

LAW IN THE CONTEXT OF LAW STUDENTS

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ABSTRACT

This article focuses on the academic aspect of national law schools in general, albeit in a satirical way. It seeks to extrapolate key issues, observations and trends using legal principles taught in class. It also attempts to break away from all the conventional modes of legal writing and thus attempts to question and dialogue about the practises followed religiously in law schools. In this process the piece explores how the law when applied in a certain context to a student's life can often create amusing annotations and inferences.

I. INTRODUCTION

We, collectively referred to as the “students of national law school,” including but not limited to our heirs, successors, assignees, legal representatives/doppelgangers, affiliates, agents, members of “the law school”, in part or in whole, unless otherwise repugnant to the context or subject in which the abovementioned word is used, are considered to be a rather elitist group by the legal fraternity, outside the protective ambit of our four walls. Many of us, during our internships, have been rebuked by partners, associates, and lawyers alike who usually remark, “*you students think that after five years of an expensive education you know the law. The law cannot be fathomed or grasped without learning on the streets, practicing in pits of subordinate courts, or working one's way up to the top from the bottom.*” This prevalent opinion, though substantially correct, has a certain degree of falsehood attached to it. This is because it stands atop a faulty syllogism, which is, “*just because all experienced lawyers know the law, does not mean all lawyers who know the law are experienced.*” Such an error is a hasty generalization that suffers from the logical fallacy of the single cause.¹ The same involves making an inductive generalization based on a single characteristic in the

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1 Judea Pearl, Causality, Models Reasoning And Inference, 283 (2000); If *A causes B* it does not mean *B causes A* (there cannot be bidirectional causation).

major premise (i.e. experience) without considering all the variables which make up a characteristic (i.e. a good lawyer), in the minor premise.² Furthermore, even any student preparing for the common law entrance test who spends a lot of time on networking sites like CLATgyan could tell you that correlation (of experience with good lawyers) cannot imply causation.

On a more logical plane, it could be said that we probably lack the experience which is an indispensable ingredient to be a successful “legal-eagle”, but it would be imprudent to say that we do not know the law. This is because we not only know the law (in its various shapes, sizes and forms), as an elephant, a blind-folded woman with scales, a foul mistress, an unruly horse or well, an ass, but we also apply it, often subconsciously, with great fervour and utility in our lives. You will find this paper replete with many such instances of application of the law to the life of a student, along with several redundant footnotes. The latter have been copiously added because I was told by my peers and seniors alike that footnotes are the elixir of a paper or project which is to be considered for publication. I have even albeit secretly, heard an editor of a student law review remark, “*we can’t publish this! This paper has only 30 footnotes*”. Thus, we poor students have no other option but to fraudulently supplant our writings with authorities even though the same are unwarranted or irrelevant. Amusingly, even though we emphasize on footnotes, we never actually read them, allowing such superfluous citations to go unnoticed.³ This is because editors require a paper to “look authoritative” even if actually isn’t. Thus, even if a line or statement is common knowledge, this is how it should be footnoted in “publish worthy” manuscripts:

“Furthermore the Court held that the setting up of such a Tribunal would inevitably involve a wholesale transfer of powers but that could in no way invalidate the setting up of a particular tribunal.”⁴

See, *Union of India v Delhi High Court Bar Association*, 2002 (4) SCC 275; *State of Karnataka v Vishwabharathi House Building Cooperative Society and Ors.* 2003 (2) SCC 412, HLA Hart, *THE CONCEPT OF LAW*, (2nd ed., , 1997), p.

² *Id.*

³ Chuck Zerby, *The Devil’s Details: A History Of Footnotes*, 13 (2003),

⁴ See generally, Rishabh Shah and C Nageshwaran, *R Gandhi v. Union of India*, INDIAN J. CONST.L. 219. (2011).

23; *S. P. Sampath Kumar v UOI*, AIR 1987 SC 386; *L Chandra Kumar v. Union of India*, AIR 1997 SC 1125.⁵

The “*Sampath Kumar case*”⁶ which has been most brazenly relied upon by authors was prospectively overruled for holding that tribunals are merely supplementary to High Courts. Furthermore, since the sentence only uses the word Court, I believe that reliance upon a single case should have sufficed. However, the national law school⁷ academic culture would abhor a line to that effect, and construe it as an un-authoritative misstatement despite it being backed by a constitutional bench of India’s apex judicial body. Hence, solely on utilitarian grounds I am going to footnote lines in my article most loquaciously even if they are superfluous, lest the editors decide not to publish this piece for want of the same in the following sections that deal with how prevalent legal concepts are subconsciously applied to the life of a law student, thus making up for the idiosyncrasies and trends so often found in national law schools.

II. EXAM AVOIDANCE, EXAM EVASION AND EXAM PLANNING

My first analysis begins with exams which follow a law student’s life like the fearful bubonic plague. This dreaded system of exams and how an ordinary law student tackles with it can be viewed through a prism of tax law principles. The tax avoidance, tax evasion and tax planning quandary has plagued the minds of judges, lawyers and students alike even before law schools were established in India. The difference between the three is as thin as our tax revision notes but the volume of material on the subject is as thick and complicated as all of Shakespeare’s plays put together, especially since our counterparts in England cannot stop writing on the subject and we cannot stop borrowing from them.

For those of you who have not been exposed to this confounding debate: tax planning occurs when an assessee is availing of provisions within the law to gain

5 Pardon me, if the footnotes do not confirm to the uniform style of footnoting that is so lucidly and illustratively detailed in the latest edition of the Harvard Bluebook, which is more dynamic and persistently evolving than our legal regime itself. I could not despite my best efforts, stick to the uniformity or the lack thereof in the Bluebook as it was too complex an endeavour.

6 AIR 1987 SC 386.

7 I will repeatedly use the word “national law school” given that a certain section of students believe that “law school” is no longer a generic word and are still under the byzantine belief that there exists only one academic institution that teaches law.

exemptions and rebates, thus paying lesser taxes to the government. Tax avoidance, on the other hand, involves utilizing loopholes within the law to avoid payment of taxes, and tax evasion occur when the assessee is simply not paying taxes and evading tax authorities⁸.

However, the problem is not that pedestrian as you may think, because it is difficult to distinguish between the three, in specific fact situations. Judges and authorities alike are at a fix in many situations. This may happen if a businessman is engaging in tax planning or tax avoidance by shell company⁹ in Mauritius in order to avail of tax benefits in that country,¹⁰ or when a transfer of capital goods that has its *situs* in India is controlled by two offshore entities (that do nothing except effect such transfers, for people looking to save tax in India).¹¹ The answers to such questions differ from jurisdiction to jurisdiction.¹² Thus, a lot of students have difficulty in comprehending the distinction between the three, which has recently

8 See generally, Lord Leonard Hoffman, *Tax Avoidance*, British Tax Review, Vol.2(2005) and Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613.

9 Azadi Bachao Andolan v. Union of India, [2003] 263 ITR 707 (SC); Re: Dynamic India Fund, AAR 1016/2010; Re: Moody's Analytic AAR 1186 to 1189/2011; Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, Congressional Research Service Report R40623, (2013).

10 Assesses can claim certain benefits if their income is subject to Tax in two jurisdictions by availing the benefits of a Double Taxation Avoidance Agreement(DTAA) under Section 90 of the Income Tax Act, 1961. Hence Income arising from Capital Gains in India and Mauritius will be taxable in Mauritius (which imposes no taxation on the same) as per the Indo-Mauritius DTAA. Many individuals and companies thus take benefit of this tax arbitrage by setting up offshore Companies or re-domiciling (changing residence) in tax-havens, despite having their assets and major source of Income in India. See, Robert Couzin, *Corporate Residence And International Taxation*, 216 (2002); Karsten Ensig Serensen and Mette Neville, *Corporate Migration in the European Union*, 6 Colum.J.Eur.L., 181 (2000);

11 Indofood International Finance v. JPMorgan, [2006] EWCA Civ 158; Aditya Birla Nuvo Limited v. Deputy Director of Income Tax, (2011) 263 ITR 706; Barclays Mercantile Business Finance Limited v. Mawson, [2002] EWCA Civ 1853; Re: SmithKline Beecham Port Louis Ltd, [2012] 24 taxmann.com 153 (AAR).

12 A Jurisdiction may adopt a “look at” or a “look through” approach to transaction attempting to avoid tax. The former approach merely examines whether the transaction as a whole is legal, while the latter purposively examines the scope of the transaction and what it intends to achieve. Thus in the event a transaction is wholly or substantially just a device to avoid tax, then it may be subject to tax. India adopts the “look-at approach”, however the implementation of General Anti Avoidance Rules (“GAAR”) may change this position and erase the difference between avoidance and evasion to a large extent. The United Kingdom already has such anti-avoidance rules in place enabling it to “look through” transactions and deny treaty benefits. See generally, Genevieve Loutinsky, *Gladwellian Taxation: Detering Tax Abuse Through General Anti-Avoidance Rules*, Houston Business and Tax Law Journal, Vol. 12(2011); Priyesh Sharma and Siddharth Dang, *Myth and reality of the imbricating concepts of tax avoidance and evasion*, Journal of Accounting and Taxation Vol. 3(2011).

been further exacerbated by the debate on Anti-Avoidance and Controlled Foreign Corporations especially before the Taxation exam.

To settle this confusion, a wise man simplified the quandary by virtue of a marvellous analogy: He said tax planning is akin to exam planning in national law schools, which is employed by the more studious of our peers to excel in exams. Such exam planning includes, but is not limited to using techniques like using colour pens to beautify an answer script, frequenting the corridors of the faculty room after class is over to uncover those secrets which cannot simply be revealed or deliberated upon in class, and diving into the dustiest archives of the library to find the rich repository of previous years' question papers. This lot actually complete their syllabi a day before the exam. Most of them actually listen to what is being said in class and finish their coursework beforehand just like a good tax-payer who remains abreast with the recent changes, files his returns on time and regularly has tax deducted at source. Exam planners are also aware of all the "shortcuts to success" and are able to study and execute their papers in the most efficient, effective and least time consuming manner. Their techniques are akin to a samaritan tax payer who knows exactly how much rebate he or she must file for, and which schemes are to be availed of to pay as less tax as possible.

Then there are the exam avoiders. These folks manage to not appear in the examination at all by strategically picking their moot court competitions, exchange study semesters and conferences in such a manner that the events/competitions clash with the exams they do not wish to appear for. Thus, they are, pursuant to official permission, outside college when the exams take place and are not obligated to attend them at least on a particular date. Companies by incorporating themselves in tax-havens use a similar defence by arguing that since the company is not based in India, it cannot be taxed.¹³ Hence, it can be inferred that both, tax and examination systems are based on rules of residency.

Some students also regularly manage to fall sick or "cultivate" infections in the most unlikely parts of their body at a particular time of the year and then get a doctor's certificate which is conclusive proof that they are not in a condition to give exams. Such a certificate is akin to a Tax-Residence Certificate (TRC) which is

13 Supra n. 7.

considered as an authoritative and indisputable proof of the fact that the person is not eligible to any Capital Gains Tax in India.¹⁴

Exam avoidance is surprisingly a safe strategy that maybe undertaken, as the university, just like the morally upright and legally correct adjudicators in England and India does not “pierce the veil”¹⁵ or look into the actual nature of the “exam leave application”. It therefore considers a doctor’s certificate (certifying that a student is ill) conclusive proof of a student’s inability to appear for the exam, irrespective of what his health actually is. This approach is best illustrated by the *Ramsay Principal*¹⁶ (recently recapitulated in the *Vodafone International Holdings BV v. Union of India*¹⁷). Thus, a student may be going for the most inconsequential, poorly organized and legally irrelevant conference or moot court competition, but he will still be entitled to an exemption as the Administration will only “look at”¹⁸ whether the competition is actually a moot or a conference. This is notwithstanding the fact that the same was picked solely for the purpose of gaining exemption, making exam avoidance a favoured strategy for students.

Last, there is the more brazen and ostentatious class who, simply don’t give exams/pay their taxes at all. The procedure to avail of this benefit is to simply not show up in the examination hall. The obvious consequence of this is that the student will receive an F/the taxpayer will be prosecuted by the tax department. However, both the government and our national law schools enact special schemes for such people. The Special Bearer Bonds (Immunities and Exemptions)

14 Azadi Bachao Andolan v. Union of India, [2003] 263 ITR 707 (SC).

15 W.T. Ramsay Ltd. v. Inland Revenue Commissioners, (1981) 1 All E.R. 865, examined a sale-lease back transaction in which gain was counteracted by establishing an allowable loss. The appellant company entered in a self-cancelling transaction in order to avoid tax. Lord Wilberforce likened the two self-cancelling assets to particles in a gas chamber “one of which is used to create the loss, the other of which gives rise to an equivalent gain that prevents the taxpayer from supporting any real loss and whose gain is intended not to be taxable”. The Court said that the transaction was subject to tax and held, “It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is the series or combination which may be regarded.”

16 *Id.*, “The task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is the series or combination which may be regarded”.

17 (2012) 6 SCC 613, “In this connection, we may reiterate the principle enunciated in *Ramsay* in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue to ascertain the legal nature of the transaction.”

18 *Supra* n. 10.

Ordinance, 1981 was one of many¹⁹ such infamous schemes. Clause 3(a) of the ordinance gave protection to such a purchaser from being required to disclose, the character and source of acquisition of the Bonds. This investment in Bearer Bonds was subject to tax, albeit a lower one as these bonds were not considered capital assets.

Thus, these Bonds were an excellent way of allowing not only tax-payers to convert black money into white money, but also of avoiding penalties and paying lesser taxes. This encouraged tax evasion in a sanctioned manner. Professor Upendra Baxi, most eruditely articulated the Ordinance as a having a “countervailing effect” on honest tax payers incentivizing them to cut-corners and evade taxes.

This countervailing effect is to a certain extent also produced by repeat examinations in law school. The system of repeats was originally designed to provide a second chance for those students who genuinely fell ill or could not clear the paper in the first attempt. Since the latter gradually grew in number, the repeat examination papers were, in the opinion of some, slightly simplified. This had a countervailing effect on the rest of the populous who thought, they could avoid/evade giving one or two of the relatively tougher exams and instead appear for the easier repeat exams creating a vicious and disappointing cycle of procrastination. Another instance of this countervailing effect is the new policy in certain colleges that makes it “even more impossible” for students to fail by allowing them to retake their entire course’s evaluation all over again, enabling students to convert their black F’s into white grades.²⁰ A policy to this effect has only one benefit to the extent that it truly endorses and vilifies the latin maxim *lex non cogito ad impossibilia*.

Such a perspective on Taxation ought to have made the entire lineage of Judges from Lord Fraser to Lord Denning roll in their graves. Alas, taxation would have been so much simpler if they were students of our pristine institutions. This analogy would have greatly simplified their judicial conundrum especially since it is

19 See T.N. Pandey, *Why bond with the bad*, Hindu Business Line, < <http://www.thehindubusinessline.com/todays-paper/tp-opinion/why-bond-with-the-bad/article2193760.ece?textsize=large&test=1> > last visited on 3/07/13.

20 The “F” grade is always represented in Bold in the NALSAR Grade sheet for reasons unknown.

likely that they would have been under the influence of certain, more popularly renowned “Lord of Coke” who is oft quoted and heavily relied upon by our lot.

Though a morally upright person would abhor exam avoidance done solely in order to not write exams, I opine that we lawyers just like our equally vicious political fellowmen *should be allowed some play in the joints, because we have to deal with complex problems which do not admit of solution through any doctrine or straight jacket formula* (like our byzantine question papers for instance).²¹ However, from both, a more disciplinary and policy-based perspective, the strict “look-at” approach must be modified to identify sham transactions and transactions with a deliberate malicious intent to abuse the system. Though it is debatable whether the General Anti-Avoidance Rules ought to be enacted, not having General Exam-Avoidance Rules would be an *argumentum ad ignorantiam*.

III. ACADEMIC DEBT RESTRUCTURING

Exam avoiders and evaders are not the only ones who write repeat examinations. There is also another class of students who are unable to clear their exams, and thus have to appear for the exams once again. This is the class of students for whom the repeat exam system was created in the first instance.

The entire system of repeat examinations is akin to Corporate Debt Restructuring (CDR). CDR involves reducing the burden of debts on the company and increasing the time a company has to pay back its debts.²² Thus, it involves reorganization of the company’s outstanding obligations. Common measures of CDR include conversion of debt into equity, waiver of interest payable on loans, conversion of un-serviced portions of interest into term loans, and giving haircuts on loans.²³

Companies with an outstanding exposure of 10 crore are allowed to adopt the CDR mechanism subject to consent of 60% of the creditors.²⁴ However,

21 R.K. Garg v. Union of India 1982 133 ITR 239, Federation of Tax Practitioners & Ors. vs UOI & Ors., 1998 231 ITR 24.

22 Suresh Padmalatha, Management Of Banking And Financial Services, 186 (2010).

23 *Id.*

24 RBI Master Circular on *Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances*, RBI/2012-13/39.

companies indulging in fraud or malfeasance are not permitted to take this route.²⁵ The CDR mechanism allows the creditors to enter into an agreement with the company in order to permit some of the abovementioned measures as well as have a legal standstill for ninety to one-eighty days. Furthermore, all the parties involved along with certain government appointed bodies formulate a scheme for the revival of the company.

In the event that: a) a company's accumulated losses exceed 50% of its average net-worth²⁶ during 4 years of its existence or, b) it fails to repay debts to its creditors in 3 consecutive quarters on demand, then it is declared "sick" and is required to submit a scheme for revival and rehabilitation to the Bureau of Industrial and Financial Reconstruction (BIFR).²⁷ Given that the BIFR was instituted in 1985, many of its procedures and mechanisms are outdated, as a result of which many companies either end up being wound up or suffering huge losses. Some companies also use the BIFR to their advantage and use the tribunal as a safe-haven in order to stall their creditors, and thus remain "sick" for as long as possible.²⁸

Giving a repeat examination is akin to restructuring one's academic debt. Thus, an aspect of the relationship between a student and an institution is similar to one between a lender and a borrower. The institution is supposed to promote legal and ethical values, improve the ability to analyse and present contemporary issues, and confer degrees upon students.²⁹ Given that the institution completes only a negligible part of its obligation, all a student must do is comply with the prescribed credit requirements (i.e. pay his academic debt) and obtain his degree. By failing in a particular subject, a student defaults upon payment of a return that

25 *Id.*

26 As per Section 3(1)(ga) of the Sick Industrial Companies Act, 1985 (SICA) Net worth means sum total of paid up capital & free reserves.

27 See Section 3(1)(o) and Section 15 of the SICA, 1985.

28 The BIFR is seen as a safe haven for defaulting companies since it gives a stay on the proceedings takes at least three to four years to sanction a scheme for rehabilitation. *See generally*, Sumant Batra, *Insolvency Laws in South Asia: Recent Trends and Development*, OECD Fifth Forum for Asian insolvency Reform (2006). The current Companies Bill, 2012 seeks to replace the BIFR along with several other tribunals and introduce the National Company Law Tribunal in order to overcome procedural and enforcement related hurdles. However the Supreme Court vide its decision in *R Gandhi v. Union of India*, JT 2010 (5) SC 553 has stayed the creation of such tribunals till certain legislative changes are made.

29 See Section 4 of the National Academy of Legal Studies and Research University Act, 1998.

he owes to the institution. The fees payable by the student acts as a form of collateral for repayment of academic debt and can even be waived or reduced in certain circumstances. The institution is thus akin to a lender who does not bother as to whether the money he has lent to a borrower actually benefits the borrower, as long as it is paid back adequately, on time.

In the event the student defaults upon payment of his debt, the restructuring mechanism of repeat examination kicks in upon payment of a fee by the student. The student thus enters into an informal agreement with the professor acting on behalf of the institution as a result of which the date on which he is to repay his debt (i.e. the date of the exam) is extended. Furthermore, the student can also receive a “haircut” in the syllabi or the difficulty of the exam. However, the same is dependent upon his negotiation skills. He may also offset his academic debt by re-submitting a project or re-writing a mid-term exam as collateral. Unfortunately, our Constitution prohibits slavery,³⁰ thus making the divesture of any individual ownership interest in favour of another, illegal. Our Constitution, if interpreted progressively, may thus prohibit conversion of academic debt into equity. Hence, the “shylockian professor” as much as he is inclined to, cannot demand “a pound of flesh,” proverbially or otherwise, if a student does not pass his exam.

A student who fails his repeat exam is declared a sick unit and is given a year to repay his dues. Such a student gets caught in a vicious cycle as he must not only work towards payment of outstanding dues but also ensure that he is prepared to pay his ongoing debt as well. As a result of the huge burden on the student a simpler scheme/paper is devised for the student in order to pass his exams. However, given that his ongoing payments are not frozen, it is still an uphill task for a student to pass all his exams. Furthermore, the procedure for sanctioning such a scheme is tedious and it does not really benefit the student. However, many students, by avoiding or evading exams, have themselves declared as sick (often literally) so that they can benefit from the schemes devised for sick units.

From the analysis above, it can be gathered that our examination system is probably similar to our insolvency laws. Thankfully, we do not have a procedure akin to the one prescribed in the Securitization and Reconstruction of Financial

³⁰ Article 23 of the Constitution of India, 1956.

Assets and Enforcement of Securities Act, 2002 (SARFAESI) that allows a financial institutional to seize all collateral assets upon giving a 30 day payment notice.³¹ However, borrower sensitized laws along with procedural efficiency in order to benefit lenders should not harm the credit system in anyway. Maybe a cue from Chapter XI of the United States Bankruptcy Code is in order.

IV. THE IDEA EXPRESSION DICHOTOMY IN QUESTION PAPERS

In *University of London Press Ltd v University Tutorial Press Ltd*³² the Court of Chancery held that question papers published by Oxford Professors are copyrightable subject matter. Alas, this decision was given in 1916 and the Chancery division had no opportunity to review Question Papers set by our esteemed professors. If such a review were possible the law of copyright might have taken a different route and legal history could have been altered.

Question papers in law schools seem to suffer from the oft quoted and theorized Idea-Expression Dichotomy³³, an argument that is frequently used to debunk intellectual property rights. This doctrine originated in the case of *Baker v. Selden*³⁴, wherein the plaintiff published a book on accounting and book-keeping that was similar to a book published by the defendant. The defendant's argument was that Baker had copied his system of book-keeping. The defendant however did not allege that the forms and charts in his book were copied by Baker. The Court ruled in favour of the plaintiff holding that there is a distinction between the book and the art (the method of accounting). The former was held to be copyrightable as it was expression while the latter was not because it was only an idea. This doctrine was also relied upon by the Court to hold that the maker of piano roll could not have a claim against a producer of song even though the song was composed relying on the piano roll.³⁵

³¹ Section 13 of the SARFAESI Act, 2002.

³² [1916] 2 Ch 601;

³³ See Abinava Sankar and Nikhil Chary , *The Idea-Expression Dichotomy: Indianizing an International Debate*, Journal of International Commercial Law and Technology, Vol. 3 Issue 2(2008); The article relies upon Section 105 of the US Copyright Act, 1976 to explain the Idea-Expression Dichotomy thus,“*In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.*”

³⁴ 101 U.S. 99, 107 (1880).

³⁵ *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).

However it is difficult to distinguish what is an idea and what is an expression. For instance this Article is inspired from Professor Gordon's tongue in cheek piece, "*How Not to Succeed in Law School*."³⁶ Professor Gordon believes that the Harvard Bluebook is founded on the principal of "nature aboreth a vaccum"³⁷ and advocates that standard rules of footnoting are irrational. His piece also discusses the idiosyncrasies, fallacies, obsolescence of the "Law School System/Culture" in a satirical manner. Then can my Article be said to be plagiarized from his? The idea-expression dichotomy comes to my aid in this situation. Even though this Article discusses the above mentioned subject-matter it merely (partially, actually) borrows Professor Gordon's idea and not the manner in which he has expressed the same. Because my work is not "substantially similar"³⁸ to Professor Gordon's Article I am outside the ambit of NALSAR's Academic misconduct policy and Copyright laws (as I would most conveniently like to presume).

The Idea-Expression Dichotomy was enunciated in India by the Supreme Court in *R.G. Anand v. Deluxe Films*³⁹ which used the below mentioned example to illustrate the difference between an Idea and an Expression.

*"Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo Juliet, Jullius Caesar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance with elegance and erudition, as a result of which the end product becomes an original in itself".*⁴⁰

36 James Gordon, *How Not to Succeed in Law School*, The Yale Law Journal, Vol. 100(1991).

37 Given the number changes made to it every year, and the plethora of classification and methods of footnoting provided therein.

38 Some Judges believe that the test of substantial similarity and the Idea-Expression Dichotomy are applicable in different contexts. The former is more relevant in cases of literal infringement whereas the latter is applicable in deciding whether immaterial variations are plagiarized. See *Nichols v. Universal Pictures Corporation*, 45 F.2d 119.

39 1978 AIR 1613 in which that judge had to determine as to whether a film-maker vide his motion picture "New Delhi" had substantially copied from a play titled "Hum Hindustani." Both the play and the motion picture were based on the central idea of provincialism and parochialism. However the treatment and expression of these ideas was done differently in the film. The Court thus dismissed the action infringement holding that the two works of art were not substantially similar.

40 *Id.*

In *NRI Film Production Associates v. Twentieth Century Fox Film Corporation*⁴¹ the Karnataka High Court held that certain stock ideas, or scenes which must be done, are considered *Scenes a faire* and cannot be said to infringe a copyright⁴². *Scenes a faire* are so common, that the manner of expression of the idea merges and become associated with the very idea itself.⁴³ Hence given the complex interplay of facts and the proximity between an idea and an expression it often becomes difficult to distinguish between the two.⁴⁴

The difficulty of determining what is an idea and what is an expression becomes pedestrian when one looks at the Question Papers set out in our esteemed institutions. If a book containing syllabi for a subject and the question paper for the same subject were two distinct copyrightable pieces it would be impossible to tell the similarity between the two. Though the “underlying idea” (which is covering what is taught in class) is reflected in both, the manner of expression of this idea (in the question paper) is so materially different from the syllabi that it almost makes you laugh/or cry while writing the examination. In certain instances, some professors get so involved in the challenging task of paper-setting that they often seem to forget the underlying idea itself, thus making the paper from an all-together different syllabus. Furthermore the manner of weighing the importance of and distributing marks for tested topics in questions papers in law school is as efficient as the Whole Sale Price Index that still uses the quantum of type-writer sales in its weighted average basket of goods to compute inflation.

The question papers in our institutions flagrantly violate the sanctity of the copyright law more as they continue to seamlessly rely on the text of recent

41 2005 (1) KCCR 126; in this case the plaintiff filed a suit for a declaration that the Movie Independence Day made by the defendants infringes the copyright of the film script Extra Terrestrial Mission. Both films involved Aliens coming to earth and subsequently engaging in a war with the United States in a similar manner. The idea and portrayal of sequences like traffic jams, disruption of communication, dazzling effects of the nuclear missiles were considered *Scenes a Faire* as they were concomitant effects of every science fiction film. The Court considering the same and broad dissimilarities between the two films ultimately dismissed the suit.

42 For instance all motion pictures in which Salman Khan plays the lead role are similar to the extent they involve a scene wherein he 1) exhibits partial nudity, 2) fights off a hundred men 3) dances with an actress who has introduced in the motion picture only for one song 4) has a final fight scene with the villain of the motion picture that culminates with the retrieval of the lead female role. Such scenes are considered *Scenes a faire* to all Salman Khan Starrers.

43 Melville Nimmer And David Nimmer, *Nimmer On Copyright*, 75 (1993).

44 *Id.*

judgments in their questions. The text of these papers is so “substantially similar” to Supreme Court judgments that it would amputate Justice Hand⁴⁵ if he were to either decide originality of the same or even attempt such a paper- given that the time for writing such papers and the sheer quantum of matter expected, share an inversely proportional relationship.

Despite the best attempts of our Professors to express the Shakespearean text of Indian Judgments with further elegance and erudition to make it fresh and indistinct, the questions still substantially resemble judgments. Some would deem such similarity reasonable as there isn’t much one can do with Shakespearean text except borrow from it. Hence extensive and generous reliance upon judgements of Indian Courts has become so common and indispensable that it could be considered *scenes a faire* (i.e. stock idea)⁴⁶ to a question paper.

Members of the House of Lords or even our own *sentinel de qui’ve* would tremble if they were given the facts of a borrowed yet obscure judgment and asked to decide by relying upon recent case laws in a span of thirty minutes to one hour. To add to their misery there is also an unwritten condition precedent to writing such papers which is also the *jus cogens* norm⁴⁷ in scoring at least average marks in such examinations. Though it has different variations, it can be reduced to this- All answers must be structured, neatly written, overtly verbose, highly repetitive, and heavily reliant on only case law and materials discussed in class.

There is another unwritten rule to the effect that every student must ensure that at least one pine tree goes down every time he or she sits to write exams. In my four years at NALSAR I have seen students who take this rule too seriously and have thus become strong enough to consume an entire forest with their paper writing skills, despite the impending time crunch. It is a pity that no Judge will ever be able to excel in our exams. While our Indian Judges would miserably fail to comply with the first norm, our British counterparts would balk and break

45 Justice Hand was the Judge who laid down the substantial similarity/abstractions test in *Nichols v. Universal Pictures Corporation*, 45 F.2d 119.

46 A *Scenes a faire* question would normally read thus: *Given below is a specific fact situation. Based on relevant materials, recent case laws and discussions in class- Decide.*

47 M.N. Shaw, *International Law*, 118 (2008), *Jus Cogens* refers to norms that command peremptory authority, superseding conflicting treaties and custom from which no derogation whatsoever can be permitted.

themselves into a sweat over the second. It is no surprise that many students do not wish to take up adjudication as a profession after five years of studying in a national law school.

Thus all laws relating to copyright and principles relating to ingenuity must be forgotten while writing papers. Unless your answer is either exactly identical or concurrent to the materials/cases that you have relied upon, odds are against you. Your law school is the only place where ignorance of law may be actually forgiven, making the maxim read thus for five years -: *ignorantia juris excusat*. Aristotle who coined the inverse could safely be presumed to have not attended law school as he did not know that when the law on a particular subject is brief or terse, it is better not to know the law than to harm oneself by learning it.

V. APPLICATION OF THE LOCKEAN THEORY TO PROJECTS

In the Renaissance age, when most jurists were debating about the origin of property, John Locke, came up with an excellent theory to justify how man acquired ownership of land⁴⁸. He argued that all Property initially existed within “the commons,” or the public domain. An individual by applying his own labour and effort to property could transfer the same from the commons to his own private domain⁴⁹. The extent to which he could do this was however limited by two riders. They were-: consume only so much that there is an equal amount left for others (equality for all principal) and consume only that which is necessary (no-spoilage principal)⁵⁰. This theory was promulgated in 1690, a time of conflict when the sovereign exercised a lot of political control in England⁵¹. The immediate as well as intended benefit of this theory was that it established an absolute right of an

48 John Locke, *Second Treatise On Civil Government*, 45 (1960).

49 Daniel Russell, *Locke on Land and Labor*, *Journal of Philosophical Studies*, Vol. 117, 325 (2012). Daniel Russell has recently suggested that for Locke, labour is a goal-directed activity that converts materials that might meet our needs into resources that actually do.

50 *Supra* n. 36.

51 In the 17th century the overlapping conflicts between Protestants, Anglicans and Catholics swirled into civil war in the 1640s. With the defeat and death of Charles I, there began a great experiment in governmental institutions including the abolishment of the monarchy, the House of Lords and the Anglican church, and the establishment of Oliver Cromwell's Protectorate in the 1650s. The collapse of the Protectorate after the death of Cromwell was followed by the Restoration of Charles II and the return of the monarchy, the House of Lords and the Anglican Church. This period lasted from 1660 to 1688. It was marked by continued conflicts between King and Parliament and debates over religious toleration for Protestant dissenters and Catholics.

individual over his own private property that could not be under any circumstances taken away or violated by the government.

Little did the father of classical liberalism know about the ridiculous proportions to which his theory would be stretched. Locke's theory was capable of elasticity by virtue of analogies as Locke, deliberately did not define the extent of labour required to transfer property from the public to the private domain. Hence the Lockean theory of private property was ludicrously relied upon by Courts to give a copyright, which requires at least a "minimum degree of creativity,"⁵² to a phone-directory publisher who merely published addresses and numbers by relying upon other directories, and to question-papers made by Professors.⁵³ Both these activities are universally opined to suffer from a lack of originality and creativity in most scenarios.

National law school students familiarize themselves with Locke's theory of Property in their first year itself by virtue of studying Political Science. They are thus quick to defend heavily plagiarized projects, and vehemently argue for higher marks on the ground that the project is their original work, as it was made from their own labour. Consequently, due to the existence of the "Lockean Loophole" a twenty page Wikipedia article becomes the original work of a student after he or she labours to add his name to the document and remove the hyperlinks from the data. Unfortunately after going through the abovementioned tedious tasks most of us don't have the time to format our projects given our tight schedules, leading to easy detection of our sources by Professors.

However in our defence, since we extract information from the public domain (by virtue of our labour) into the private domain we exercise an absolute right, over our projects and research papers. This right cannot be taken away as long as we have the necessary and indispensable cover page with our name and the university logo on it. In addition to Locke's theory the two riders of Locke are also most religiously complied by our lot. This is because none of the projects exceed the minimum word/page limit even by a word thus endorsing the no-wastage principle. Furthermore since we rely upon the most limited and often a singular

52 Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1.

53 University of London Press Ltd. Case, (1916) 2 Ch 601.

source of public data that is available to everyone the equality principle cannot be violated under any circumstances.

Hence the abovementioned “Lockean argument” in my opinion stands tall, albeit tenuously, against the vice of plagiarism that has terrorized our lot since the inception of legal institutions. I do however sincerely hope that this paper is not published by someone else by striking my name and throwing theirs on it.

VI. THE DEEMED TO BE HEARING THAT NEVER COMES CLOSE TO A HEARING

Any article on the idiosyncrasies of law school would be incomplete without a section on mooting. Mooting has been described by a wise man to be one of the most glamorous albeit arbitrary activities in law school.

Fortunately mooting suffers from a poverty of definition despite being referred to constantly in various books and across the World Wide Web, thus saving me from the clutches of "a necessary" yet redundant authoritative footnote. Hence before I proceed to completely disparage the very logic behind this activity I believe as a national law school student it is my duty define it. We lawyers much like the drafters of our constitution (who even went to the extent of saying that the word “part” refers to part of the constitution) like to give lengthy and confusing definitions. This is because verbose and lengthy constructions are likely to give rise to contentions regarding the import of particular word. This keep the wheels of litigation of churning, thus giving our profession much envied self-sustainability.

However before defining the word “mooting” it is important to understand its meaning and history. The etymology of term can be traced to Anglo-Saxon times, when a moot was considered to be a congregation of prominent men in a particular area to discuss matters of local importance. The extent to which the addition of gerund can change the character and import of a word is an apt example of the vagaries of the English language. The addition of the gerund to the word moot thus results in a simulated albeit fictitious hearing before a Bench in which practices and procedures followed in Court are adhered to as far as possible.

In my opinion, mooting is best described using a tool of statutory of interpretation known as a legal fiction. The word legal fiction has been defined in the most complex manner possible by Jeremy Bentham who said,

“A fiction of law may be defined as a wilful falsehood, having for its object the stealing of legislative power, by and for hands which durst not, or could not, openly claim it; and, but for the delusion thus produced, could not exercise it⁵⁴”.

Thus an imposition of a legal fiction involves alteration of a particular fact in order to change the effect/consequence of particular law⁵⁵. Corporate personality, according to which a corporation can sue or be sued and is regarded as a separate person⁵⁶, is an instance of application of legal fiction. Section 82 of the Indian Penal Code, 1860 according to which nothing committed by a child under the age of seven is a crime also creates a legal fiction, as it presumes that children under the age of seven do not possess *mens rea*. Thus the fact that we are lowly group untrained, arrogant and inexperienced law students is a trifle altered to make us senior counsels arguing over matters involving public interest, constitutional interpretation or national sovereignty. Though most teams significantly alter the effect or consequence of a particular law by reading it as they please, the team that deviates the least from the correct position of law is usually the team that performs well.

At this point it must be noted that a legal fiction can be used to alter facts whimsically. In order to prevent this problem of whimsical alteration the learned Judges fired another one of their canons of statutory interpretation which read thus-: *A legal fiction must be stretched only as far as its logical consequence*.⁵⁷ Thus even though a corporation is regarded as a person it cannot be vested with fundamental rights under Part III of the Constitution of India.⁵⁸

However it is likely that mooting seems to either pre-date or disregard the above mentioned canon, as it is more akin to legal fictions of equity employed by

54 Ck Ogen, Bentham's Theory Of Fictions, 8(1932), .

55 Vepa P Sarathi, The Interpretation Of Statutes, 102(2008).

56 Salomon v A Salomon & Co Ltd, [1897] AC 22; Colt Group Ltd. v. Couchman, [2000] I.C.R. 327, Collector of Central Excise, Ahmedabad v. I TEC (P.) Ltd., (2002) 112 Com Cases 470 (SC); Associated Cement Co. Ltd. v. Keshavanand (1997) 7 Scale 734 (SC).

57 Re East End Dwelling co Ltd., 1952 AC 109; Hughes v Metropolitan Railway Co, (1877) 2 AC 439; Central London Property Trust Ltd v. High Trees House Ltd, (1947) KB 130; Bengal Immunity Co. v. State of Bihar [1955] 2 SCR 603.

58 The State Trading Corporation of India v. The Commercial Tax Officer, 1963 AIR 1811; Chiranjit Lal Chowdhuri v. Union of India, [1950] S.C.R. 869.

jurists such as Lord Denning, who used fictions to enhance the scope the legal doctrines to achieve substantive justice and fill legal lacunae.⁵⁹ Upon such usage the elasticity of a legal fiction was made subject to a lot of debate. In my opinion the extent to which legal fictions can be stretched is best explained by relying upon *Hookes Law* which states that “*the stress imposed on a solid is directly proportional to the strain produced, within the elastic limit.*”⁶⁰

Hence the extent to which one can stretch a particular fact is directly proportional to the expansion of the law, thus increasing its scope in order to fill up loopholes. However what went wrong with mooting was that the amount of “fiction” applied on a “legal matter” exceeded the latter’s elastic properties creating an entirely different compound altogether. Thus mooting for the purposes of this article is defined as a woeful attempt to conduct a simulated trial using a set of illogical rules or conditions. (explained below).

A typical moot always has a moot problem. In order to give the fair opportunity everyone to become the Devil’s Advocate and play turncoat within a limited span of fifteen to thirty minutes, it miserably tries to create a balanced fact situation. In order to reach this equilibrium, that is an indefensible pre-requisite, of any moot problem it decides to omit material facts in the most inconspicuous manner. Such omissions often create a “Catch-22 situation” for participants. Many “mooters” tend to thrive on such illogical omissions as it gives them an epinephrine rush more colloquially referred to as a “kick” whilst they burn the midnight oil deliberating upon the numerous interpretations of an unrealistic byzantine problem with a woefully incomplete set of facts.

A criminal law moot confirms to the abovementioned definition of mooting most robustly. It turns the most fundamental tenet of our criminal law system i.e. its adversarial nature on its head. As a result proceedings in the moot become akin to those followed by the *Cour de Cassation* of France which follows the inquisitorial system.⁶¹ Thus fact-finding which is supposed to be the domain of

59 In *Hughes v Metropolitan Railway Co*, (1877) 2 AC 439 and *Central London Property Trust Ltd v High Trees House Ltd*, (1947) KB 130, Lord Denning applied legal fictions to equitable remedies like estoppel, so that they could be used not only as a defence but also as a means to gain equitable relief.

60 RV Shukla, *Practical Physics*, 56 (2007).

61 Loïc CADIET, *Introduction to French Civil Justice System and Civil Procedural Law*, Recueil des lois et reglements, p. 333, 2011.

the lawyer is seamlessly encroached upon by Judges in Moot court. In an ideal adversarial system the judges are supposed to examine the evidence and arguments presented by the parties, and then come to a decision.⁶² However in a moot court competition Judges become tend to become strangely proactive and often present evidence, examine parties and advance arguments making the trial inquisitorial in nature. Some judges even go to the extent of giving their inquisition a medieval zest⁶³ often denying the parties the right to fully represent their client or complete their arguments. Participants most note that such judges look upon the most trifle deviations as heresy and can subject participants to corporal punishments if given the liberty to do so.

Unlike the "real deal" wherein litigators must comply with time-crunching deadlines, mooters are given a ridiculously long time to prepare their briefs. Though written submissions were originally referred to as "briefs," the word was subsequently changed to "memorial" given the sheer discrepancy between the nature of the document and its meaning. Memorial drafting has one golden rule:- Unless the percentage of footnotes in a memorial is greater than that of the words in a memorial it deemed to be of poor quality irrespective of the submissions it contains. Hence not a single line must be left without source unless it forms a part of a submission or prayer. As a result of the above, mooters effectively create the mother of authoritative documents, authoritative enough to rival our Constitution itself. As a result of their sheer size, memorials are seldom read, even by the participants themselves. Hence they are used only for the sake of referral or in order to mock participants who contradict themselves and are insistent on writing silly things. It is for that very reason that the decision of awarding best memorial reflects an inconsistency that can only rivalled by our Personal Laws.

The final and most important stage of this tedious process is the oral round wherein the participants are to argue before a bench. The only similarity between most of our Indian Judges and the Judges of moot courts are that both of them receive the file and facts on very short notice, as a result of which they are unable to

62 Harry R. Dammer, Jay S. Albanese, *Comparative Criminal Justice Systems*, 120 (2011), ;Stewart Field, *Judicial Supervision and the Pre-Trial Process*, *Journal of Law and Society*, Vol. 21, p. 125 (1994); Geraldine Szott, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, *Buffalo Criminal Law Review*, Vol. 8, 220 (2004),

63 See, Henry Charles Lea, *A History Of The Inquisition Of The Middle Ages*, 28(2012), in relation to the nature of inquisitions in the 12th -13th century by the Church.

devote a lot of time to it. It is also expected that a Mooters argument must cease on the exact minute his prescribed time expires, irrespective of whether it is a matter of constitutional importance that is to decide the fate of the teeming millions, or the number of petulant questions that may be asked.

Unfortunately the manner of adjudication in Moots is markedly different from that used in Courts. The team that wins the round is usually the team that possesses the best manner, method and knowledge of law. Thus irrespective of the veracity and efficacy of one's arguments he may still lose in a moot court if he does not fit the three criteria. Some argue that the criterion of evaluation makes mooting a very elitist activity that prefers articulation and presentation over real substance.

However I disagree with the aforesaid view. This is because mooting allows for a large extent of arbitrariness, as it makes sure that the stronger side/better side does not always come out victorious. In doing so it prepares us for life outside law school and for situations in which weeks of research can be disregarded because the Judge hearing the matter doesn't consider it to be important or, a situation when a lawyer is only given five minutes to make an impression. Hence Mooting despite all its deficiencies, unreal simulations and inconsistencies prepares a law student for such arbitrary situations.

VII. CONCLUSION

The academic life of a law student in most instances revolves around examinations, projects and Mooting. When we enter national law schools or "the law school" we sign an unwritten contract with the institution. This contract is in standard form or akin to a boiler plate contract in the sense that only one party decides the rules of the contract and it is offered to us on a "take it or leave it" basis. The terms of these unwritten contracts regulate the academic life of a student. As a result of the same unfortunately or fortunately we have very little control over the rules that dictate our academic performance. Nevertheless, as I have exhibited through various illustrations, we ingeniously use the law to side-step rules, prepare for results, or maybe look at things in a different way. Such application often occurs at a sub-conscious level and is evident by the manner in which the legal jargon creeps into our language making it "common usage."

People often consider law as a dull and arid field of study, however the author submits that it has a colourful side that most of us are unaware of. This colourful side exists in the laws itself and is often exhibited when it is put in a historical or contemporary context, however ridiculous the context maybe. Late Prof. Vepa P. Sarathy often made it a point to expose us to the colourful side of his with his jokes on phrases like “testimonial confession” whose origin was derived from actions akin to those performed in a scene from the movie “*Casino Royale*.” By exposing oneself to this colourful side not only does one find humour in mundane activities like examinations and evidence law, but also cultivates a capacity to think out of the box and apply the law, albeit differently. It is a shame that people think we do not know the law!