understood as political space, a critical venue where civil society is voicing its concerns. As such, the environment represents a marker where, to varying degrees, popular resistance to globalization is manifest. Slicing across party, class, religion, gender, race and ethnicity, environmental politics offers a useful entry point for assessing counter-globalization".[15]

Therefore, in order to counter the adverse effects of globalization and liberalization effectively, this environmental resistance should be mingled with the larger human enterprise, which is striving to turn the current tide of globalization and liberalization while exploring alternatives in the areas of governance and development emanating from the emerging world order.[16]

VII. WATER POLLUTION

Although India is home to 15% of the world's population but has only 4% of the world's freshwater supply. World Bank data indicates that merely 37% of land being used for agriculture in India is being irrigated. This means that a very large portion of land that is being used for farming is completely dependent on rainfall. [17] Nevertheless, governments have not done much to conserve water. Despite the fact that India has constructed 4,525 large and small dams, we have only 213 cubic meters per capita of storage. On the other hand, Russia have 6,103 cubic m per capita of storage, United States of America have 1,964 cubic m per capita of storage, Australia have 4,733 cubic m per capita of storage and China has 1,111 cubic m per capita of storage.[18] India largely depends on just a few major river systems like the Ganges and its tributaries for its water supply.

[15] JAMES H. MITTELMAN, GLOBALIZATION AND ENVIRONMENTAL RESISTANCE POLITICS 847-872
(19th ed. 1998).
[16] Supra Note 1.
[17] World Bank. *"Agricultural irrigated land (% of total agricultural land) – India."* World Development Indicators, The World Bank Group 2019.
[18] Moin Qazi, *India's Thirsty Crops Are Draining the Country Dry*, THE DIPLOMAT (April 06, 2016), https://thediplomat.com/2017/04/indias-thirsty-crops-are-draining-the-country-dry/.

It is pertinent to note that India uses almost twice the amount of water that is needed for cultivation of crops in the United States and China. There are primarily two reasons for this. Firstly, there has been a decline of water levels in India because of the power subsidies for agriculture. Secondly, inspite of the Minimum Support Prices (MSPs) being declared public for 23 crops, it has been observed that the most effective price support is for rice, sugarcane and wheat. This has led to the creation of a highly skewed incentive structure which promotes the cultivation of water intensive crops.[19] A classic example of the short-sighted and skewed agrarian preferences that are upsetting the water tables in India are the practices followed in some of the provincial states, in particular, Punjab, Haryana and Maharashtra. The changes that can been seen in cultivation are because of the profit motives of young farmers. Earlier, farmers used to grow cereals like sorghum and millet, however, they are now turning to sugarcane, particularly in Maharashtra, which brings in more money but is a very water-intensive crop. Similarly, farmers in Punjab and Haryana have started growing more wheat and rice, which is only making things worse. These are two states where the water in aquifers has fallen to record levels. At the center of India's farming quagmire are Maharashtra and its landlocked Marathwada belt, which is in a miserable state. Among the worst affected due to shortages of water is the Marathwada district as it has been through three bad monsoons in a row. With changes in the climate all across the world, monsoons are increasingly becoming more and more erratic. The lowest ratio of actual irrigated land in relation with the irrigation potential of the state is in Marathwada. Of the potential irrigation by the dams created in the region vis-à-vis the land, only 38% of them have been irrigated. In the other parts of Maharashtra, this number stands at 76%. In the Marathwada district, the per capita income is 40% lower as compared to the rest of Maharashtra.[20]

Farmers have been drawn to the region due to inexpedient government measures in the form of incentives which has resulted in an increase in the cultivation of sugarcane, which is a very thirsty crop, is ill-suited to Marathwada's semi-arid climate. Approximately 6 million gallons of water per hectare are required for sugarcane in its 14 months growing cycle compared to just 1 million gallons for 4 months in the case of chickpeas, known as gram locally. Growing highly water-intensive crops like sugarcane in areas that are prone to droughts is a recipe for disaster. Nevertheless, the area being used for sugarcane cultivation in Maharashtra has increased almost ten times in 40 years, from 167,000 hectares in 1970-71 up to 1,022,000 ha in 2011-12. Maharashtra is India's second largest producer of sugarcane, despite being one of India's driest

[19] Supra Note 1.
[20] Id.

states. Sugarcane accounts for 70% of Marathwada's irrigation water, despite using only 4% of its cultivable land.[21]

The sugar industry in Marathwada has been propelled by politicians with an intent to replicate the success of mills in the different parts of Maharashtra, however, in contrast, these mills were situated in areas where there was no dearth of water. Politicians helped open new mills everywhere, even in areas where water for basic purposes like drinking was scarce. Sugarcane has gained prominence because farmers are able to sell directly to sugar mills, cutting out the middleman. Sugarcane's sturdiness as a crop is another reason why it attracts farmers; mature cane can withstand dry spells or heavy rainfall and it is also less vulnerable to diseases and pests in comparison to other crops. The situation is similar in Haryana and Punjab, the difference being rice instead of cane. Farmers of rice in Punjab produce approximately 12 million tonnes of rice every year, or more than one-tenth of the total staple grain produced in India. That is why Punjab is also known as the granary of India and with its close neighbor Haryana, are also among the largest contributors in the production of wheat in India. While the winter crop of wheat doesn't require as much water as rice does and hasn't seen any fall in acreage, farmers have started to abandon paddy and are now looking for different options. Inspite of the fact that almost all crops have been hit by droughts, India is still managing to produce more wheat, sugar and rice than it is utilizing domestically.[22]

It is very natural for farmers to grow cane and rice when government schemes promote this practice. Both water as well as power are basically free of charge. The state purchases wheat, rice and sugar at prices that are very remunerative, which means that the farmers are justified economically. Such practices cannot last, and there is an urgent need for a change in the policies of the government, as well as the need for active intercession to set the balance of revenue in favor of the crops that consume less water, otherwise, this practice of incessant cultivation of water-intensive crops will further deplete the already scanty water resources. The state, as of now, is merely asking farmers to shift to less water intensive crops, however, it has not done much to support this change. Not just that, inconsistent prices of pulses, oilseeds and vegetables provide farmers with limited options.[23] Persistent extraction of groundwater has led to a sharp decline in water levels in India — the fastest in the world. Some cultivators in these dried-out areas have to dig as far as 300 feet for water. They have been forced to drill wells deep beneath the tilled soil

[21] Id.
[22] Id.
[23] Id.

into the volcanic rock – 700 to 900 feet down. Sometimes farmers find nothing at all. In some of the severely affected areas, bore wells as deep as 500 meters (1,640 feet) have gone completely dry. The underground water level has dropped so much that there is no water at all in some places.

VIII. AIR POLLUTION

Even the elite urban class are now being affected directly. The quality of air in the capital city of Delhi, is worse than any major city in the world according to a survey conducted across 1650 cities all over the world conducted by WHO.[24] In November of 2017, after the festival of Diwali, the levels of pollution in the air increased far beyond acceptable levels. The levels of PM2.5 and PM10 particulate matter reached 999 micrograms per cubic meter, while the safe limits for those pollutants are 60 and 100 respectively. It is also pertinent to note that most of the machines that record levels of air pollution in the National Capital Region, have an outer limit of 999 micrograms per cubic meter only. This would indicate that in many areas the levels of air pollution might have gone beyond those levels that were being recorded, as most of the machines were showing the pollution levels to be at the maximum levels. This argument can further be supplemented because in the cities of Noida and Ghaziabad, where the machines with the latest equipment have been installed, were showing readings of 1700 and 2500 micrograms per cubic meters respectively. However, Delhi is not the only place which is being severely affected by air pollution as it is widely believed. The truth is that air pollution is a national issue, from Punjab, Haryana and Delhi to Uttar Pradesh, Bihar and even West Bengal. An analysis of the Air Quality Index Bulletin provided by the Central Pollution Control Board shows that Delhi does not feature even in the top ten most polluted cities.[25] The reason for this in all likelihood is the media focus on the capital city. In Delhi, when pollution levels reach the hazardous category (500+) for more than 48 hours, a graded response action plan comes into effect, in which schools are shut down, construction activities are put on hold, and odd-even scheme takes place. It is very unfortunate that such basic measures are not being brought into effect in other states which have also been hit by air pollution. Punjab and Haryana are responsible for 46% of the air pollution in Delhi.[26] There was a significant drop in cases of stubble burning from 2016 to 2018. However, this year there has been an increase of 25%

[24] World Health Organization, *Ambient (outdoor) air pollution in cities database 2014,* WHO, https://www.who.int/phe/health_topics/outdoorair/databases/cities/en/.
[25] Central Pollution Control Board, Air Quality Index on November 4th, 2019.
[26] SAFAR data.

in stubble burning this year in Punjab.[27] The respective governments of Punjab and Haryana are responsible for this, and have increased by 40% this year. The respective governments have been ineffective to compensate farmers and in giving them adequate incentives. It is pertinent to note here that most of the air quality monitoring stations in the National Capital Region can only record PM2.5 and PM10 levels only up to 999. In Ghaziabad on the night of Diwali, the pollution levels were so high that they could not be measured according to the current standards (2507). If we take a look at the condition of the air quality, it is as serious as that of India's water, if not worse. It is estimated that approximately 140 million Indians breathe air that is over the WHO safe limit[28]by 10 times or even more. Furthermore, 13 of the world's 20 most polluted cities are in our country. Air pollution in India is responsible for the deaths of at least 2 million people every year.

One glimmer of hope is that judicial activism is taking root on the issue of air pollution. According to the Supreme Court the practice of burning stubble is an "organized sin" that takes place annually. In a little known but landmark move, the Supreme Court in 2002 set up a quasi-judicial body called the "Central Empowered Committee" (CEC) to "monitor the implementation of the Hon'ble Court's orders and place reports of non-compliance before the Court" related to forestry issues, giving the committee sweeping powers. Working quietly and efficiently, CEC has functioned as an active watchdog on forestry related issues ever since. More vividly in popular perception, it was judicial action that forced the government to move the entire fleet of buses in Delhi to CNG in 2001. A number of ad hoc interventions by the court eventually culminated in the establishment of a National Green Tribunal in 2011, as a professional empowered judicial body to adjudicate on environment and forestry related cases.[29]

In a very recent writ petition filed in the Supreme Court by renowned environmental advocate Mr. M.C. Mehta, regarding the alarming pollution levels in the capital city, the Hon'ble Justice Arun Mishra remarked:

> "Today everyone is concerned about level of pollution in Delhi and NCR region. This is not something new, every year this kind of piquant situation arises for a substantial period. It is compounded by the fact that year to year in spite of various directions issued by High Court, other authorities including this Court the State Governments, Government of NCT

[27] Punjab Pollution Control Board.

[28] Bernard, Steven; Kazmin, Amy, *Dirty air: how India became the most polluted country on earth,* FINANCIAL TIMES (Dec 11, 2018), https://ig.ft.com/india-pollution/.

[29] Varad Pande, *25 years of reform: The environment vs growth debate* (Jun 1, 2016, 10:39 AM), https://www.livemint.com/Politics/m8vwrdS79Wnbps2cwY9i5M/25-years-of-reforms-The-environment-vs-growth-debate.html.

of Delhi and the corporations of Delhi and nearby States are not performing their duties as enjoined upon them. This is a shocking state of affairs in which we are put as on today. This is a blatant and grave violation of the right to life of a sizeable population by all these actions and the indicates that the life span of the people is being reduced by this kind of pollution which is being created and that people are being advised not to come back to Delhi or to leave the Delhi due to severe pollution condition which has been created. There cannot be a large-scale exodus. People have to perform their duties in Delhi also and people cannot be evacuated from Delhi being a capital city. We are at a loss to understand why we are not able to create a situation in which this kind of pollution does not take place, that too in a routine manner every year."[30]

CONCLUSION

Given these developments, the new buzzword is "balancing" growth with environmental protection. This is a welcome change in vocabulary. But have we figured out the right mechanisms that strike such a balance? Not yet: from the Sardar Sarovar Dam, to the Jaitapur Nuclear Power Plant, to the polluting tanneries of Kanpur, environmental issues remain highly contested. More than 1,600 cases have come before the National Green Tribunal in the last few years, and that is just the tip of the iceberg. Having seen some of these contestations closely in the last decade, environmental conservation and economic development are not an 'either-or' choice; solutions that strike a balance are indeed possible. The need of the hour is to think creatively.

First, we need to have 'smarter' regulation that leverages technology and markets. Environmental laws should not become the post-reform equivalent of the license-quota-inspector raj. Technology-based tools and market approaches can make for better regulation. A great example was the Emissions Trading Scheme, conceived by the Ministry of Environment & Forests and Abdul Latif Jameel Poverty Action Lab (J-PAL) in 2011, where real-time emissions monitoring and trading (modeled on the famous 'Acid Rain" program of the US) was launched in select industrial clusters. More such innovative approaches to pollution monitoring need to be mainstreamed. Second, we need to revamp our outdated regulatory tools. India's current Environmental Impact Assessment (EIA) process is broken. The project proponent chooses (and pays) consultants who conduct the

[30] M.C. Mehta vs Union of India, W.P.C. No. 13029/1985 (India).

assessment, mandatory public consultations are rarely held with integrity, and environmental damage is seldom quantified rigorously. EIAs need to be done by independent accredited professionals, and need to follow more robust methods that quantify the economic benefits and the environmental costs, surfacing trade-offs and outlining mitigation measures. Lastly, we should take a look at serious institutional strengthening. It is high time India has an independent, professional environmental regulator. A detailed blueprint for such an entity – a National Environmental Appraisal and Monitoring Authority (NEAMA) – was put together in 2011. NEAMA was to be a permanent professional body, with adequate teeth and specialist expertise to appraise projects and monitor compliance. In 2015, the Supreme Court stepped in and asked the government to constitute such an authority; however, there has been little progress since.[31]

[31] Supra Note 39.

The Effect of Commercialisation of Bycatches on the Marine Ecosystem: An Imminent Need For Implementation Of Sustainable Fishing Practices

*Divya Meenakshi R. & Barani Bharathi B**

ABSTRACT

A healthy aquatic ecosystem is vital for the conservation of biodiversity and habitat security of oceanic species, that is being threatened due to overfishing, pollution and anthropocentric activities, and the absence of adequate regulations to curb these have proven to be detrimental to the marine environment. With the influx of mechanization in the arena of fishing, there has been a rise in large scale fishing operations by using huge vessels such as bottom trawlers, seiners and gill netters for catching commercially valuable species. The fishing nets and gears manoeuvred by these vessels do not employ any technology to selectively catch only the commercially valuable species, thus reeling in all the other living organisms present in the area covered by these nets, snaring juvenile fish, eggs and such non-target species, including protected and endangered ones as well. This unintended catch is known as bycatch. There is a pressing need to reduce the incidence of bycatch as it is critically affecting the balance of the marine ecological system. This paper analyses various aspects of this issue by throwing light on commercialisation of bycatches and the direct effect that it has on the oceanic food chain as a whole, along with how it affects humans, as it is violative of various facets of fundamental rights guaranteed under the Constitution of India. The author also critically examines the inadequacies in the prevailing legal regime in terms of protection of oceanic biodiversity, the non-conformity of the state legislations to international standards and prescribed guidelines, across the coastal states. Hence this paper highlights the imminent need for reforms in these legislations and strict enforcement of the policy oriented towards management of fisheries coupled with sustainability, for ensuring ecological balance in the marine ecosystem.

KEY WORDS: *Marine Ecosystem, Biodiversity, Bottom Trawlers, Bycatch, CCRF, Sustainable Fisheries Management.*

* THIRD YEAR, B.A., LL.B. (HONS). STUDENT AT SCHOOL OF LAW, CHRIST (DEEMED TO BE UNIVERSITY), BANGALORE

I. INTRODUCTION:

Marine biodiversity consists of a unique and distinct ecological system by itself, as the ocean provides habitat to numerous species of aquatic life. The oceans happen to play a vital role in mitigation of global warming and addressing climate change. Many species of marine living organisms are exploited for commercial purposes with no legal measures to regulate the same wherein for preserving the salubrity of oceans, these species must be protected.[1] Over harvesting of marine resources, loss of habitat for some species, pollution, deterioration of water composition and unsustainable methods of extraction of oceanic resources threaten the existence and survival of many marine species. So, it is vital to administer inflexible measures for protecting the marine ecosystem as a whole.[2] Fish happens to be an important source and seedbed of protein, for consumption, as meat and as an additive in many food products. They play a major role in nurturing the ecological balance that prevails in the oceans.[3]

India's contribution to the fish production in the world has witnessed an increase over the years, and fish-based products' export has also aided in improving the country's GDP. Fishing as an activity is a means of livelihood to many and this sphere contributes to the socio-economic development of the country.[4] About fourteen million people are involved in fishing and industries connected to this category of activities. India has witnessed substantial enhancement in the fishing sector in the present century. Artisanal fishing crafts and traditional fishing methods are being replaced with mechanized boats and modern fishing equipment that efficiently secure a larger quantity of fish in much lesser time. As a result, there has been an increasing trend in the production and export of fish in India, making it the third largest producer of fish in the world.[5]

---

[1] Philippe Goulletquer, Gilles Boeuf, et al., *Biodiversity In The Marine Environment*, 1-13 (Springer, 2014).

[2] Venkataraman K, Raghunathan C, et al., *Marine Biodiversity In India*, (Oct. 22, 2019), https://www.cbd.int/idb/image/2012/celebrations/idb-2012-in-zsi-marine.pdf.

[3] National Fisheries Development Board, Department of Fisheries, Ministry of Agriculture, Government of India, *Annual Report 2010 - 2011* (2012).

[4] Planning Commission, Government of India, *Report of The Working Group on Fisheries for The Tenth Five Year Plan*, (2001).

[5] P.V. Sree Vyshnavi, P Venkata Rao, *Importance of Marine Fisheries in Indian Economy*, International Journal of Applied Science Engineering and Management 68 (2016).

II. POLICY CHANGES GOVERNING FISHERIES

The budgetary allocations through centrally sponsored schemes and state schemes for the fishing sector have witnessed an increase in the various five year plans. The 12th Five Year plan also aimed at improving the information and data base on various factors concerned with fisheries, which will play an important role in marine ecosystem management.[6] The current arrangement and regulations wherein free access is granted for profiteering from these resources has led to a steep fall in the magnitude of yield and unrewarding quality of tasks, while undermining the sustenance security too. Such vulnerabilities make it the need of the hour, to supervise and utilize these resources in an efficient manner, by bringing about appropriate mandates in favour of marine biodiversity protection and conservation, as the current state of affairs and practices employed are destructive and harmful.[7]

III. PROBLEM OF BYCATCH

Bycatch can be simply described as unintended catch that is incurred during the process of largescale fishing.[8] It consists of the non-target species of marine organisms that get caught in fishing nets, while attempting to catch certain commercially valuable fish species. Bycatch may consist of many aquatic species, such as fish, sharks, turtles, porpoises, corals, etc.[9] This unintended catch is often discarded as they are often not very valuable in the market. As much as 7.3 million tonnes of marine species has been discarded as bycatch in a year, according to an estimate. As the cost of sorting such bycatch and storing it on fishing crafts is not viable due to its low commercial value, such catch is often dumped back in the ocean or on the shore, and they die either way.[10]

According to a study undertaken by the International Whaling Commission, about three lakh dolphins are caught unintentionally every year. So, the problem of bycatch threatens all marine

---

6 Department of Animal Husbandry, Dairying and Fisheries, *Handbook on Fisheries Statistics*, Ministry of Agriculture, (Aug. 14, 2019), http://fsi.gov.in/LATEST-WB-SITE/pdf_files/statistics/hofs-2014.pdf .

7 Ministry of Statistics and Programme Implementation, Government of India, *Manual on Fishery Statistics*, 1-6, (Aug. 14, 2019), http://www.mospi.gov.in/sites/default/files/publication_reports/Manual_Fishery_Statistics_2dec11_0.pdf .

8 Meghan E. Marrero and Keira Lam, *Catching The Wrong Species: Engineering a solution to the problem of bycatch in the tuna fishery*, 81 The Science Teacher 25-29 (2014).

9 Aaron Savio Lobo, *Managing fisheries in an ocean of bycatch*, Position Paper for CBD-COP 11, Dakshin Foundation, Bengaluru and Foundation for Ecological Security 3 (2012).

10 Aaron Savio Lobo, *The Bycatch Problem: Effects of Commercial Fisheries on Non-Target Species in India* , Resonance 60-70 (2006).

species, according to the International Union for Conservation of Nature (IUCN). Many species of cetaceans, marine mammals and turtles among numerous others are protected under the Wildlife Protection Act, 1972 (WPA) or other authorities such as the IUCN's Red List. The increase in the presence of bycatch over the years is due to the widespread usage of modern fishing gear.[11]

IV. UNSUSTAINABLE FISHING PRACTICES EMPLOYED BY THE FISHERMEN IN RECENT TIMES

In artisanal and traditional fishing methods and usage of indigenous techniques, the incidence of bycatch was relatively low, as there was specificity and selective capture of the target species alone, as the appropriately designed nets were cast upon smaller areas.[12] However with mechanisation, technological advancement and demand for fish, motorised fishing vessels using fishing methods such as trawling, pair trawling, gill netting, purse seining, ring seining, etc,[13] came to be increasingly used by fisher folk in order to increase the quantity of catch and their profits. This was due to globalisation and the rising demand of certain fish species such as shrimp and prawn in the international market.[14]

V. DESTRUCTIVE FISHING GEAR

A trawl net is shaped like a funnel and it tends to capture all species that cross its path in the water, while it is towed by a fishing craft. Bottom trawls scrap away organisms on the sea bed such as corals and sponges.[15] Gill nets cause all the fish to be entangled in the nets, such that unintended catch are stuck without any means of escaping. Abandoned gill nets lead to "ghost fishing", where fish continue to get caught in the floating nets. These nets are not selective and hence their usage aggravates the magnitude of bycatch.[16] Purse seine nets are often used for rounding up a shoal of

---

[11] R. Jeyabaskaran and E. Vivekanandan, *Marine Mammals and Fisheries Interactions in Indian Seas*, Regional Symposium on Ecosystem Approaches to Marine Fisheries & Biodiversity, Kochi (2013).

[12] Aarthi Sridhar and Meera Anna Oommen, *Representing Knowledge: LEK and Natural Resource Governance in India*, Deutsche Gesellschaft für Internationale Zusammenarbeit 16-18, German Federal Ministry for Environment, Nature Conservation, Building and Nuclear Safety and Dakshin Foundation (2014)

[13] P.U. Zacharia, *Present and Future Scenario of Indian Marine Fisheries*, Central Marine Fisheries Research Institute,(Oct. 22, 2019), http://www.cmfri.org.in/uploads_en/divisions/files/Present%20and%20future%20scenario%20of%20Indfian%20marine%20fisheries.pdf.

[14] Sridhar, *supra* note 12 at 20.

[15] Food and Agriculture Organization of the United Nations, *FAO Fisheries Report no.829*, Workshop on Vulnerable Ecosystems and Destructive Fishing in Deep-sea Fisheries (2008).

[16] Pingguo He, *Gillnets: Gear Design, Fishing Performance and Conservation Challenges*, 40 Marine Technology Society Journal 16-17 (2006).

fish and capturing them, and during the operation of these nets, landing non target species is rampant, along with the principal catch.[17]

As early as the 1980s and 1990s, globally about 27 million tonnes of fish and other marine species were discarded as bycatch of commercial bottom trawling. Bycatch generally consists of juvenile fish and eggs, affecting the overall population of these species. Trawling also destroys the flora on the sea bed, due to which chemical processes such as carbon mineralisation, the nutritional balance in the water and the oxygen content in the water are affected.[18] It was seen that in Kerala, during the period 2000-'01 and 2001-'02, 2.62 and 2.25 lakh tonnes of marine species, respectively, were tossed from bottom trawlers. The bycatches in Kerala consisted of two species of turtles (Lepidochelys olivacea and Eretmochelys imbricata inlscata) and three species of marine snakes. The marine snakes in the family Hydrophiidae are protected under Schedule IV of the WPA. All the marine turtles fall under the threatened category of IUCN and under the Schedule I of the WPA.[19]

Trawling and overfishing are the major reasons behind imbalance occurring in the food web amongst aquatic organisms, as illustrated by the instance of infestation of algae in the Jamaican reefs.[20] The plethora of species that exist in the natural environment are interdependent upon each other in order to sustain. So the ecological balance that exists in nature is bound to be affected, upon continuous exploitation of a particular species, which happens when destructive fishing practices are employed. Such practices are utilised because of the capitalization policy of the government, encouraging growth in the fishing sector. Disrupting natural this balance has grave consequences, as it poses a threat to the livelihood of all life forms.[21]

VI. COMMERCIALISATION OF BYCATCHES: UTILISATION IN THE POULTRY AND PET FOOD INDUSTRIES

[17] Barry Baker and Sheryl Hamilton, *Impacts of purse-seine fishing on seabirds and approaches to mitigate bycatch*, Agenda Item 9, Seventh Meeting of the Seabird Bycatch Working Group, Chile, (2016).
[18] Biju Kumar & G.R. Deepthi, *Trawling and bycatch: Implications on marine ecosystem*, 90 Curr. Sci. 926 (2006).
[19] Biju Kumar, *Biodiversity Assessment, Nutritional Status and Economic Evaluation of Non-Target Species Wasted by Trawlers in the Fishing Harbours of Kerala*, Technical Report, University of Kerala (2007).
[20] Richard W. Zabel, Chris J. Harvey et al., *Ecologically Sustainable Yield*, American Scientist 150, (2003).
[21] Sansar Chand v. State Of Rajasthan, (2010) 10 SCC 604 (India)

Trawl fisheries witnessed an expansion when the demand for certain species such as shrimp and some fish varieties rose, India's export policies also witnessed changes, providing for an increase in the magnitude of export. But lately, the population of these commercially valuable species has fallen, due to continuous exploitation in order to derive profits.[22] As a result of depletion of such species and the fall in the quantity of main catch secured, the bycatch which was traditionally discarded is now being utilised for other purposes. In the recent times, bycatch has been used for preparation of manure, animal feed, and fish meal (used as feed in poultry farms). With the growth of the pet food industry, bycatch is being used in the manufacture of its products.[23]

In 2008, in China, about 6 to 8 million tonnes of trash fish that was acquired as bycatch was utilised as fish meal in the aquaculture industry. India produced about 7 million tonnes of aquafeed in the year 2006.[24] The aquaculture industry has witnessed significant development in the recent years the demand for fish meal is also rising, which is produced by processing the bycatch. According to a report of the Food and Agriculture Organisation (FAO) in 2010, it was estimated that around 270, 000 tonnes of fish (low value bycatch) could be required for the manufacture of fish meal, to meet the demands of the aquaculture industry.[25] Because of this, bycatch has become more profitable. This directly encourages destructive fishing practices where large quantities of bycatch can be secured. Hence there is an increasing pressure on the fish stocks in the ocean, and worsening the prevailing situation where the population of popularly consumed commercially valuable species is already falling at alarming rates. It also puts the lives of threatened and endangered species at stake.[26]

Estimates show that 40 percent of the total catch is utilized by the livestock sector and out of which around 13 percent of it is used by the poultry industry as fishmeal.[27] There is widespread usage of fish based proteins in pet food manufacturing units. Hence it is seen that bycatch which was an environmental concern earlier is now viewed from a different perspective due to its

---

22 Department of Animal Husbandry Dairying and Fisheries, Ministry of Agriculture, *Report of the Technical Committee to Review the Duration of the Ban Period and to Suggest Further Measures to Strengthen the Conservation and Management Aspects* (2014).
23 *Id.* at 20.
24 Albert G.J. Tacon, Mohammad R. Hasan, Marc Metian, *Demand and Supply of Feed Ingredients for Farmed Fish and Crustaceans - Trends and Prospects*, Fao Fisheries and Aquaculture Technical Paper (2011).
25 A. P. Dineshbabu, E. V. Radhakrishnan et al., *An appraisal of trawl fisheries of India with special reference on the changing trends in bycatch utilization*, 55 J. Mar. Biol. Ass. India (2014).
26 A.P.Dineshbabu, *The trawl fishery of the Eastern Arabian Sea*, APFIC Regional Expert Workshop on Tropical Trawl Fishery Management, Food and Agriculture Organization of the United Nations (2013).
27 Naylor, R. L, Goldburg, R. J et al., *Effect of aquaculture on world fish supplies*, Nature, 1017-1024 (2000).

commercialisation.[28] This leads to a rise in the usage of fishing methods that would increase the total amount of fish landings, which is bound to affect marine biodiversity and the ecosystem as a whole. It is disturbing the ecological balance present in the marine environment, resulting in disruption in the food chain and depletion of resources, affecting all living species as every organism is a part of the food chain that exists in nature. It is also important to acknowledge the information gap with respect to the magnitude of bycatch, as the diversity and composition are often not recorded or reported properly.[29]

However, proper handling of bycatch and using manual methods to reduce the death of the unintended catch is labour intensive and time consuming, and it is not feasible for fisherfolk to efficiently separate the bycatch from the total landing. Commercialisation of this bycatch is also depriving the poor of a food source rich in protein.[30] So it is the need of the hour to undertake measures and actions to curb the bycatch, on account of the adverse effects it has, towards the natural environment and living creatures.

VII. VIOLATION OF VARIOUS FACETS OF FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION OF INDIA DUE TO UNSUSTAINABLE FISHING PRACTICES

Right to wholesome and healthy environment

An important facet of the right to life, is the right to live in a wholesome environment and the right to dwell in a healthy environment, under Article 21 of the Constitution was explicated by spelling out these rights as a part of it.[31] Though this fundamental right to live in a healthy environment was previously perceived from a narrow outlook, this perception was broadened to include many aspects. All species are endowed with a right to live, supported and protected by the law of the land.[32] The increasing incidence of bycatch violates this right of the species consisting of the bycatch, and this is in the absence of human necessity. If humans possess the right to live in a healthy environment under Article 21, it is important to ensure that animals are guaranteed with

[28] Kelly S. Swanson, Rebecca A. Carter et al., Nutritional Sustainability of Pet Foods, 4 Adv. Nutr. 141-150 (2013).
[29] Amanda Keledjian, Gib Brogan et al., *Wasted Catch: Unsolved Problems In U.S. Fisheries*, Oceana (2014)
[30] Ulf N. Wijkström, *The use of wild fish as aquaculture feed and its effects on income and food for the poor and undernourished*, Fisheries and Aquaculture Technical Paper 371-407 (Rome, 2009)
[31] Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, 1985 AIR 652 (India).
[32] Animal Welfare Board Of India v. A. Nagaraja, (2014) 7 SCC 547 (India).

these rights as well, as their lives are interconnected. About 5000 to 10,000 turtles lost their lives as bycatch, due to trawlers and gill nets, in the state of Orissa. Such incidence must be reduced.[33]

The prevalence of ecological balance is a basic feature of a healthy living environment, without which sustenance is impossible, and there is a requirement and burden upon the Central and State Governments make sure that it prevails. An imbalance in the marine ecosystem is directly connected to the right to live in a healthy environment.[34] Considering the contribution of the oceans in influencing climate change and global warming, humans are directly impacted by the ill effects of unsustainable fishing practices.[35] The ecological balance is a necessity for ensuring that living species' right to live is not subject to infringement. Therefore, it's imperative to preserve the pristine state of the natural environment, and the environment, and the term "environment" has been interpreted to include wildlife, forests, air and water.[36]

Measures taken by the State constitute the basis of socio-economic security, without which one cannot enjoy the right to life.[37] It is the State's duty to protect the environment under Art. 51A(g) read with Art. 48A.[38] The deterioration caused to the environment is affecting the population of living organisms, and there is a duty upon the State to protect all life forms, for safeguarding the environmental and ecological security of the country.[39] For fortifying the balance in the food chain, the issue of bycatch must be addressed immediately. Gill nets which are often used for obtaining crabs, have recorded up to 80% of the total landings as bycatch in certain areas along the eastern coast of India, highlighting their detrimental effect.[40]

Violation of the right to sustainable development

Right to environment has been held to be fundamental right along with the right to development. This encompasses the right to sustainable development, that has been declared to be enshrined in Article 21of the Constitution. States must eliminate unsustainable patterns of production and consumption.[41] For ensuring that development happens in a sustainable manner, protection of the

---

33 *Id.* at 11.
34 Virendra Gaur v. State Of Haryana, (1995) 2 SCC 577 (India).
35 *Id.* at 20.
36 MC Mehta v Union of India (1991) 2 SCC 353 (India).
37 Amarnath Shrine, In Re v. Union of India, (2013) 3 SCC 247 (India).
38 Centre For Envir. Law, Wwf-I v. Union of India, (2011) 14 SCC 297 (India).
39 *Ibid.*
40 Anirudh Kumar , B. Sundaramoorthy et al., *Standardization of crab bottom set Gillnet for reduction of Bycatch at Thoothukudi coast, Tamilnadu, India* ,74-81, Archives of Applied Science Research (2013).
41 Rio Declaration on Environment and Development 1992, Principle 8.

environment is an indispensable element of the development process.[42] Due to destructive fishing practices the right to sustainable development is violated, due to which these practices must be curbed.[43] The increasing value of bycatch is leading to excessive fishing and if the population of fish reduces, it will deprive the forthcoming, future generations of the resources available in the ocean. This would not support the growth of sustainable development, if the practice is not controlled by government intervention.[44]

Sustainable development is a process by which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony, and enhance both current and future potential to meet human needs and aspirations. In 1987, the UN General Assembly was of the view that an equitable stake in the environmental costs and benefits of economic development amidst the current generation and the future ones was a key for achievement of sustainable development.[45] It refers to the upper limit upto which development can be fostered, taking into account the magnitude of endurance the ecological system, with or without mitigation.[46] Natural resources and human development share an intimate link, as the latter cannot happen without the utilization of the former.[47]

Economic consumption of oceanic resources must be coupled with measures to augment the replenishment process of the resource. The methods employed to exploit them must ensure that development and utilization happens at a sustainable rate and manner. These techniques must also be monetarily feasible. Practices aimed at resource conservation must also be endorsed and applied throughout, such that the efficacy obtained from these resources is at its utmost maximum.[48]

The Rio Declaration persuades states to incorporate sustainable development and an enhanced standard of life for all people, by way of abatement and eradication of unsustainable models of production and consumption, and by advocating suitable demographic reforms.[49] "In order to achieve sustainable development, environmental protection shall constitute an integral part of the

[42] *Id.* Principle 4.
[43] ND Jayal v. Union of India, (2004) 9 SCC 362 (India).
[44] Jane Lubchenco, Elizabeth B. Cerny-Chipman et al., *The right incentives enable ocean sustainability successes and provide hope for the future*, Proceedings of the National Academy of Sciences of the United States of America, 14507-14514 (2016).
[45] Brundtland Commission Report (1987).
[46] Narmada Bachao Andolan v. Union of India, AIR 2000 SC 375 (India).
[47] Bombay Dyeing & Mfg. Co. Ltd vs Bombay Environmental Action, AIR 2006 SC 1489 (India).
[48] *Id.* at 9.
[49] Rio Declaration on Environment and Development 1992 ,Principle 8.

development process and cannot be considered in isolation from it."[50] Article 10 of the Convention on Biological Diversity, requires the contracting parties to integrate consideration of the conservation and sustainable use of biological resources into national decision making and the parties are also obliged to encourage cooperation between its governmental authorities and the private sector in developing methods for sustainable use of biological resources.[51] To deal with the problem of bycatch, these provisions directly point towards sustainable fisheries management.

In light of the problem of bycatch and the issues related to it, the Jakarta Ministerial Statement had reaffirmed the critical need for the COP to address the conservation and sustainable use of marine resources, and referred to the new global consensus regarding this as the Jakarta Mandate on Marine and Coastal Biological Diversity.[52] All the natural resources are limited and when they are increasingly procured for a particular purpose, it is imperative to prevent over exploitation and ensure that there is scope for its renewability. Sustainable development must be an integral part of the mandate of the government as well as private institutions. It is their responsibility to pass policies to make sure that sustainable economic practices are followed.[53] The actual availability of fisheries' resources must be taken into consideration before fishing practice at this rate is permitted.

Violation of the principle of intergenerational equity

The concept of intergenerational equity acknowledges the right of each generation of human beings to enjoy the natural heritage from the previous generation, but they also have a duty as well, to protect and safeguard the heritage of these resources for future generations.[54] This refers to the preservation of the environment, biodiversity and all the other resources that includes soil, water and other natural resources.[55] Every duty has a corresponding right that is attached to it and in this context, there rests a duty on the present generation to safeguard and protect the environment, which confers a right upon the future generations to reap the benefits of a healthy environment which is of the same quality and composition that the current generation is living in. Destructive fishing practices have led to a fleeting fall and depletion of the oceanic stockpile of due to which

[50] *Id.* at Principle 4.
[51] Convention of Biological Diversity (1992).
[52] Convention on Biological Diversity, *The Jakarta Mandate – from global consensus to global work: Conservation and sustainable use of marine and coastal biological diversity*, (Oct. 31, 2019), https://www.cbd.int/doc/publications/jm-brochure-en.pdf.
[53] *Id.* at 46.
[54] State of Himachal Pradesh v. Ganesh Wood Products 1996 AIR 149 (India).
[55] Goa Foundation v. Union of India, (2015) 1 SCC 153 (India).

forthcoming generations would be deprived of these resources.[56] Preservation of the environment was emphasized over the State agency's resolution to establish and operate wood based manufacturing units, in light of intergenerational equity, on account of the larger public interest revolving around it.[57]

VIII. NEED TO CURB SPECIESISM

Speciesism touches upon the idea that conveys that a man, having been born as a homo sapien, entitles him to possess a broader bundle of rights and privileges compared to other living species. By exploiting marine life through environmentally unfriendly fishing gear and practices, for human interest, the interest of the marine species is sacrificed.[58] Speciesism has been described as a prejudice or bias in favour of the interests of members of one's own species, and against those of members of other species. It has been equated with sexism, racism and such other forms of discrimination, which exists among humans itself. The rationale behind this concept goes along the lines that the variation in species must not exert influence on their moral status. The general supposition among us is that humans possess the ability to rationalize, in comparison to non-human animals, automatically letting them derive certain advantages.[59]

But it has been proven that all humans do not have greater cognitive capacities than animals. It has been observed that some non-human animals in fact have better cognitive abilities compared to human beings. So the principle of equal consideration of interests must apply to both humans and animals. It holds that animals, as living creatures have certain interests and these interests have a moral backing to it. Such interests should not be placed below that of humans, merely because non-human animals have a lesser reasoning capacity and lack certain other qualities that human beings possess. In this respect, the rights of animals, in this context, that of the marine life should be given just as much importance that human rights are accorded.[60]

Though duties of humans towards animals are ensured through statutory provisions such as the Prevention of Cruelty to Animals Act, 1980, but there are restrictions upon those rights in a manner that is advantageous to man. This notion can be illustrated by understanding the Doctrine of Necessity, which is formulated in such a manner that the interest of animals can be sacrificed for

56 *Ibid.*
57 *Supra* at 56.
58 Donald Graft, *Against Strong Speciesism*, 14 Journal of Applied Philosophy 107-114 (1997).
59 Peter Singer, *Speciesism and Moral Status*, 40 Metaphilosophy 567, (2009).
60 *Id.* at 61.

the benefit of a human, if it is essential for mankind.[61] Prejudices such as racism and the given concept of speciesism share a psychological relation, as both are defined by our emotions, actions and attitudes towards another set of living beings that we seem to feel superior to, which is not acceptable in terms of moral standards.[62] So the inadequacy in rules related to the extortion of and utilisation of bycatch is in violation of the theory of speciesism, stressing the need to eliminate this phenomenon.[63]

IX. APPLICATION OF THE PRECAUTIONARY PRINCIPLE

The Precautionary Principle is an innate and structural feature of the environmental jurisprudence, in the Indian context.[64] According to this principle, law enforcement authorities have a duty to envisage and avert any pursuit that may damage the natural environment.[65] The unavailability of scientific backing regarding the damage cannot be a valid reason for a competent Court to not take up the matter wherein a particular act could lead to unalterable ecological harm which includes the extinction of species.[66] The method of bottom trawling has escalated the rate of bycatch. The employment of this practice can be traced to the fact that the income secured from the procurement of target species has fallen. Alongside, the bycatch are sold either fresh or after drying, by vendors, for export or human consumption and certain species are purchased by manufacturers of poultry and fish feed.[67] However a noteworthy portion of the bycatch is cast aside as trash fish as these are low value bycatch.[68]

Viewing the situation in pertinence to the precautionary principle is monumental, along with the need to control and condemn destructive fishing practices while curbing the commercialisation of bycatch, for saving some rare species from becoming extinct. The undeterminable character of scientific proof connected to the same should not be considered as a hindrance for State action. The burden of proof falls upon the party involved in the allegedly injurious activity to prove that there is no actual damage arising from it.[69]

---

61 *Id.* at 34.
62 Lucius Caviola, Jim A.C. Everett et al., *The Moral Standing of Animals: Towards a Psychology of Speciesism*, Journal of Personality and Social Psychology, (2018).
63 Maximilian Padden Elder, *The Fish Pain Debate: Broadening Humanity's Moral Horizon*, 4 Journal of Animal Ethics 26 (2014).
64 Vellore's Welfare Citizens' Forum v. Union of India, AIR 1996 SC 2715 (India).
65 *Ibid.*
66 A.P. Pollution Control Board v. Prof. M.V.Nayudu, (2001) 2 SCC 62 (India).
67 *Id.* at 32.
68 *Id.* at 27.
69 Arjun Gopal v. Union of India, AIR 2018 SC 5731 (India).

In Kerala during May 2004 to April 2006, a survey of trawl bycatch revealed the existence of 534 species, which involved 20 species categorized either as Rare, Endangered and Threatened (RET) or scheduled in the Wildlife Protection Act, 1972. The scheduled species include four species of gorgonian corals, a species of sea cucumber Leptopentacta javanicus (Echinodermata, Cucumariidae) and one species of gastropod mollusc (Strombus plicatus sibbald). The RET fish species include 3 species of sharks (Chiloscyllium griseum,[70] C. indicum, Scoliodon laticaudus[71]) three species of rays (Rhinobatos granulatus, R. obtusus, R. thousin) and two species of seahorses[72] (Hippocampus kuda, H. trimaculatus). Thus, to mitigate the threats to such species, it is important that the State under its duty enshrined in Articles 48A and 51A(g), must take positive measures, by applying the precautionary principle, which points towards governmental efforts in regulating fishing practices.[73]

X. CONSERVATION MEASURES ARE NOT IN VIOLATION OF ART 19(1)(G)

Under Article 19(1)(g) of the Constitution, every citizen has a fundamental right to conduct trade, business or profession, but this right is subject to the imposition of reasonable restrictions. The Supreme Court, in this respect has pronounced that any trade or business that harms the growth and replenishment of flora and fauna must not be allowed by the authorities, in light of Article 19(1)(g) of the Constitution. Complete restriction on carrying out such trade or profession may be urged, provided that there is proof of larger public interest embraced upon by the government, in deciding to do so.[74] The entity that happens to be the source of damage being suffered by the ecology, must not be allowed to continue in its pursuits, though there might be loss of revenue, unemployment caused due to it. It is done so, by accounting for the comprehensive welfare and health of the people.[75]

Hence the restriction on the right to trade and profession must be accepted, when it is harmful to the right to livelihood of the people and the said practice is destructive to the stock of the fisheries, leading to a significant fall in their numbers. In this respect, it has been held that employment of a

---

[70] Lisney, T.J. & Cavanagh, R.D.,SSG Australia & Oceania Regional Workshop (March 2003), *Chiloscyllium griseum*, *The IUCN Red List of Threatened Species*.
[71] Simpfendorfer. C., *Scoliodon laticaudus, The IUCN Red List of Threatened Species* (2009).
[72] Ting-Chun Kuo, *Fisheries and trade of species listed on CITES Appendix II, with a focus on seahorses*, University of British Columbia, (2017).
[73] *Id.* at 73.
[74] Sushila Saw Mill v. State of Orissa, AIR 1995 SC 2484 (India).
[75] M.C. Mehta v. Union of India, AIR 1988 SC 1037 (India).

few specific methods of fishing which led to falling rates in the fish stock, should be forbidden and ecological well-being was accorded primary concern over the rights of those involved in fishing activities, under Article 19(1)(g).[76] So any measures taken in favour of curbing destructive fishing practices will not violate the fundamental right to any trade, business or profession.

XI. ECOCENTRIC APPROACH IN FISHERIES MANAGEMENT

Anthropocentrism revolves around the notion that humans are recognized to be of substantial congenital worth, compared to other species, which gives rise to the idea that the flora and fauna are to be utilised for human welfare. Ecocentrism places emphasis on the coherence and interdependence of all species that are alive. It supports the protection of all life forms, not just those which are of value to humans or their needs and underlines the fact that humans are just one among the various life forms on the planet.[77]

The Animal Welfare Act, 2010 (Norway) states "Animals have an intrinsic value which is irrespective of the usable value they may have for man." This is an instance of an ecocentric approach, unlike the notion adopted by Indian legislations which are based on the premise that all living species possess an innate right to live, and law must safeguard this right, subject to an exception provided out of necessity.[78] With the commercial value of bycatch incurred during fishing witnessing an increase, the human tendency is to exploit the situation to make further profit out of this. The lack of restriction with respect to destructive fishing practices and inadequacy in the currently prevailing provisions in relation to the same is a classic example of how human welfare is assigned more importance over that of another species and highlights the need to consider ecocentric principles in the current situation.

XII. APPLICATION OF THE PUBLIC TRUST DOCTRINE

The 'Public Trust Doctrine' primarily rests on the principle that certain resources like air, sea, water bodies and forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. Alongside, it places great emphasis upon the conception that the State must be the trustee of all natural resources, that are to be accessible to all.[79] The State is empowered to distribute natural resources. While distributing

[76] State of Kerala v. Joseph Antony, AIR 1994 SC 721 (India).
[77] *Id.* at 40.
[78] *Ibid* at 34.
[79] M.C Mehta v. Kamalnath, (1997) 1 SCC 388 (India).

these natural resources which are considered as national assets, the State is bound to act in consonance with the principles of equality and public trust, to ensure that no action is taken which may be detrimental to the public interest.[80]

The marine environment is a resource that must be protected by the State.[81] Usage of fishing equipment such as trawlers leads to a rise in the magnitude of bycatch. At the same time, commercialisation of bycatch for meeting the demands of the poultry and the pet food industry acts as an incentive for fisher folk employing such fishing gears to use these at a larger scale, which is destructive to the marine environment as a whole.[82] It is leading to a plunge in the quantity of fish stock, and traditional, artisanal fisher-folk are hence deprived of their means of livelihood itself. While applying the Public Trust Doctrine, it is seen that, State by placing no regulation on unsustainable fishing practices, fails in its duty of acting as a trustee of the marine resources. Hence it is vital for the State to take regulatory action against these practices, while restricting the commercialisation of bycatch, so that it fulfills the duty vested upon the State by way of the said doctrine, in order to protect the natural resources.[83]

XIII. INADEQUACIES THAT ARE PRESENT IN THE EXISTING STATE LEGISLATIONS AND THEIR NON-CONFORMITY TO INTERNATIONAL STANDARDS

Fisheries within the territorial limits of the sea falls under List II (State List) in the Seventh Schedule of the Constitution. The onus is upon the various states to address the issues in relation to overfishing in their respective Marine Fishing Regulation legislations.[84] It is important to urge the State governments of coastal regions, to restrict the destructive fishing practices such as bottom trawling, purse seining and gill netting, in a strict manner in their respective Fisheries Regulation enactments. The fact that these practices are still prevalent denotes that stringent measures haven't been enforced towards it. Such practices result in the death of juvenile fish and their eggs.[85]

[80] Centre for Public Interest Litigation v. Union of India, AIR 2012 SC 3725 (India).
[81] John Organ and Shane Mahoney, *The Legal Status of the Public Trust Doctrine*, (Aug. 24, 2019) ,https://nctc.fws.gov/courses/csp/csp3112/resources/Related_References/Overview_of_Public_Trust_Doctrine.pdf.
[82] Aaron Savio Lobo, Andrew Balmford et.al., *Commercializing bycatch can push a fishery beyond economic extinction*, 3 Conservation Letters 277 (2010).
[83] Association for Environment Protection v. State of Kerala, (2013) 7 SCC 226 (India).
[84] Ind. Const., Schedule VII, List II.
[85] *Supra* note 84 at 288.

Therefore, it is put forth that there is a need to place a regulation over the number of trawlers that are permitted to employ this practice,[86] as per the respective States' requirements.

State	**Closed season**	**Fishing area - traditional vessels**	**Fishing area -mechanised vessels**	**Mesh size - trawl net/ gill net**
Gujarat	June - August (45 days)	Within 9 km	Beyond 9 km	Gill net - mesh size less than 150 mm. Trawl net, square mesh - 40 mm size at cod ends.
Maharashtra	June - August (45 days)		Trawl net prohibited from the seashore to 5 fathoms and 10 fathoms depth zone in few areas - same not allowed b/w 6 A.M to 6 P.M.	Trawl gear 35 mm mesh size - in territorial waters of few areas. Nets with 25 mm mesh size shall be operated by any mechanized vessel within territorial waters of Ratnagiri.
Goa	June - August (45 days)		Area up to 5 km from the coast-line is the specified area - mechanized fishing vessels are prohibited.	20 mm - net mesh size for prawn and 24 mm for fish.
Karnataka	June - August (45 days)		Area up to 6 km from the shore or up to 4 fathoms (whichever is farther) is reserved for traditional crafts, Mechanized boats must operate beyond 6 km, Deep-sea vessels may operate beyond 20 km.	
Kerala	June - August (45 days)		Mechanised fishing except by motorized country craft is prohibited in first, second zones. Country craft and traditional craft is allowed in these zones.	

[86] Kalawar Committee Report

Tamil Nadu	April - May (45 days)	Areas up to 5 km are reserved for traditional non-mechanised boats.	Mechanized boats are permitted to use areas beyond 5 km.	No gill net of mesh size less than 25 mm, No shrimp trawl net with a mesh size less than 37 mm at cod end, No fish trawl net with a mesh size less than 40 mm at cod end shall be used.
Andhra Pradesh	April - May (45 days)	Upto 8 km	Beyond 8 km- Mechanised fishing vessels of 25 Gross tonnage and above or 15 m and above of length shall be allowed to operate only beyond 15 km from the coast.	Minimum mesh size - 15 mm. Shrimp trawlers engaged in fishing without Turtle Excluder Device (TED) shall be liable for confiscation of entire catch and a fine of Rs. 2,500/-.
Orissa	April - May (45 days)	Within 5 km	Beyond 5 km	
West Bengal	April - May (45 days)	Within 18km	Beyond 18km	No gill net with a mesh size less than 25 mm, no bag net/ dol net with mesh size below 37 mm, no shore seine/drag net with mesh size below 25 mm to be used. Trawl net of standard mesh size fitted with TEDs to be used.
Andaman Nicobar Islands	15th April to 31st May.	Within 10km	Beyond 10km	Fishing nets below 20 mm mesh size are prohibited. Trawl nets of standard mesh size fitted with turtle excluder device alone are permitted. Only gill nets, shore seines and dragnets with mesh size above 25 mm are allowed to operate.

Lakshadweep				Use of purse seine, ring seine, pelagic, mid water and bottom trawl of less than 20 mm mesh size, draft gill net of mesh size below 50 mm is prohibited except live bait net;

*The above tabular column is a compilation of various state fisheries regulation provisions present in the respective State Legislations, Rules and Notifications. This highlights the non-conformity to the international standards as laid down by the FAO to develop responsible and sustainable fishing practices.

Rigorous enforcement of the rules pertaining to the trawling practices during the ban period are to be undertaken by the State Government to avoid over exploitation. Existing provisions in the State legislations ban the usage of trawlers during the breeding season.[87] But, this ban is not uniformly implemented in all the coastal states, due to lack of proper administration. Further, banning of trawling for all seasons during night, could help in reduction of mortality of non target species; as the presence of bycatch has been identified to be higher in magnitude at night.[88] So this denotes lack of sufficient and specific provisions with respect to the practice of trawling and highlights its need. However the approach of command and control may not be completely reliable, unless compensatory mitigation schemes in favour of fisher folk are formulated. This has proved to be efficient for reduction of bycatch, in the US.[89]

XIV. ALTERATIONS IN THE MESH SIZE OF FISHING NETS

It is vital for the states to bring about reforms for the enforcement of an appropriate mesh size and usage of nets with a square mesh coded. Although all the State legislations in their Marine Fisheries Regulations contain provisions that prescribe mesh size of the nets, these have also been marked by ineffectiveness, due to significant violation of these rules.[90] Every trawl net's catch is determined by the mesh size of its cod end, wherein a net with a greater mesh size would allow

87 Rajesh. K.M, *Fisheries Legislation in India* , (Aug. 22, 2019),http://eprints.cmfri.org.in/9871/1/Rajesh_8.pdf.
88 *Id.* at 20.
89 Chris Wilcox, C. Josh Donlan, *Compensatory Mitigation as a Solution to Fisheries Bycatch-Biodiversity Conservation Conflicts*, 5 Frontiers in Ecology and the Environment, 331 (Wiley, 2007)
90 Chattopadhyay NR, *Study On the ByCatch Loss in Two Coastal Districts of West Bengal, India*, Int J Marine Biol Res (2017).

juvenile fish to escape during the trawling process. The large magnitude of discards from trawlers operating in the Kerala coast was attributed to the usage of nets with small mesh size, towards the cod end.[91] Commercialisation of bycatch tends to incentivise fisher folk to use nets with smaller net sizes,[92] owing to the demand of poultry and animal feed industries.[93] Nets with a square mesh cod end are more selective than ones with a diamond mesh,[94] and this has proven to be efficient in aiding the reduction of bycatch.[95] Reports of WWF have proven that nets with a square mesh and 40mm cod end effectively reduce the magnitude of bycatch than nets with a diamond mesh and 40mm cod end.[96] Therefore, it is necessary to enforce and adopt the same, since the current State legislations of some States permit the usage of nets with lesser mesh sizes such as 25mm to 35mm.[97]

XV. IMPLEMENTATION OF THE CCRF

The Code of Conduct of Responsible Fisheries (1995) is a voluntary regime that was formulated by the FAO as a result of recent developments that have taken place in the fisheries sector. In order to ensure sustainable exploitation of oceanic and other aquatic resources, the FAO laid down recommendations, practices and principles to be followed in the fishing sector. Article 12.4 provides for collection of precise data in relation to the extent of bycatch. Article 12.5 places a responsibility upon states to assess and monitor the fish stock and anthropological reasons for depletion of fish.[98] Though the National Marine Fishing Policy for the year 2017 emphasizes upon the imminent need for incorporating the principles and standards that are laid down in the CCRF, the given magnitude of bycatch in the past decade shows the lack of implementation of this Code. The National Fisheries Development Board's Guidelines for integrated management and development of fisheries has one of its projects for implementing the CCRF, through relevant State bodies.[99] This imposes an obligation on the Government towards implementing the Code and

[91] Kerala Institute of Labour and Employment, International Centre for Economic Policy and Analysis, *Impact of Trawl Ban on Employment and Food Security of the Fisher folks in Kerala: an Analysis in the Context of Globalization* , (Aug. 22, 2019), http://kile.kerala.gov.in/wp-content/uploads/2018/09/Rajasenan.pdf.
[92] V.S. Somvanshi, *Issues Concerning Marine Fisheries And Fisheries Management In India,* (Aug. 22, 2019), http://www.fao.org/3/ad495e/ad495e02.pdf.
[93] *Id.* note 93.
[94] Department of Fisheries, Mohamed, K.S., P. Puthra et.al., *Report of the committee to evaluate fish wealth and impact of trawl ban along Kerala coast*, (2014).
[95] Nayak, B. B. and Sheshappa, D. S., *Effect of large meshes on the body of trawl net in energy conservation*, Fish. Technol. Soc. Fish. Technol., (1993).
[96] Marta Coll Monton, *Ecosystem-based assessment of the effects of increasing trawl selectivity in the Mediterranean*, WWF Mediterranean, (2008).
[97] See Kerala Marine Fisheries Regulation Act, 1980.
[98] Code of Conduct for Responsible Fisheries, 1995.
[99] Guidelines - Centrally Sponsored Scheme on Blue Revolution :Integrated Development and Management of Fisheries, National Fisheries Development Board (2018)

developing sustainable fishing practices. But till today not all the state governments have taken measures to implement the principles of CCRF, which is one of the main reasons for the persistence of bycatches.

Adoption of Bycatch Reduction Devices

The usage of Bycatch Reduction Devices, which aid non-target species to escape from the total landing, must be mandated by the government. This will minimize the negative effects of trawling and threats to endangered marine species. It also enhances the catch quality, reduces the duration of fishing and the time taken to sort out the catch.[100] The catch of target species has witnessed only a negligible decrease upon installation of BRDs,[101] such as escape windows, radial escape section, sieve nets, Juvenile Fish Excluder cum Shrimp Sorting Devices, Juvenile and Trash Excluder Devices and the like.[102] In Orissa, West Bengal, Tamil Nadu and Andra Pradesh, the respective state governments have mandated the usage of TEDs in trawlers, through their Marine Fishing Regulations.[103] Under the guidance of Marine Products Export Development Authority, an Expert Scientific Panel recommended that all mechanised trawlers should install a TED. Usage of a TED model developed by CIFT showed that the magnitude of catch loss in shrimp trawlers with TEDs stood at 0.52% to 0.97% and in other trawlers, it was 2.44% to 3.27%.[104] Therefore it is important for the States to advocate and mandate the utilisation of BRDs and TEDs.

XVI. CONCLUSION

Though commercial utilisation of bycatch is playing an enriching role in the economic growth in the pet edibles, poultry and fisheries industry, this cannot take place such that the natural environment in the marine ecosystem is threatened. State action is the need of the hour for assigning rules and regulations in relation to fishing practices and processing of bycatch.[105] There is a duty upon the State to emphasize on environmental protection in the course of development, in light of the fundamental rights guaranteed to citizens. Such measures constitute the bedrock of socio-economic security, for assuring that the right to life is protected.[106] "Economic and social

[100] Steve Eayrs, *A Guide to Bycatch Reduction in Tropical Shrimp-Trawl Fisheries*, FAO (Rome, 2007)
[101] P. Pravin, T.R. Gibin kumar, et. al., *Bycatch Reduction Devices*, Regional Symposium on Ecosystem Approaches to Marine Fisheries & Biodiversity, Kochi (2013)
[102] *Id.* at 101.
[103] *Id.* at 89.
[104] M.R. Boopendranath, R. Raghu Prakash and P. Pravin, *A review of the development of the TED for Indian fisheries*, Article for Indian Ocean – South-East Asian (IOSEA) Marine Turtle MoU Website (2010).
[105] Goa Foundation, Goa v. Diksha Holdings Pvt. Ltd., AIR 2001 SC 184 (India).
[106] *Supra* at 39.

development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for improvement of the quality of life."[107]

Proper handling of bycatch and using manual methods to reduce the death of the unintended catch is labour intensive and time consuming, and it is not feasible for fisherfolk to efficiently separate the bycatch from the total landing. Commercialisation of this bycatch is also depriving the poor of a food source rich in protein.[108] So it is the need of the hour to undertake measures and actions to curb the bycatch, on account of the adverse effects it has, towards the natural environment and living creatures. Hence it is seen that there is an impending threat to the environment that needs to be addressed by the government immediately, due to the alarming rate at which the stock of protected and endangered species are being caught as bycatches and the rate at which overfishing has become prevalent. There must be uniformity in the standards that are set by the respective coastal state governments, in order to tackle this particular issue. It is the responsibility of the government to actually sensitize the fishing community about this particular issue and make them understand the need for employing sustainable and environment-friendly practices for fishing.

107 Stockholm Declaration 1972, Principle 8.
108 Ulf N. Wijkström, *The use of wild fish as aquaculture feed and its effects on income and food for the poor and undernourished*, Fisheries and Aquaculture Technical Paper (2009).

RESEARCH NOTE

SPECIAL ECONOMIC ZONE - CRITICAL ANALYSIS

*Neel Vasant**

I. INTRODUCTION

It is a very well-known fact that for any country, industrialisation is a much-needed tool for development. Agriculture alone is not sufficient to fulfil the needs of a vast country like India. According to Amartya Sen, there has been no developed country which has reached the level by solely relying on agriculture.

Back in the 1990s, India, in order to overcome the domestic economic distress adopted the policy of liberalisation, privatization and globalization, better known as the LPG policy. The idea was to inculcate free market philosophy. However, the LPG reforms did not end up achieving the desired results due to a number of factors such as red tapism, rigid labour laws and poor infrastructure. In order to solve the situation, the government relied on Export Processing Zone(s) (EPZs) to boost the industrial sector.

EPZs also failed to bring a favourable change, the government then replaced the EPZ scheme with the Special Economic Zone (SEZ) scheme, which was based on the Chinese Model. It is worth understanding that although the objective of both EPZ and SEZ was the same, the main difference lies in the fact that the latter is an industrial township with world class infrastructure, whereas the former was just an industrial arena or an enclave.

II. SEZ ACT – A GOLDEN HISTORY?

It is worth noting that India is not the first country to implement the public policy of SEZ to boost industrial growth. Many countries around the world have successfully tried and tested the policy of SEZ. It was around the year 2000, when the Indian government seriously felt the need to make a public policy of SEZ. Murasoli Maran, the then Union Minister of Commerce, visited the

* 4TH YEAR STUDENT OF B.B.A., LL.B(H) AT SYMBIOSIS LAW SCHOOL, HYDERABAD.

neighbouring country of China.[1] After visiting the Guandong SEZ, he felt the need of framing a similar policy suitable to India to boost economic growth.

On his return after several rounds of deliberation, finally the government was convinced to incorporate the framework for SEZ into its 1997-2002 EXIM Policy Framework. The states were given the free hand to frame their own SEZ rules. It was in the year 2005, that the Parliament made a specific act which would override the state SEZ Laws.[2] For proper and effective functioning of the act, in the year 2006, the Ministry of Commerce and Industry implemented the SEZ Rules.[3]

III. **SEZ – OBJECTIVES**

The main reason behind the decision of framing a public policy revolving around SEZ was to make available various types of Goods and Services strongly supported by competitive infrastructure to support the export demands of the country. SEZ was also set up to attract huge amounts of foreign direct investments by liberalising tax benefits. In order to achieve the objective various incentives are given such as the 10-year tax holiday', 100 % permission for FDI, no import license requirement et cetera.[4]

IV. **SEZ – BRIEF OVERVIEW OF INCENTIVES**

1. SEZs are held to be located outside the customs territory of India, though being the beneficiary of tax regulations.[5]
2. Exemption from import duties from the domestic market.
3. Banks established within the territory of a SEZ are deemed to be offshore banking units. This is done with a view to increase trade with other countries.[6]

---

1 Navdanya, Corporate Hijack of Land 1 (RFSTE/Navdanya 2007).
2 The Special Economic Zones Act, § 51(2005).
3 Special Economic Zone Rules, 2006, GSR 54(E) (Feb 10, 2006).
4 Zafar Mahfooz Nomani & Mohammad Rauf, Role of SEZ in Socio Economic Development, 21 ALJ (2013-14) 102.
5 The Special Economic Zones Act, § 53 (2005).
6 The Special Economic Zones Act, § 17 (2005).

4. Only 50% of a SEZ territory is allowed to be used for any industrial purpose.[7] The said figure was earlier 25%.
5. Lands not utilized for industrial purposes may be used for educational, commercial, residential purposes.[8]
6. Appointment of development commissioner for monitoring the working of each SEZ.[9]
7. Responsibility of providing adequate supply of resources such as electricity lies on the state establishing the zone.[10]
8. Rules governing labour[11] and environment[12] are relaxed for a company operating within the SEZ.

V. SEZ – A ROSY PICTURE?

It is true that the concept of SEZ was introduced in India keeping in mind the industrial and economic growth, but if one closely analyses it in detail, one may find that it has done more harm than the intended good. India's experiment with SEZ has not proved to be an unqualified victory. Loss of revenue to the government by framing favourable tax structure suitable to a SEZ has not been compensated or matched with economic benefits arising from a SEZ.

The main advantage which was perceived by the people was that a SEZ would help reduce the levels of unemployment as more and more industries would set up, which would in turn require labour. Although in reality the industries who would set up their operations in a SEZ would be primarily high technology industries, which would demand only highly skilled and educated class of labourers. In a country like India, such a condition would be very difficult to fulfil as the rate of poverty and unemployment remains quite high.[13]

The original goal of framing the public policy of SEZ was to solve the nations problem by getting investments into the country, but now it itself is creating new problems, majorly by threatening the national food security. Most of the state governments in a hurry to allot lands for the purpose of creating SEZ's, acquire the agricultural lands which are highly fertile. This process of acquiring

[7] The Special Economic Zones Rule 5(2)(a) (2005).
[8] The Special Economic Zones Rule 10 (2005).
[9] The Special Economic Zones Act, § 11-12 (2005).
[10] The Special Economic Zones, Rule 5(5), (2005).
[11] The Special Economic Zones Rule 5(5) (e) to (g) (2005).
[12] Ramchandra Bhatta, SEZ and Environment, 38 Econ & Pol WKly 1928 (2003).
[13] Dr. Md. Rahmatullah, SEZ'S: An Engine of Growth, 19 ALJ 167 (2008-09).

land is done in such a haphazard manner that our country stands at a stage where highly irrigated and fertile land is given, which places the food security of India at risk.

VI. SEZ & LAND ACQUISITION ACT – A HORROR STORY?

A colonial era law known as the Land Acquisition Act was used by the government in order to get the lands from the general public for the effective working of a SEZ. The Land Acquisition Act, allows the government to acquire any land which may be useful for any 'public purpose'.[14]

There have been very few changes in the act even after independence, most noteworthy ones being in 1962 and 1984. It was during the tenure of Jawaharlal Nehru government that the amendment of 1962 was introduced. It added the term "company" in the act. Hence, this amendment empowered the government to acquire land for companies in the name of 'public purpose'. Under the Indira Gandhi government, the 1984 amendment was implemented out which allowed the government to acquire land for the purpose of planned development and thereby selling to private players.[15]

The act mentions that the market value of the property to be acquired, along with any compensation to be given to the landowners.[16] However, the trap lies in the fact that the SEZ act considers the initial value of the land, which is bound to rise once multinational companies desire to enter the area.[17]

The point to be made is that the term 'public purpose' in the act has been heavily used by the states to benefit corporate giants, keeping a close eye on the rights of the original land owners.

VII. DADRI SEZ - RELIANCE ENERGY GENERATION - CASE REVIEW

In order to truly understand the ground level situation of a SEZ, it becomes necessary to do a real-life case study. This was shortly after the SEZ Act in the year 2006. It was in the outskirts of Delhi,

14 Somavanti v. State of Punjab, 2 SCR 774, 818 (1963).
15 Erik Daniel Kaeding, Special Economic Zones: Problems and Solutions, 2 GNLU L. Rev. (October) 69 (2009.
16 The Special Economic Zones Act, § 23(2) (2005).
17 A. Subramanyam, Special Economic Zones Act, 2005 and Judicial Response, 54 JILI 248 (2012).

in the area of Dadri, Ghaziabad that Reliance Energy made plans to build its 3500-Megawatt power plant. The power plant was supposed to be one of the largest gas-based power plants.[18]

The government allotted Reliance group a vast land of 2500 acres which was acquired through the Land Acquisition Act. It is important to know that the land given to the SEZ was considered as one of the most fertile regions of the world. Farmers were caught by surprise when they came to know the fact that the government had acquired their land till the foundation stone of the power plant was unveiled.

The farmers protested the move of giving fertile agricultural lands for the power plant project, but police arrested them and kept them in custody for several days. These atrocities of government officials indicate gross violations of fundamental rights enshrined in Part III of the Constitution. This is just one example out of many where in the name of economic development, landowners were subjected to gross injustice.

VIII. SEZ – BIRTH OF CORPORATE POLICE STATES?

The responsibility of governing the SEZ's is given to development commissioners who are appointed by the Central Government.[19] Their operation is independent of any control from state or local government. Wide powers are bestowed upon the development commissioner which include the ability to control basic freedoms like association and travel.

Further the commissioner is empowered to issue identity cards to those employed in a SEZ.[20] It also said that such an action also violates the Seventy-Fourth Constitutional Amendment. The main object of this amendment was to enhance the representative democracy, and hence, absence of any local control within SEZs and giving all the power in the hands of a commissioner seem to violate the spirit of the Seventy-Fourth Constitutional Amendment.

IX. SEZ'S IN INDIA – TWISTING THE DRAGON'S TAIL?

The model of SEZ has been popular in Asia since a very long time owing to the fact that the SEZ model has been instrumental in rapid economic growth in many countries. It is believed that due

[18] Swapan Kumar Patra, Dadri Power Project, UP, India, EJAtlas - Global Atlas of Environmental Justice (22nd July 2019, 3.30 pm), https://ejatlas.org/conflict/dadri-power-project-up-india.
[19] The Special Economic Zones Act, § 23(3) (2005).
[20] The Special Economic Zones Act, § 46 (2005).

to the overwhelming success of SEZ in China, India too was prompted to adopt it. It is a fact that the India model has been left way behind the Chinese model.

Shenzhen, is considered to be one of the first SEZ's in China. In today's time it has transformed itself from a mere fishing village to a metropolitan city.[21] World's biggest tech leaders such as ZTE and Huawei have made Shenzhen their hub.[22] On the contrary, Indian model has been subjected to a lot of criticism with the way land has been acquired as discussed above. This haywire process has led to depriving farmers and poor landless labourers on the brink of starvation and unemployment.

X. SEZ'S – THE CHINESE MODEL

Till the year 1979, China was practising a closed economic system, prescribed by Mao Zedong. His successor Deng Xiaoping, realising the need to transform the closed model, adopted the "market socialism" version. To make the plan a reality four sites such as Shenzhen, Zhuhai, Shantoi and Xiamen were listed as SEZ.[23]

The main goal of the Chinese Model was to give importance to the export-oriented industries. FDI in the nation.[24] Below mentioned are the laws that were enacted by the People's Republic of China (PRC), in order to regulate the SEZ and more in particular FDI in the country: -

- The Law of PRC on Joint Ventures (1979) (Amended in 1990).
- The Law of PRC on Sino-Foreign Co-operative Enterprises (1988).
- The Law of PRC concerning enterprises with Sole Foreign Investment (1986).

The laws mentioned above are very important to study the transit of China from a closed economy to implementing SEZ model and thereby becoming an open economy. Hence, China used the SEZ's as a tool to test the experiments of modernization.

XI. SEZ & LAND ACQUISITION IN CHINA

21 Lauren Fulton, India's way of crafting SEZ's, Harward International Review (22nd July 2019, 1.00pm), http://hir.harvard.edu/articles/1523/.
22 Iram Huq & Pratyush Saha, Twisting the Dragon's Tale India's Path to Successful Sezs? The Answer May Lie in China, 1 NUJS L Rev 311 (2008).
23 Brink & Li, China on the Horizon: Exploring Current Legal Issues, 28 J. Marshall L. Rev. 567 (1995).
24 Baker, Forgotten Legal China, 17 Hous. J. Intl L. 364 (1995).

Land in China is owned under the socialist public ownership of land.[25] To understand the Land Acquisition under the Chinese Model, it becomes necessary to study Article 10 of the Chinese Constitution. Article 10 states:

> "*All urban land shall belong to the State. All rural and suburban land shall be collectively owned, except that owned by state in accordance with the law"*[26]

Similar to India, when the PRC needs a land for its own use, it shall pay compensation to the land owners. However, the difference lies in the fact that in China, land is not so easily transacted and is subject to heavy restrictions. Such restrictions, prevent the government to haphazardly acquire lands, which is the situation in our country.

It is very interesting to note that in China, unlike India a SEZ industry or an individual only has the right to use the acquired land upon approval. However, this right to use the land is different from ownership.[27] It is due to the above-mentioned few reasons that the Chinese Model has overshadowed our model by a great margin.

XII. CONCLUSION: SUGGESTIONS FOR HOLISTIC DEVELOPMENT

There is no denying that the SEZ Model has been helpful in the economic growth, but however its demerits overpower its advantages. After looking at the depth of the issue it becomes necessary to recommend steps to rectify the error. Development is not only about urbanization and boosting the Gross Domestic Product. India, as a country needs to stop corporate lands garbs and should focus primarily on proper human development. Industrialisation has to be planned keeping in mind its pros and cons and by just not blindly following the rat race of developing nations.

To achieve genuine development, the government needs to make sure that more and more citizens of the country own land. Basic needs of people will automatically be satisfied if they become owners of their land. True development can only be possible if the farmers in our country become self-sufficient.

[25] Land Administration Law of the People's Republic of China, 1988 Art 2.
[26] The Constitution Law of People's Republic of China, Art 10 (1962).
[27] Regulation for the administration of Land Use in the Xiamen Special Economic Zone, 1984, Art 9.

The Land Acquisition Act used to acquire lands for the purpose of a SEZ needs to be amended to make sure that the fertile and irrigated farm land is not acquired. For that purpose, there is a need to amend the definition of “vacant” in SEZ Rule 7(2). This rule mandates that a SEZ can be built only on a vacant land. The suggestion here is that it is necessary to specify that the term “vacant” should not include cultivated land. By doing this the fertile and irrigated land would be protected.

Further, strict compliance should be carried out to compensate the land owners and every alternative should be tried to relocate them. At present the process of identification of land is carried out by industries, the process can be reversed by letting the government to first identify the land.

Rule 5(2)(a) of the SEZ rules requires that only 50 % of the total land should be used for processing purpose. This rule can be changed to make sure less land is required for SEZ development overall. The issues of local governance within a SEZ, rights of workers etc needs to be addressed in order to make the SEZ Model highly efficient. It is a sad fact that even the most recent amendment of the SEZ Act (6th July 2019) failed to address the above-mentioned concerns.[28]

[28] The Special Economic Zones (Amendment) Act, 2019.

About the Editor-in-Chief

Srishti Khindaria, will be graduating from Amity Law School, Delhi in 2020 after completion of her Bachelor of Laws. Through her 5 years at law school, Srishti has been actively involved in co-curricular activities. She has won several accolades, nationally as well as internationally; from NALSAR, Hyderabad to Willem C. Vis (East). Srishti, would describe herself as a funny, pragmatic and a self-proclaimed coffee connoisseur. In her free time you can find her cooking, reading her favourite book, watching a cricket match or just travelling and exploring Delhi. Srishti, has a keen eye for detail and can be found correcting or marking memorials or research papers and catching even the minutest of errors in Blue booking. She has several online publications and runs a personal blog too. Srishti has interned with some of the top legal luminaries and was also appointed as a Student Teaching Assistant to the Acting Director of her college. Post completion of her degree, Srishti wishes to keep working and pursue her passion in Commercial and Infrastructure laws. Her association with the Amity Law School, Delhi, Student Journal Society dates back to the year 2016, starting as an Assistant Editor, slowly ranking up the ladder to become Editor and in 2019 she was appointed Editor-in-Chief for the 8th Edition of the Journal. She along with her team of Editors is beyond excited to present to you this Journal on Economic Laws.

About the Editors

Mitali Gupta is a fifth-year student of BA LLB (H) at Amity Law School, Delhi (GGSIPU). She was inducted as a member of the Journal Society in 2015 as a first-year student, and has ever since played an active role in the publication of the ALSD Journal. She has extensive experience as an independent writer and has worked as a freelancer for a number of organization. She also has to her name publications in reputed magazines. She likes to write about socio-legal issues, politics, and topics that strike a chord with others. Besides writing, she actively participates in moots, mock trials, debates, social service, and theatre.

Siddharth Dhawan, is a student of BA LLB (Hons.) final year at Amity Law School Delhi (ALSD), IP University and ICSI Professional Level (Company Secretary). He runs his own Law Journal (Jurisperitus: The Law Journal ISSN- 2581-6349 https://jurisperitus.co.in)

and also holds the position of Nominated Editor in ALSD Student Journal since 2018. He has completed various online courses on GST, Companies Act, Intellectual Property Rights, Competition Law and Legal Drafting. Siddharth has participated in many Moot Court Competitions and secured position of High Commendation in Amity Intra MUN. Recently, he represented Guru Gobind Singh Indraprastha University in 20th Annual International Maritime Law Arbitration Moot, organized by Murdoch University Australia and hosted by Erasmus University Rotterdam in Netherlands (30th June to 5th July 2019). He has previously interned with various Government Departments and other Law firms. He is also an active social worker deliveringhis duties towards the society through Legal Education Awareness Foundation (LEAF) an NGO. He has also written and published many research papers on various topics. Siddharth possess a working knowledge of Companies Act 2013, Mergers and Acquisition, Takeover, Competition Act and various Banking and Insurance Laws.

Suhani Chanchlani is a final year law student at Amity Law School, Delhi (GGSIPU). She is an alumnus of World Trade Institute and Centre for WTO Studies - Joint Academy on International Trade Law and Policy. She has worked extensively on trade laws, arbitration and infrastructure laws in her previous internships. She has also assisted Hon'ble Justice Indu Malhotra in research work for the 4th edition of her Commentary on the Arbitration and Conciliation Act, 1996.

Neha Das is a final year student at Amity Law School, Delhi (GGS Indraprastha University). She joined the Journal society as a Trainee Editor in her first year of law School itself, i.e. 2015. She has written and presented research papers on contemporary legal issues. She has done various internships ranging from judicial to corporate to litigation during her law school. She has also participated in various conferences and seminars held on IPR, law and justice. She is also the member of the Legal Aid Cell of the college. She has been actively involved in sports (Volleyball) throughout her school and law school days. She is an avid reader, and considers herself to be a Potterhead for life. She also thinks that the final season of Game of Thrones was quite overrated.

Tanya Aggarwal is pursuing five year law program from Amity Law School, Delhi. She was inducted into the Journal Society in the year 2017 and when subsequently promoted

to Nominated Editor in 2018. She has to her name publications in reputed journals and articles published online. Associated with the Internet Freedom Foundation, she worked towards the right to internet and privacy. She has extensive work experience in the legal profession which has come to her aid in order to understand the practical aspects of legal issues in the industry foundation, she worked towards the right to internet and privacy. She has extensive work experience in the legal profession which has come to her aid in order to understand the practical aspects of legal issues in the industry.

Ragini Juneja is a 4th year law student at Amity Law School , Delhi (Affiliated to GGSIPU). She was inducted as a member of the Journal Society of ALSD in 2017 and has ever since contributed actively by being the trainee editor in two editions of ALSD Student Journal. She has vivid experience in writing which she gained by means of internships at various reputed content providing organisations like Economic Times, Respect Women, Big & Beyond, One Song Magazine and Techworks. In her many published articles, she has laid immense emphasis on awareness of one's own rights and entitlements as a precondition for confidence, self-esteem and dignity. She is a confident public speaker and strongly believes in fulfilling her responsibilities towards the society by teaching young children in association with NGOs. Also, she has actively participated in various moots, mock trials and debates.

Shreya Jha is a fourth year BA LLB Hons. Student at Amity Law School Delhi. She is currently serving as an editor at the ALSD Student Journal. Apart from this she is also a visiting editor at the University of Bologna Law Review. She has a keen interest in competition and antitrust law and media law. She has been a member of the ALSD Student Journal society since 2017.

Arushi Sethi is a fourth-year law student pursuing her studies from Amity Law School, Delhi, GGS IP University, India. She has a zeal to work and excel, and her work speaks for itself. She is an avid reader and an enthusiastic mooter. Apart from being a member of Moot Court Society of her college, she is also a Visiting Editor for University of Bologna Law Review and is on the Executive Council of the Student Section of the Indian National Bar Association. She has been awarded the the title of 'Best Memorial' at the Jindal Technology and Policy Moot, 2019 and recently qualified for the world rounds of Frankfurt Investment Arbitration Moot Court Competition, 2020. She has also contributed to a book

titled ‘Law and Her’.Under legal paradigm, she inclines towards International Commercial Law, Competition Law and Constitutional Law.

Pankhuri Bhatnagar is presently pursuing her 4th year of BA.LLB (Hons.) from Amity Law School, Delhi. In her past 4 years studying law, she has won numerous accolades in National level competitions including St Stephens Moot court, Negotiation (at Symbiosis, Noida), Legal drafting (at Jamia Milia) and 'Special mention' in Samvaad Youth Parliament, among many others. She has excellent researching skills and many publications to her credit. Apart from the legal field, she works as a Beauty & Lifestyle Influencer and has collaborated with over 50 reputed brands. She pens down her personal musings on her blog which has garnered a readership of more than 15,000 people. Her writings mostly revolve around social issues, self love and women empowerment. She is also the Co - Author of an anthropology on modern love. Being a diligent student and preservationalist, she hopes to utilize her legal skills in the field of environmental law and animal welfare, to change our society for the better.

Ragini Kanungo is pursuing 3rd year BA LLB (Hons). She got inducted into the Journal Society in 2018 and has been trainee editor in two editions of ALSD Student Journal. She has also been awarded as ‘Student of the Year’ for Batch 2017-2022 in the year 2019. Along with the Journal Society, she is also a member of the Moot Court Society and Debating Society of the college, having participated in moots and debates as well.

Sharona Mann is a third year law student of Amity Law School Delhi, Guru Gobind Singh Indraprastha University. A bright young mind, she has a keen interest in International Humanitarian Law particularly the Law of Armed Conflict. As a member of the Corporate Social Responsibility Club, she has participated in several events aiming to address the social issues plaguing the contemporary society. Her avid interest in Transnational Organized Crimes is evinced by her essay titled "Trafficking of Falsified Medicines,” which secured the second position in Surana and Surana International Essay Writing Competition 2018. As a diligent student, she hopes to utilize her legal acumen to seek justice for the under privileged.

Subha Chugh is presently a third year law student at ALSD. She was made a part of the Journal Society in 2017. She likes playing the devil's advocate, defending, rather than prosecuting. She also likes to dabble in many different arenas apart from law, including digital entertainment, content creation and is often found making inappropriate jokes in serious situations. She's an avid reader, prefers being in water than on land and her dream world over reality. Her motto "A little pimply, a little fat, a little flawed; Just a whole lot relatable."

Saloni Sharma is a 3rd Year Law student from Amity Law School, Delhi (GGSIPU). She has been the editor of the Amity Law School Delhi English Journal since 2017. She is deeply interested in the field of Corporate Laws and Intellectual Property Law, and wishes to further pursue her career in the same field. She enjoys reading and writing in her free time. She is also trained in Indian Classical Vocal and Theatre from Gandharva Mahavidyalaya and National School of Drama, respectively.

Sonjuhi Kaul is a 3rd Year Law student from Amity Law School, Delhi (GGSIPU). She has been the editor of the Amity Law School Delhi English Journal since 2017. She is interested in the field of business laws especially Corporate Law , bankruptcy law and wishes to further pursue her career in the same field. She enjoys reading and writing in her free time. She has also interned under People's union of civil liberty covering humans rights and political issues in India.

ABOUT AMITY LAW SCHOOL, DELHI

The School has been consistently ranked as one of the Top Law Schools in the Country since 2006. In the survey of the India's Best Law Colleges by India Today (THE INDIA TODAY NIELSON SURVEY), the National Magazine, Amity Law School Delhi (ALSD) bagged 4th rank in India in 2017 moving up in ranks from Rank 11 in the same in 2016. In THE WEEK (HANSA RESEARCH SURVEY) ALSD was ranked at 12th in 2016 and 11th in 2015. THE OUTLOOK (OUTLOOK GFK MODE SURVEY), ALSD was ranked 10th in 2016.

The Amity Law School, Delhi (ALSD) has the unique distinction of being the first Law School in Delhi to start a 5-year integrated LL.B (H) programme in 1999. The School was established under the Ritnand Balved Education Foundation (RBEF) to achieve world-class legal education in the country. Dr. Ashok K. Chauhan, the Founder President of the Law School is a great philanthropist and a man of extraordinary vision. This great vision has been translated into practical reality through the establishment of various educational institutions including the Amity Law School. His vision for the Law School is to provide excellence in legal education and to produce quality lawyers with good moral principles and great human values. The President RBEF, Dr. Atul Chauhan has been providing dynamic leadership intervention in strengthening the vision of the Founder President. Presently the academic values are being inculcated by Prof. (Dr.) D. K. Bandyopadhyay, (Former Vice-chancellor, GGSIPU) Chairman, Amity Law Schools.

Amity Law School Delhi has been granted affiliation by the Guru Gobind Singh Indraprastha University, Delhi for running a 5-year Integrated LL.B (H) programme and the affiliation has been approved by the Bar Council of India. The programme is designed to incorporate teaching methods for realizing holistic legal education.

The programme offered by Amity Law School Delhi seeks to promote multi- disciplinary analysis of the socio-legal problems by designing/pursuing/giving effect to its course-structure and teaching methods to realize these objectives. The methods of teaching in the Law School include lecture, discussions, case law analysis, moot court training, project assignment and placement programmes. In addition, the School organizes seminars on contemporary legal issues, conducts clinical courses and train students in legal research and legal writing. By the time a student completes the 5-year programme he/she will be fully equipped with the required theoretical knowledge and practical experience in the field of law to become a full-fledged responsible member of the legal profession.

AMITY LAW SCHOOL (DELHI)
(An Institution of Ritnand Balved Education Foundation,
Affiliated to Guru Gobind Singh Indraprastha University, Delhi)
F-I Block, Amity University Campus, Sector-125, Noida-201313 (Uttar Pradesh)
Tel: 0120-4392681 E-mail: alsdelhi@amity.edu Website: www.amity.edu/als