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EDITORIAL

We are proud to present to you the XIIth edition of the NALSAR Student Law Review. The NALSAR Student Law Review is the flagship journal of NALSAR University of Law, Hyderabad. The XIIth edition of the NSLR presents a diverse collection of articles ranging from competition law, constitutional law and criminal law regime to issues of postmodern studies, international obligations and alternate dispute resolution.

The edition begins with Balaji Subramanian's article titled *"Requiem for a Dream: Price Control, IP and Competition in the Pharmaceutical Market"* which details the inter-relations between the two presumably incompatible fields of intellectual property and competition law, using the metric of price regulation. The author argues that price control can be antithetical to the goal of safeguarding competition in the industry under the current regime of the National Pharmaceutical Pricing Authority.

Further along the jurisprudence of competition regulation in India, Isha Jain and Vanshaj Jain in their paper titled *"Defining "Control" Under the Indian Competition Act"* attempt to delineate a definitional idea for the concept by developing an existing framework derived from the Competition Commission's orders. The authors compare the possibilities of regulating the unbridled discretion of the Commission under the Competition Act's regulations in consonance with legislations in the United States of America and the European Union.

Exploring the interdisciplinary of mediation and human psychology, Mayank Samuel in his paper titled "*Bridging Mediation and Psychology: Mediator's Mindfulness and Raising Consciousness of Unconscious Biases,"* suggests alterations in functioning of mediators based on psychological inputs. The paper examines myriad instances of mediation and posits suggestions for mediators to result in a more efficacious result.

Engaging in a feminist critique of Section 2(c) of the Indecent Representation of Women (Prohibition) Act, 1986, Vandita Khanna in her article titled, "*About Postmodern Feminism and the Law: A Postmodern Feminist Critique of the Indecent Representation of Women (Prohibition) Act, 1986*" highlights the inherent inconsistencies within the Act that negate the purpose of its implementation. Additionally, the paper proceeds to argue for an alternative method for regulation of women's representation that would accord them agency and reduce patriarchy extant in the current Act.

In the paper titled "*Justiciability of a Presidential Proclamation of Emergency under Article 352(1) of the Constitution",* Vidushi Sanghadia examines the constitution interpretations and conflicts around the contemporary debate on presidential proclamations for Emergencies in India. The author extensively examines and highlights the conflations of standards used by courts for reviewing both Article 352 and Article 356 declarations, despite operating in vastly different spheres.

Delving into the criminal jurisprudence in India, Eesha Shrotriya and Shantanu Pachauri in their paper titled "*A Proposal for a Model Witness Protection Programme: Need and Legal Ramification*," examine the gaps in the extant Witness Protection Programme in India and attempts to construct an adequate programme with suggestions for during and after trial that would allow sufficient protection to witnesses, thus ensuring a fair criminal trial.

The DU Photocopying case has been considered as progressive jurisprudence o f user rights, Arpan Banerjee in the paper titled "*Copyright Violation or Access To Education: Navigating Legal Dichotomies",* goes beyond merely exploring the Delhi High Court's reasoning but proceeds to elucidate the legal dichotomies that the Court's textualist approach creates. The paper also engages with the economic dis-incentives that might arise from unauthorised photocopying for the creation of course-packs, highlighting the specious nature of such an argument. The paper further evaluates the contribution of the judgement to the global discourse on the apparent dichotomy between concerns of education and copyright protection

In the context of recent terror strikes by Islamic State ("IS"), the present edition concludes with a paper titled "*Prosecuting the Islamic State in India: Revisiting the Application of The Passive Personality Principle*," authored by Ashray Behrua. The paper explores the present criminal statutes in India to curb the spread of IS by constructing an argument for implementation of the passive personality principle. The author examines the functioning of the principle across jurisdictions and proceeds to draw a parallel from the United States to argue for its adoption in India.

We would like to thank all the contributors, faculty, students, alumni, reviewers and other well- wishers of NSLR without whose inputs, this law review would not have been possible.

Thank you

Board of Editors

REQUIEM FOR A DREAM: PRICE CONTROL, IP AND COMPETITION IN THE PHARMACEUTICAL MARKET

BALAJI SUBRAMANIAN*

ABSTRACT

The interplay between IP and Competition Law is fascinating. Although the fields may seem to be at polarities with each other, upon closer examination one realises that there exists clear cohesion. Current academic consensus holds that IP and competition law exist in a state of equilibrium vis-à-vis each other through in-built checks and balances, a stringent price control regime represents an altogether new influence that must be factored into any sector-specific examination of the IP/Competition interface. The paper attempts to show that price control is both ineffective and pernicious in the pharmaceutical context, with particular reference to the development and launch of new drugs into the market.

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I. INTRODUCTION

Among the vast variety of interdisciplinary legal studies, the interplay between IP and competition law is particularly fascinating. At first glance, the two discrete fields appear to exist in polar opposition to each other, but deeper analysis reveals clear cohesion between them in terms of the policy goals they seek to achieve. This inherent coherence between IP and competition law has been extensively described,[1] and to reiterate it would amount to little more than a waste of precious ink and paper.[2] In a nutshell, current scholarship holds that competition law fosters innovation by maintaining the market in a static equilibrium, while IP law fosters competition by pushing the market towards a dynamic equilibrium. Thus, in a hypothetical market for ice cream, competition law keeps prices low, pushing producers to innovate to lower their production costs and increase their margins. At the same time, IP law incentivises the creation of new types of ice cream, thus expanding the market and creating new product markets for producers to compete in.

As stated above, the IP/competition law interface has received considerable scholarly attention worldwide, and at least one Indian institution exists for the sole purpose of studying this interplay.[3] In most respects, the IP/competition law interface is globally uniform: most jurisdictions have competition legislation that regulates three aspects of market conduct: anti-competitive agreements,[4] monopolistic and trade-restrictive practices ("abuse of dominance"),[5] and M&A transactions which result in the formation of monopolies or highly dominant players.[6] Similarly, the widespread adoption of the WTO TRIPS framework at the turn of the century has resulted, for better or worse, in the harmonisation of the world's market-oriented IP legislation. Due to these factors, Indian discourse on IP-related

[1]Nuno Pires de Carvalho, IP and Antitrust: The Competition Policies of Intellectual Property in Eighty Cases (WoltersKluwer 2015) 1

[2] Herbert Hovenkamp, et. al., IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law (WoltersKluwer 2001) 1-1.

[3] The Centre for Innovation, Intellectual Property and Competition at NLU Delhi is, to my knowledge, one of India's most advanced research initiatives in the area. http://ciipc.org/

[4] Illustratively, Section 3 of India's Competition Act 2002, which finds parallels in Section 1 of the American Sherman Act.

[5] Again, Section 4 of the Competition Act is analogous to Section 2 of the Sherman Act, along with Sections 2 and 3 of the Clayton Act.

[6] Sections 5 and 6 of the Competition Act perform roughly the same function as Sections 7, 7a and 8 of the Clayton Act.

competition law has trodden a predictable path before inevitably ending up where it is today, with technology standards in the telecoms sector being its primary focus.[7]

Current scholarship seems to have ignored a salient and significant feature of Indian law that differentiates it from most other countries: price control. While current academic consensus holds that IP and competition law exist in a state of equilibrium vis-à-vis each other through in-built checks and balances,[8] a stringent price control regime represents an altogether new influence that must be factored into any sector-specific examination of the IP/competition interface. There are two main ways in which price control may require special treatment when examining the IP/competition interface.

First, in IP-fuelled industries, price control, if properly enforced, achieves many of the short-term objectives of competition law (minimising costs for consumers, preventing any single player from attaining or abusing market dominance, etc.) without necessarily providing the longer term benefits of limited IP monopolies. Policymakers may be tempted to enforce strict price controls on IP-based products, especially when the underlying IP is owned or controlled by foreign nationals. However, this temptation must be resisted since the imposition of price control cannot be a substitute for competition law insofar it does not steer clear of IP monopolies. Because of this, a price control regime cannot promise the static and dynamic market equilibrium that an IP/competition regime can.

Second, price control regimes incentivise cheating or other forms of supply distortion by producers, either through cost inflation (in cost-based controls), price coordination (in market-based controls) or by simply undersupplying the market. This is particularly problematic in regimes such as India, where price control exists as a supplement to IP and competition law. In such jurisdictions, policymakers and regulators may assume that price control renders antitrust law redundant, meaning that antitrust intervention is less likely to occur if price control fails or has been manipulated by market players.

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[7] For example, FICCI's flagship certificate course on IP Rights and Competition Law devotes itself almost entirely and exclusively, after an introduction to the applicable legislation, to Standard Essential Patents and FRAND licensing. *See* Course Outline at http://ficciclipr.ficciipcourse.in/. Similarly, another premier institutional research centre, the Jindal Initiative on Research in IP and Competition at OP Jindal Global University, devotes itself almost entirely to SEP/FRAND work. *See* Events at http://www.jgu.edu.in/jirico/index.php.

[8] Illustratively, compulsory licensing provisions in patent law, nominative fair use in trademark law and the idea/expression dichotomy in copyright law all have a competition-fostering purpose. Similarly, competition law contains exceptions that prevent the antitrust regulator from infringing patent monopolies such as Section 3(5) of the Competition Act 2002.

Over the course of this paper, I examine these themes by evaluating the effectiveness of recent regulatory interventions in the market for pharmaceutical products. IP-indifferent price control which results in a mere static equilibrium is best illustrated through India's regulation of the market for genetically modified seeds. The second theme, of antitrust apathy to price control circumvention, is best illustrated through recent trends in the pharmaceutical industry.

The Essential Commodities Act 1955 permits the union government to control the price at which any essential commodity (which has been defined to include drugs and cotton seeds, among other things) may be bought or sold.

II. PHARMACEUTICAL PRICE CONTROL

Despite an elaborate legal framework with laudable goals, I argue that pharmaceutical price control is little more than the policy equivalent of a wild goose chase. Over the course of this section, I highlight some unique features of the Indian drugs market, after which I describe the prevailing drug price control mechanism. I then argue that pharmaceutical price control is not only ineffective but also comes with tangible harms, which manifest in the realm of competition law. Finally, I argue that a combination of IP and competition law must altogether replace price control as a mechanism for preventing market failure in the industry.

A. Market structure

The market for pharmaceutical formulations is unique, both with reference to other product markets in India, and with reference to pharmaceutical markets abroad. This is because unlike most other geographic or product markets, the Indian pharmaceutical market is characterised by a strong middle player that mediates the relationship between the producers of drugs and their consumers.

Organisations such as the All India Organisation of Chemists and Druggists represent this unique phenomenon, in which a consolidated union of middlemen in the pharmaceutical supply chain have immense bargaining power as against producers as well as consumers. The market features nearly 100% retail consolidation, to the extent that manufacturers must virtually sell their products to a monopsony. This is because the AIOCD and its sister organisations operate to maximise their own interests at two levels, as exposed in two

separate investigations carried into them by the Competition Commission of India.[9] Associations of chemists and druggists (of which the AIOCD is the apex body) have consistently fallen foul of the CCI's rulings, meaning that their anti-competitive market consolidation and monopsonistic practices are not isolated, but form a pattern. In 2011, a range of stockists and other wholesale drug suppliers informed the CCI of anticompetitive conduct by the AIOCD and its sister organisations. In its orders in these matters, the CCI has returned findings that the AIOCD and its members have blatantly violated Section 3 of the Competition Act with impunity, maximising their cash flow at the expense of consumers and manufacturers of drugs.[10] The AIOCD was found to have colluded with associations of drug manufacturers (OPPI and IDMA) to fix retail prices, as well as to fix price margins.[11]

The AIOCD's relationship with pharmaceutical manufacturers is complex. On the one hand, it represents the consolidation of virtually every single retail player in the Indian drugs market, meaning that the manufacturer's market access is entirely dependent on the AIOCD. On the other hand, the AIOCD's all-pervasive influence over its members means that it has immense bargaining power against manufacturers, thus infringing upon their right to set prices for their products. The AIOCD's vast territorial reach and significant influence over its members means that it enjoys a virtual monopsony vis-à-vis manufacturers, as well as a virtual monopoly vis-à-vis consumers. Because of this, it has the ability to squeeze out a lion's share of the revenue arising from the value chain in pharmaceutical products sold in India. In addition, the CCI has recorded instances of the AIOCD and its members organising trade boycotts of manufacturers, wholesalers and retailers that offered discounts or set prices without its consent.[12] These factors indicate that the market for drugs in India is particularly vulnerable to both supply-side dominance (vis-à-vis consumers) and demand-side dominance (vis-à-vis manufacturers), and that such dominance is likely to be exerted against manufacturers, stockists and retailers who disobey the AIOCD's diktats.

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[9] *CCI passes cease-and-desist orders against AIOCD, others*, Business Standard, 11 December 2013, http://www.business-standard.com/article/economy-policy/cci-passes-cease-and-desist-orders-against-aiocd-others-113121100561_1.html

[10] In re: Peeveear Medical Agencies, Kerala, CCI Case No. 30/2011.

[11] "DG has observed that it is apparent that the MOUs between the AIOCD, OPPI & IDMA have directly or indirectly led to the determination of the purchase or sale prices of drugs in the market and the said conduct therefore falls within the mischief contained in Section 3(3)(a) of the Act." Id. Paragraph 14.12.10.

[12] *See, eg., In re: PK Krishnan*, CCI Case No. 28 of 2014, *In re: Santuka Associates*, CCI Case No. 20 of 2011.

Despite cosmetic attempts to comply with the CCI's orders against it,[13] the AIOCD and its sister organisations continue to act in a manner that invites antitrust scrutiny.[14]

B. Price control mechanism

India's political leadership in the years immediately following its independence was famously socialist, and began exercising its expansive powers under the Act from the Third Five Year Plan period.[15] The first instance of pharmaceutical price control occurred in the immediate aftermath of India's military engagement with China, in 1963, with the promulgation of the Drugs (Control of Prices) Order 1963.[16] Passed under the Defense of India Act, this order represented a form of crude market-based price control, freezing drug prices to the prevalent market rate as on April 1 1963.[17] The first price control regime under the Essential Commodities Act was the Drug Prices (Display and Control) Order 1966,[18] which mandated prior government approval for all increases in drug prices, although novel drugs were carved out of its scope through an amendment.[19]

Today, drug price control is enforced through the Drug Price Control Order 2013, issued by the National Pharmaceutical Pricing Authority (NPPA), a body under the Ministry of Chemicals and Fertilisers, and guided by the National Pharmaceutical Pricing Policy 2012.

The DPCO contemplates a two-step process in order to fix a ceiling price for drugs listed in its Schedule. First, the average price of all brands or variants of a formulation whose market share over the last year exceeded 1% is taken. A 16% margin to the retailer is added to this average price to arrive at the ceiling price. In addition, a 3.6% mandatory annual increase in prices has been provided for in the DPCO.[20]

The DPCO's scope extends to all drugs contained in its First Schedule, which has conventionally corresponded to the National List of Essential Medicines, which in turn

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[13] Peethaambaran Kunnathoor, *AIOCD issues circular to members, state assns. urging strict compliance with CCI order*, PharmaBiz, 17 May 2013, http://www.pharmabiz.com/NewsDetails.aspx?aid=75384&sid=1

[14] Shreeja Sen, *Karnataka Chemists & Druggists Association under CCI scrutiny again*, Mint, 3 March 2017, http://www.livemint.com/Industry/hgeyRe7CaVZp50tTS18qbN/Karnataka-Chemists--Druggists-Association-under-CCI-scrutin.html. *See also* MM Sharma, *Pharma firms beware, CCI is inquiring*, Financial Express, 5 April 2016, http://www.financialexpress.com/opinion/pharma-firms-beware-cci-is-inquiring/232609/

[15] Planning Commission of India, Third Five Year Plan 1961-66, Chapter 32.

[16] Subal Basak, *The genesis of drug price control*, PharmaBiz, 9 January 2008, http://pharmabiz.com/PrintArticle.aspx?aid=42905&sid=9

[17] Subba Rao Chaganti, Pharmaceutical Marketing in India (Excel Books 2005) 144

[18] National Pharmaceutical Pricing Policy 2012

[19] Chaganti, *supra*.

[20] Drug Price Control Order 2013.

closely mirrors the WHO's List of Essential Medicines. The NLEM does not include patented drugs, but the NPPA has made multiple attempts to expand the ambit of the DPCO beyond the NLEM. Most notably, in 2014, the NPPA invoked emergency provisions in the DPCO (intended to deal with public health crises and other extraordinary circumstances) to pass price control orders against 108 formulations that were not listed in the NLEM.[21] This included cardiovascular drugs, some of which (such as Merck's patented anti-diabetic sitagliptin) were protected by valid patents.[22] Manufacturers immediately filed writ petitions at High Courts in Delhi and Bombay, but were unable to obtain an interim stay on the price control orders.[23] In a sudden and inexplicable development, the NPPA revoked its price control orders within weeks,[24] ensuring that the storm died down amid much confusion.[25] The withdrawal of the orders sparked another round of litigation, which remains unresolved, in which the All India Drug Action Network sought a writ of mandamus from the Delhi High Court seeking the reinstatement of price control over non-essential drugs.[26]

In 2015, the Parliamentary Standing Committee on Chemicals and Fertilisers tabled a report in the House recommending the imposition of price control on all drugs (irrespective of patent status or essentiality) on the Indian market.[27] In addition, the NPPA sought information specifically on patented drugs from manufacturers, in a bid to negotiate a ceiling price.[28]

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[21] Rupali Mukherjee, *Major diabetes, cardiac drugs to become up to 35% cheaper*, The Times of India, 14 July 2014, http://timesofindia.indiatimes.com/india/Major-diabetes-cardiac-drugs-to-become-up-to-35-cheaper/articleshow/38339283.cms

[22] Madhulika Vishwanathan, *NPPA caps prices of non-essential medicines: a policy appraisal*, SpicyIP, 20 July 2014, https://spicyip.com/2014/07/nppa-caps-prices-of-non-essential-medicinesa-policy-appraisal.html

[23] Madhulika Vishwanathan, *Delhi High Court refuses to allow pharma industry's plea seeking stay on NPPA price cap decision*, SpicyIP, 5 August 2014, https://spicyip.com/2014/08/delhi-high-court-refuses-to-allow-pharma-industrys-plea-seeking-stay-on-nppa-price-cap-decision.html

[24] *Non-essential drugs: NPPA withdraws price control order*, The Hindu, 24 September 2014, http://www.thehindu.com/business/Industry/nonessential-drugs-nppa-withdraws-price-control-order/article6439154.ece

[25] "The above said guidelines dated 29.05.2014 and orders dated 10.07.2014 have been challenged in Bombay and Delhi High Court. The Union of India and NPPA which have been made respondents, after careful consideration in consultation with the M/o Law and Justice had decided to convey to the Hon'ble Courts that the guidelines dated 29.05.2014 are to be withdrawn." NPPA Powers not Withdrawn, Press Information Bureau, Government of India, 24 September 2014, http://pib.nic.in/newsite/PrintRelease.aspx?relid=109967

[26] Rupali Samuel, *AIDAN files PIL against NPPA decision to withdraw price control guideline*, SpicyIP, 9 October 2014, https://spicyip.com/2014/10/breaking-news-aidan-files-pil-against-nppa-decision-to-withdraw-price-control-order.html

[27] Anubha Sinha, *Parliamentary committee recommends imposition of price caps on all life-saving drugs*, SpicyIP, 30 April 2015, https://spicyip.com/2015/04/parliamentary-committee-recommends-imposition-of-price-caps-on-all-life-saving-drugs.html

[28] *Patented drugs details sought from Cos for price negotiation*, Business Standard, 29 January 2015, http://www.business-standard.com/article/pti-stories/patented-drugs-details-sought-from-cos-for-price-negotiation-115012901539_1.html

The current Modi government's election manifesto prominently featured the reduction of healthcare costs, and it remains a major aspect of the policy agenda. In 2016, after being chastised for its inaction by the Parliamentary Committee on Government Assurances for its "lackadaisical attitude" and "gross negligence" on this front,[29] the Department of Pharmaceuticals began a consultation process with various ministries on the price control of patented drugs.[30] More concrete change occurred on 1 October 2016, when Mr. Amitabh Kant, the CEO of the NITI Aayog, hosted a meeting with the Secretaries of the Department of Pharmaceuticals, the Ministry of Health & Family Welfare, and the Department of Industrial Policy and Promotion.[31] A decision was made to delink the DPCO from the NLEM, and wrest the price control function from the NPPA (an ostensibly independent body) and vest it directly in the Department of Pharmaceuticals (which functions directly under the political leadership).[32] Despite questions surrounding the authority of the attendees to take such a decision, the fact that the meeting occurred at the Prime Minister's Office makes it amply clear that the Modi government intends to follow through on its promise of cheap drugs via the price control route, regardless of patent status or essentiality.

C. Price control is Ineffective

Two cases must be considered in order to evaluate the effectiveness of the current price control framework: patented and non-patented drugs. The objective of price control is to broaden access to medicines in the short run, thus enhancing consumer welfare, while also ensuring that manufacturers have sufficient incentive to continue supplying the market within the ceiling price. This represents a fine balance, and I now examine whether such a balance is attainable by the current framework (or any hypothetical system of pharmaceutical price control).

1. Case I: Patented Drugs

The DPCO 2013 and the NPPA's guidelines permit price control of novel (and presumably patented) drugs in two ways. First, there exists a provision for setting the price of

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[29] *Parliament panel slams government on regulating prices of patented drugs*, The New Indian Express, 18 August 2016, http://www.newindianexpress.com/nation/2016/aug/18/Parliament-panel-slams-government-on-regulating-of-prices-of-patented-drugs-1510656.html

[30] Arijit Paladhi, *Govt seeks views on pricing patented drugs*, Mint, 23 September 2016, http://www.livemint.com/Politics/kVTTeIKZsy3xLYlNYeKCWO/Govt-seeks-views-on-pricing-patented-drugs.html

[31] Venkat Ananth, *Why India's drug price regulator's fate hangs in the balance*, The Ken, 9 December 2016, https://the-ken.com/why-indias-drug-price-regulators-fate-hangs-in-balance/

[32] RTI responses from the MoHFW and the NITI Aayog available on file with author.

new drugs according to the principles of pharmacoeconomics, which assigns a "fair market value" to new drugs based on their therapeutic effect. However, there exists no universal definition of value in healthcare, and attempts to quantify the value of any particular therapy have been proven to be vague and subjective.[33] More importantly, these principles have not been applied by the NPPA, and it is unclear if a hypothetical price control decision on such vague grounds by an administrative authority would survive judicial review by a writ court.

The alternative is for the regular average price calculus to be applied to a patented drug, in which market share is calculated depending on the number of variants of a formulation present on the market. In situations where the patentee is the sole manufacturer of the drug, the average price on the market must roughly be equivalent to the price set by the patentee, meaning that price control does little more than freeze the price of drugs set by the patentee at the time of product launch (subject to the mandatory annual upward revision of 3.6%). Such a ceiling price proves spectacularly and almost absurdly ineffective, given that patentees are likely to reduce the prices of patented products over time, meaning that the ceiling price fixed by the DPCO will be marginally higher than the monopolist's price on the market at first, and then progressively increase while the monopolist's price decreases.

Market trends in the pharmaceutical industry have been pointing to a shift in the manner in which originator firms work their patents in India. MNCs historically supplied the local market with patented drugs that their Indian subsidiaries manufactured or (more likely) imported from facilities abroad (such as Bayer's Nexavar, which was imported in low quantities until a compulsory licence was granted to Natco).[34] More recently, however, foreign originators are choosing to license their patents (often on a non-exclusive basis) to Indian generic manufacturers (such as Gilead Sciences' licence to seven companies for the manufacture of sofosbuvir).35 The strategy appeals to originators for several reasons: first, generic manufacturers are (along with NGOs) among the patent's strongest opponents.

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[33] Fernando Antonanzas, et. al., *The value of medicines: A crucial but vague concept*, 34 Pharmacoeconomics 1227 (2016).

[34] "Illustratively, the Form 27 filed in 2009–10 for Bayer's controversial drug Nexavar® (Patent No. IN21578) states that while 4665 units of the drug were imported into India, only 1679 units of the drug were sold." See Shamnad Basheer, Making patents work: of IP duties and deficient disclosures, 7 Queen Mary J. of IP 3 (2017).

[35] Rupali Samuel, *Gilead enters into licenses with 7 Indian generics for manufacture and sale of Sovaldi*, SpicyIP, 7 September 2014, https://spicyip.com/2014/09/gilead-enters-into-licenses-with-7-indian-generics-for-manufacture-and-sale-of-sovaldi.html

Illustratively, BDR Pharma, Natco Pharma[36] and the Indian Pharmaceutical Alliance (whose members are the largest generic manufacturers in the country by market share) had filed pre-grant opposition proceedings against the sofosbuvir patent with the Indian patent office.[37] All of them withdrew their oppositions as a direct consequence of the licensing agreement, perhaps as a result of a clause contained in it.[38] *Second*, licensing the patent and transferring the technology allows the originator to leverage its patent without any further investment in building a manufacturing presence, especially given that the opinion of the patent office[39] and independent scholars[40] is that local manufacture is a pre-requisite to satisfy the patent working requirement in Section 83(b) of the Patents Act.[41]

These situations are typically characterised by wide inter-brand price variation between the originator (which continues to sell the product at its international price) and the licensees (which sell the product at a significantly lower price). Illustratively, a single pill of sofosbuvir is priced at $1,000 by Gilead, while those manufactured by local licensees typically retail at around $4 per pill.[42] The ceiling price would be the average price of all variants of the patented drug, including those imported by the originator. Such an average is overwhelmingly likely to be significantly closer to the originator's price than the generic price. This is because the originator sells the "brand name" version of the drug, carrying with it two unique selling points. First, there exists a perception among patients (especially wealthy ones who can afford to pay for the originator's drug) that the branded drug is qualitatively superior or more efficacious than its generic counterparts.[43] Second, most doctors prescribe drugs under brand names, rather than generic or non-proprietary names,

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[36] PT Jyothi Datta, *More patent-opposition on Gilead's hepatitis C drug sofosbuvir*, The Hindu Business Line, 2 February 2015, http://www.thehindubusinessline.com/companies/more-patentopposition-on-gileads-hepatitis-c-drug-sofosbuvir/article6847904.ece

[37] *Sofosbuvir*, Patent Opposition Database, https://www.patentoppositions.org/en/drugs/sofosbuvir

[38] AN Gireesh Babu, *IPA, Natco withdraw opposition to Gilead's drug*, Business Standard, 14 September 2015, http://www.business-standard.com/article/companies/ipa-natco-withdraw-opposition-to-gilead-s-drug-115091300385_1.html

[39] "Section 83(b) states that Patents are not granted merely to enable patentees to enjoy a monopoly for importation of the patented article. Upon a reading of this provision it becomes amply clear to me that mere importation cannot amount to working of the patented invention." Natco v. Bayer, Compulsory Licence Application 1 of 2011 at p. 43.

[40] Basheer, *supra.*

[41] "83. Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely: […] (b) that [patents] are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article."

[42] Ketaki Gokhale, *The same pill that costs $1,000 in America sells for $4 in India*, Bloomberg, 29 December 2015, https://www.bloomberg.com/news/articles/2015-12-29/the-price-keeps-falling-for-a-superstar-gilead-drug-in-india

[43] Jeremy Greene, *Generic drugs: the same, but not*, The Atlantic, 30 March 2015, https://www.theatlantic.com/health/archive/2015/03/generic-drugs-the-same-but-not/388592/

despite consistent pressure to adopt generic prescription.[44] These selling points may allow (but not justify) the originator to command a higher price than its generic counterparts. However, price control regimes are blind to these distinctions, and must fix a single ceiling price for the formulation as a whole. In the example of sofosbuvir, the ceiling price is likely to be close to $800, an absurd and utterly irrelevant outcome in a situation where market forces set the optimal price for generics at close to 0.5% of the ceiling.

The only discernible effect of such a ceiling price would be on the branded drug manufactured or imported by the originator, who would be forced to cut prices by a small but significant percentage to remain under the ceiling. The originator may comply, and marginally enhance the welfare of wealthy consumers who opted for the branded drug over generic counterparts. However, these consumers are irrational actors, given that they have consciously chosen the branded drug over a cheaper substitute. On the other hand, the originator may value its brand equity and opt to pull the branded drug off the Indian market, thereby safeguarding itself from the threat of parallel imports into more lucrative international markets. In doing so, the originator would be immune from Section 84 liability for non-working since it has extensively licensed its patent.

In either case, it is clear that the price control has had no effect on enhancing access to the patented drug.

2. Case II: Off-patent drugs

Here, I only consider the effect (or lack thereof) that market-based price controls have on off-patent drugs. This is because market-based controls are generally seen as superior to cost-based price controls for two reasons. First, cost-based controls eliminate firms' incentive to innovate to reduce their production costs, leading to a stagnation in the state of the art. Second, cost-based controls are vulnerable to misreporting and inflated accounts of raw material costs by firms.

The nature of the Indian drugs market makes it particularly unsuited to market-based price controls. The pharmaceutical industry is one of several sectors which features significant collaboration in the form of advocacy organisations that lobby the government on behalf of their members. The Indian Pharmaceutical Alliance counts about twenty of the

[44] Rakhi Jagga, *Health minister to doctors: prescribe salt name only*, The Indian Express, 26 October 2013, http://archive.indianexpress.com/news/health-minister-to-doctors-prescribe-salt-name-only/1187523/

biggest manufacturers in the country as its members, while the Organisation of Pharmaceutical Producers of India and the Indian Drug Manufacturers' Association represent hundreds of smaller companies. All three organisations have built relationships with regulators, and are known to influence the business decisions of its members. In addition, as discussed previously, intermediaries in the Indian drugs market have disproportionately high bargaining power. OPPI, IDMA and the IPA all have signed MoUs with the AIOCD[45] and its subsidiary organisations regarding price margins and resale price maintenance. These factors ensure that producers have perverse incentives to manipulate any market-based price control imposed on them. In fact, the high degree of collaboration among manufacturers, when coupled with similar levels of demand-side consolidation, ensures that market players (either manufacturers, wholesalers or retailers) who undercut the price set by the associations are unlikely to reach consumers. This is because organisations such as the AIOCD frequently utilise trade boycotts as a means to enforce their terms on the market.[46] While demand-side consolidation has frequently been used as a defence against Section 4-type abuse of dominance claims by market players[47] (who counter the accusation by arguing that the countervailing market power afforded by such consolidation militates against their own dominant position in the market),[48] the issue at hand does not involve abuse of dominance.[49] On the contrary, the circumvention of price control occurs through a coordinated price increase in the period immediately preceding price regulation, so as to raise the market-based ceiling price.[50] In this context, demand consolidation in the form of intermediary associations has an anti-competitive effect, inasmuch as these associations act as gatekeepers of the consumer market and hold manufacturers to ransom.[51]

One study tracked the price of the off-patent anti-diabetic metformin between 2007 and 2015 to study the impact of the DPCO 2013. In an ostensibly competitive market, with an average of 61 manufacturers selling 69 versions of the drug in any given month, the drug was

[45] Peeveear, supra.
[46] Santuka and PK Krishnan, supra.
[47] *See, eg., General Electric v. Commission*, Case T-210/01, European Court of First Instance (Second Chamber) 2005. Although the issue here was primarily one of merger control, the combination's dominance is discussed.
[48] John Lopatka, *Predatory Buying*, in Roger Blair and Daniel Sokol (eds.), The Oxford Handbook of International Antitrust Economics Vol. II (Oxford 2015)
[49] While demand consolidation has been the subject of much academic attention, the current literature primarily focuses on consolidation through managed medical care, in the form of universal insurance and other such schemes. *See* Dranove David, et. al., *Is managed care leading to consolidation in healthcare markets?*, 37 Health Serv. Res. 573 (2002).
[50] Peter Law, Welfare effects of pricing in anticipation of Laspeyres price-cap regulation: an example, 49 Bull. of Econ. Res. 17 (1997)
[51] Warren Grimes, Buyer power and retail gatekeeper power: protecting competition and the atomistic seller, 72 Antitrust L. J. 563 (2005)

priced at INR 1 per 500mg dose in 2007. Given the nature of the market, prices should have remained constant or increased steadily, as they do in the control period (between 2007 and 2009). Upon the initiation of stakeholder consultation by the government to draft the NLEM 2011, manufacturers began a rapid and coordinated price escalation, armed with the knowledge that the 500mg dosage of the drug would fall in the list. The 1000mg dosage did not figure in the NLEM, and was used as a reference in the study. The 2011-2013 period witnessed a steep rise in the average price of the 500mg dosage, without a similar rise in the price of the 1000mg tablet. Upon the fixation of the ceiling price under the DPCO 2013 (at approximately INR 1.6 per 500mg tablet), prices marginally reduced under the ceiling. The market data is conclusive: manufacturers coordinated selectively in the 500mg tablet market between 2011 and 2013 to raise the ceiling price of the drug.[52]

While it is true that backdated market references for the imposition of price control may partially mitigate this form of cheating, such backdating requires accurate data on price trends, inflation, etc., which are not realistically available to the government. In addition, the choice of a cutoff date to determine prevailing market prices is inherently vague and subjective, meaning that it (like the principles of pharmacoeconomics) would be insufficient to base an administrative decision, especially under writ review.

It is important to note that the structure of the drugs market in India makes it extremely difficult for firms to cheat their way out of horizontal agreements to circumvent price controls through coordinated price increases. This is because any deviation by a manufacturer would likely be met with swift retribution from industry associations in the form of a sales boycott and the accompanying denial of market access. These factors severely disincentivise cheating horizontal agreements, meaning that the game theoretical foundations of cartel-busting simply fail to work in the context of the Indian drugs market.[53]

The fact that price control in the drugs market today is entirely ineffective appears to be the subject of a careful cover-up by industry players. Associations such as the IPA are known to frame victim narratives[54] in which they hold price control squarely responsible for

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[52] Ajay Bhaskarbhatla, et. al., Mitigating regulatory impact: the case of partial price controls on metformin in India, 32 Health Pol. & Plg. 194 (2016).
[53] Christopher Leslie, *Antitrust amnesty, game theory, and cartel stability*, 31 J. of Corporation L. 453 (2006).
[54] *IPA punches holes into drug pricing policy implementation*, Economic Times, 4 April 2017, http://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/ipa-punches-holes-into-drug-pricing-policy-implementation/articleshow/58010089.cms

the pharmaceutical industry's stunted growth in recent years.[55] More insidious is the fact that they do this despite well-documented internal statistics dispelling this claim. In fact, an internal report drafted by the IPA in February 2017 admits that the majority of the market is effectively out of price regulation, and an estimated 2-4% of its members' revenue was hit by price control. Price regulation, to quote a senior executive of an IPA member company, is not one of the industry's primary problems.[56]

D. Price control harms consumer welfare by acting as an antitrust vaccine

I have established that pharmaceutical price control on the Indian market does not enhance consumer welfare by lowering prices, both for patented and off-patent products. The reasons may vary, but in all cases, the ceiling prices imposed by price control fall at or above the prices set by the manufacturer of the drug. However, mere redundancy may not prove to be a strong enough argument against pharmaceutical price control, since there exist a number of laws that are unenforceable, redundant or simply pointless.[57] In contrast to these laws, I argue that pharmaceutical price control has the potential to cause active harm to consumer welfare. Although I have attempted to show previously that all forms of price control in the Indian drugs market will fail, here I confine myself to the current model of price control as mandated by the DPCO 2013. This is for two reasons: having shown that all price control is ineffective, I no longer shoulder a burden to show that alternative, hitherto untested models of price control are harmful – lack of efficacy is sufficient to refrain from legislating new policies, but the additional element of harm is only necessary to overcome the inertia of policies already in place. More importantly, criticisms of price control must necessarily depend on the precise model of regulation employed. Consequently, it would be impossible to catalogue the harms of vague and hypothetical models.

I have established that in an overwhelming majority of cases, the ceiling price is likely to be well above the price set by the market in equilibrium. I argue that the imposition of such ceilings effectively immunises manufacturers from antitrust scrutiny for at least some of their actions on the market.

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[55] *See, eg.,* DG Shah, *A chill pill that India needs*, Economic Times, 13 April 2017, http://blogs.economictimes.indiatimes.com/et-commentary/a-chill-pill-that-india-needs/ (note that the author is Secretary General of the IPA and speaks in his official capacity)

[56] Ruhi Kandhari, *What is hurting Indian pharma more – misinformation or price control?*, The Ken, 20 April 2017, https://the-ken.com/indian-pharma-misinformation-price-control/

[57] Suicide legislation is one such example. *See, eg.*, Gerry Holt, *When suicide was illegal*, BBC News, 3 August 2011, http://www.bbc.com/news/magazine-14374296

This is because a price control model of this sort effectively gives manufacturers free licence to do as they please as long as they stay beneath the ceiling price. While this would ordinarily pose no significant problem, it results in concrete harms in situations where the ceiling price is substantially supra-competitive in and of itself.

A unique chain of circumstances allows manufacturers to take advantage of pharmaceutical price control at the expense of consumer welfare. To begin with, the price control regime (effectively acting as an administrative determination that supracompetitive pricing, to a point, is acceptable) permits sub-ceiling price increases by manufacturers. In any other country or any other market, the first supplier to carry out such a price increase would be severely undercut by competitors, and forced to return to the equilibrium market price. In ordinary circumstances, even a relatively small lone supplier holding out at the equilibrium price would suffice to combat a coordinated price increase by the rest of the manufacturers. However, another factor unique to the Indian market prevents this failsafe from kicking in: intermediary demand consolidation through organisations such as the AIOCD. Since these intermediaries act as retail gatekeepers, any manufacturer that cheats or holds out from a coordinated price increase is likely never to see a consumer at the end of the tunnel. Finally, when the entire act does finally come before the antitrust regulator, it is unlikely to be treated as a serious infraction of antitrust law, since the burden of proof for the regulator increases manifold when it needs to show that a sub-ceiling price increase adversely impacted consumer welfare.

To illustrate, we need only examine the CCI's treatment of sub-ceiling pricing policies in the drugs market. In *Peeveear*,[58] the CCI examined allegations that the OPPI, IDMA and AIOCD colluded to fix trade margins and allocate value among manufacturers, wholesalers and retailers. The DG's report, and subsequently the CCI order, extensively referenced paragraph 19 of the DPCO 1995, which provided as follows:

> "*19. Price of formulations sold to the dealer – (1) A manufacturer, distributor or wholesaler shall sell a formulation to a retailer unless otherwise permitted under the provisions of this order or any order made there under, at a price equal to the retail price, as specified by an order or notified by the government, (excluding excise duty, if any) minus sixteen percent thereof in the case of Scheduled drugs*."

[58] Peeveear, supra.

In interpreting paragraph 19, the DG and the CCI committed a crucial error by holding that the DPCO imposed a *statutory obligation* to pay a sixteen percent margin to retailers in respect of scheduled drugs.[59] On the contrary, the framers of the DPCO only intended to fix a *ceiling* on the prices and margins charged on drug sales. The CCI, in its wisdom, interpreted the DPCO to mean that it had fixed a statutory price from which no deviation was permissible. This interpretation is significant, since the CCI's order held that the provision of a 20% retail margin amounted to an anticompetitive vertical agreement between manufacturers' and retailers' associations, while refraining from interrogating a "statutorily provided" margin that was merely 4% lower. I submit that the existence of a ceiling on retail margins rendered the AIOCD, the OPPI and the IDMA immune from antitrust proceedings, as long as they did not overstep such a ceiling. In situations where the ceiling is substantially and significantly supracompetitive, firms have no incentive to overstep (or even closely approach) the ceiling price. Hypothetically, if the price of generic insulin in the market today is 60% of the ceiling price, then a coordinated price increase to about 80% of the ceiling price would enrich manufacturers and retailers immensely at the expense of consumer welfare, while simultaneously staying below the antitrust radar.

Price-fixing by generic drug manufacturers is a global phenomenon, as evidenced by the fact that no fewer than twenty states in the US have initiated antitrust proceedings in this respect.[60] The fact that leaders in the Indian generic industry such as Aurobindo Pharma and Emcure Pharma have been implicated in the suits (with the latter being named as the "ringleader")[61] must come as no surprise, given the results of the metformin study discussed above.

III. ENGAGING THE IP/COMPETITION INTERFACE

Price control can prove especially disastrous in IP-fuelled industries, as evidenced by the market's reaction to a recent decision by the Indian government to bring genetically

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[59] "Thus, while working out the price of scheduled drugs, the National Pharmaceutical Pricing Authority (NPPA) makes an allowance for 16% margin on price to retailer (as per DPCO, 1995) and 8% margin to wholesaler as per practice. However, DG also noted that for non-scheduled drugs (drugs not under price control), there is no statutory obligation to pay any specified margins to either the retailers or the wholesalers." Id. at paragraph 5.3.3.

[60] Katie Thomas, *20 states accuse generic drug companies of price fixing*, The New York Times, 15 December 2016, https://www.nytimes.com/2016/12/15/business/generic-drug-price-lawsuit-teva-mylan.html

[61] Zeba Siddiqui, *Aurobindo Pharma shares hit nine-month low on US price-fixing lawsuit*, Mint, 16 December 2016, http://www.livemint.com/Money/SGgSIaxPImqi7VHyLU6YfJ/Aurobindo-Pharma-shares-hit-ninemonth-low-on-US-pricefixin.html

engineered cotton seeds under price regulation. The government invoked the Essential Commodities Act[62] to fix the trait value that Monsanto (which owned patents and related know-how covering the technology)[63] could charge to sell bollworm-resistant cotton seeds to Indian companies.[64] The move met mixed response from activists[65] and experts, [66] but its most significant impact was Monsanto's decision not to launch the latest generation of its cotton seed technology in India.[67] In a market where the monopolist's product has little in the way of equivalent competition, this was a catastrophic result for Indian agriculture, and serves as an illustration of the manner in which price control can elicit the worst out of the market.

Regulatory intervention in the form of ineffective price control also has adverse implications for the delicate balance that currently characterises the relationship between IP protection and antitrust intervention. It is undoubted that price control of patented drugs would meet stiff challenges in the form of TRIPS compliance,[68] but that is not the focus of this paper. The essential question that must be asked is whether there are in-built safeguards in IP and competition law that enable policymakers to achieve similar or better results with respect to access to patented drugs than price control.

A. Test cases in the market for patented drugs

As explained previously, Indian patent law contains sufficient safeguards through the threat of compulsory licensing against patentees who fail to "work" their invention, and patentees who fail to meet reasonable market demand.[69] Consequently, supracompetitive

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[62] Cotton Seed Price (Control) Order 2015. *Fix a uniform price of Bt cotton seeds across the country for the benefit of farmers*, Press Information Bureau, Government of India, 9 March 2016, http://pib.nic.in/newsite/PrintRelease.aspx?relid=137599

[63] Sanjeeb Mukherjee, *Seed pricing: cottoning on to controls*, Business Standard, 22 March 2016, http://www.business-standard.com/article/economy-policy/seed-pricing-cottoning-on-to-controls-116032201241_1.html

[64] Sayantan Bera and Shreeja Sen, *Govt cuts Bt cotton royalty fees by 74%*, Mint, 10 March 2016, http://www.livemint.com/Politics/NdDYRxsayfh2655qOqy7mI/Centre-notifies-Bt-cotton-seed-prices-slashes-royalty-fees.html

[65] Vandana Shiva, *Why the government is right in controlling the price of Monsanto's Bt cotton seeds*, Scroll, 22 August 2016, https://scroll.in/article/814476/why-the-government-is-right-in-controlling-the-price-of-monsantos-bt-cotton-seeds

[66] Vivian Fernandes, *Bt cotton price control against R&D*, Financial Express, 12 December 2015, http://www.financialexpress.com/opinion/column-bt-cotton-price-control-against-rd/177690/

[67] *Monsanto pulls new GM cotton seed from India in protest*, The Hindu, 25 August 2016, http://www.thehindu.com/business/Monsanto-pulls-new-GM-cotton-seed-from-India-in-protest/article14588852.ece

[68] Article 31's extensive focus on fair remuneration to the patentee might be one of many stumbling blocks.

[69] Section 84 of the Patents Act 1970 states: "*Compulsory licences.* -

pricing can only occur in situations where the patentee is able to singlehandedly supply the drug to the Indian market. In the overwhelming majority of cases, the originator is an MNC with little or no local manufacturing capacity, meaning that licensing arrangements of the form mentioned previously are the only sure-shot strategy to avoid compulsory licensing. Consequently, the challenge for Indian IP and competition law is to prevent supracompetitive pricing at the level of licensing agreements.

B. Safeguards in competition law

Patentees enjoy a lawful monopoly under Indian law that appears, at first glance, to be exempt from antitrust scrutiny.[70] Upon deeper examination of the CCI's orders dealing with patent protection, however, it is clear that nothing could be further from the truth.

The CCI's analysis of IP suggests that it is open to inferring dominance from the mere fact that a market player holds patents over certain technologies.[71] Going further, the CCI has also recognised that the threshold for abuse of IP-induced dominance in the market is not high. In the Auto Parts case,[72] for example, the CCI has held that unilateral refusals to license patents would violate Section 3 of the Competition Act if they foreclosed market access to downstream players such as independent service providers and small mechanics.

More pertinent for our purposes is the CCI's treatment of vertical agreements between licensors and licensees of patents, since this is the nature of the relationship between large foreign originator MNCs and local Indian drug manufacturers. In such circumstances, the

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At any time after the expiration of three years from the date of the 170 [grant] of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:-
that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or
that the patented invention is not available to the public at a reasonably affordable price, or
that the patented invention is not worked in the territory of India."

[70] Section 3(5) of the Competition Act, for example, states that *"Nothing contained in this section shall restrict—*
the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:
the Copyright Act, 1957 (14 of 1957);
the Patents Act, 1970 (39 of 1970); […]"

[71] *Micromax v. Ericsson*, CCI Case No. 50 of 2013, http://www.cci.gov.in/sites/default/files/502013_0.pdf

[72] *Shamsher Kataria v. Honda Siel, et. al.*, CCI Case No. 3 of 2011, 25 August 2014, http://www.cci.gov.in/sites/default/files/032011_0.pdf?download=1

CCI has leaned perilously close to holding "restrictive" vertical agreements as *per se* anticompetitive:[73]

> "*...a non-dominant enterprise may enter into a vertical agreement which forecloses the market but enhance certain distribution efficiencies, and in such conditions the Commission on balancing the factors provided in section 19(3), may conclude that such agreement does not cause an AAEC in the market. However, where such agreements are entered into by a dominant entity, and where the restrictive clauses in such agreements are being used to create, maintain and reinforce the exclusionary abusive behavior on part of the dominant entity, then the Commission should give more priority to factors laid down under section 19(3)(a) to (c) than the pro-competitive factors stated under section 19(3)(d) to (f) of the Act, given the special responsibility of such firms not to impair genuine competition in the applicable market*."

In essence, the CCI's stance appears to be that while restrictive vertical agreements entered into by non-dominant players are subject to a "rule of reason" analysis, those entered into by dominant players are subject to a modified form of scrutiny in which the anti-competitive factors are weighed heavier than pro-competitive ones.

Dominance is easily established from the mere existence of a patent monopoly, especially in the market for cutting-edge pharmaceutical preparations. In the example of sofosbuvir, the product drug has no substitute insofar as its ability to treat Hepatitis C Virus without its myriad side effects is unique. Once a finding of dominance is returned, the modified inquiry in Auto Parts will necessarily mean that restrictive conditions (such as exorbitant royalties, resale price maintenance, etc.) are particularly vulnerable to antitrust intervention.

It is important to note that the liability here would be under Section 3 for the licensing agreement that causes an AAEC, rather than under Section 4 for abuse of dominance. The CCI's reasoning in the Auto Parts test seems to hold dominance as a necessary but not sufficient factor – liability is attracted by the licensor for entering into a restrictive licence which poses appreciable anticompetitive effects and distorts the market. However, the

[73] *Id.* at paragraph 20.6.35.

dominant or non-dominant position of the licensor will play a role in deciding the relative weight of the evidence that AAEC has occurred.

The only question left to answer from a competition perspective is whether the CCI has formulated an appropriate test to detect supracompetitive pricing. The jurisprudence on this point, primarily illuminated in *HT Media v. Super Cassettes*,[74] where it has noted that "*determining whether a price is excessive is an uncertain and difficult task*:"[75]

> "*The Commission notes that in the absence of the cost data it will be difficult, neigh impossible, to term the price charged by the opposite party at 661 INR per needle hour as unfair being excessive solely on the basis that it is higher than the price charged by the competitors of the opposite party. In view of all factors discussed in the preceding paragraphs above, the Commission holds that a case of excessive pricing has not been made out against the opposite party*."

However, supracompetitive royalty rates have, in fact, been addressed by the CCI and the Delhi High Court in SEP/FRAND cases such as *Micromax v. Ericsson*,[76] resulting in market players abiding by court or regulator-ordered royalty structures.[77] In addition, the subjective determination of whether a licensor's asking price is supracompetitive can be best answered by competitors on the market. As will be shown below, Indian patent law provides competitors an opportunity to do so.

C. Safeguards in IP law

The Patents Act contains unique compulsory licensing provisions in Section 84, which provide that any interested party may apply to the patent office (after meeting some threshold criteria such as making an attempt to obtain a voluntary licence on mutually agreeable terms) for a licence to practice the patent. In *Natco v. Bayer*,[78] one of the grounds pleaded by the applicant was Section 84(1)(b), which tackles the question of affordability (rather than competitive pricing). Applicants for licences under Section 84(1)(b) are typically required to furnish information to the patent office as to their intended pricing policies in the

[74] CCI Case No. 40 of 2011, http://www.cci.gov.in/sites/default/files/C-2011-40_0.pdf
[75] *Id.* at paragraph 199.
[76] Supra.
[77] *Ericsson v. Intex*, [2015] SCCOnline Del 8229
[78] Compulsory Licence Application 1 of 2011

event that they receive the licence. Section 84(1)(b) filing information may prove valuable information for an antitrust regulator, since it may point to a competitive price that market player is willing to offer the patented product to the market at. In addition, the price offered in the Section 84 application is typically awarded without modification upon the success of the application, meaning that successful applicants may not subsequently raise the prices of the patented product.

However, it is equally important to note that the exact calculus utilised for price determination under Section 84 may not be suited to detect supracompetitive pricing. In *Lee Pharma v. AstraZeneca*,[79] the patent office denied a compulsory licence to the applicant on the ground that the patentee's anti-diabetic drug (saxagliptin) was priced in the same range as other patented drugs of the same class. The patent office refused to consider generic drug (either licensed or infringing products) prices in the same class since the patentee may be justified in charging a higher price to recoup its research costs. A vast divergence between the patentee's price and an applicant's offer, as in the case of Natco, would nevertheless be a strong indicator of supracompetitive pricing by the patentee.

Another provision in the patent law that could be used to mitigate anticompetitive licensing structures is Section 140, which prohibits and renders void restrictive covenants in patent licences. These include some forms of tying and exclusive grant-back clauses that may distort downstream innovation in the market. However, Section 140 has never been used in the competition context, and it is unclear whether it is enforceable by the competition regulator.

IV. CONCLUSION

Over the course of this paper, I have attempted to show that price control is both ineffective and pernicious in the pharmaceutical context, with particular reference to the development and launch of new drugs into the market. Price regulation amounts to nothing more than a ham-handed attempt to preserve short-term interests at the expense of long-term market stability. As such, it can be justified in a narrow set of circumstances, such as epidemics and military engagements. Its use by the Indian government as a peacetime policy instrument is alarming, and must immediately cease in favour of a combination of IP and

[79] Compulsory Licence Application 1 of 2015. *See* Balaji Subramanian, *Examining the rejection of Lee's Saxagliptin CL application*, SpicyIP, 22 January 2016, https://spicyip.com/2016/01/examining-the-rejection-of-lees-saxagliptin-cl-application.html

competition law. Indian antitrust jurisprudence has shown itself to be more than enthusiastic to break down IP-enabled abuses, and IP law offers an opportunity to tackle supracompetitive pricing and restrictive licensing.

DEFINING 'CONTROL' UNDER THE INDIAN COMPETITION ACT

ISHA JAIN & VANSHAJ JAIN*

ABSTRACT

The Competition Act, 2002 proposes to regulate acquisitions of "control" over corporate entities, as distinct from acquisitions of securities. Yet, neither the Act nor the Rules thereunder provide a clear explanation of which contractual rights would result in a conferral of control.

The task of defining control has since been carried out by the Competition Commission of India on a case-to-case basis. Through this article, an attempt is made to draw out a consistent definition of the concept of "control" from the decisions of the Commission. In the second part of the article the Commission's interpretation of the "solely for investment" exemption is discussed. It is concluded that the Commission's broad interpretation of "control" and narrow interpretation of "solely for investment" has resulted in an unreasonable widening of the regulatory net under the Act. Throughout, the article compares the jurisprudence under the Competition Act with that under the regulatory regimes of the United States and the European Union.

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I. INTRODUCTION

The Competition Act, 2002 ["Competition Act"] was brought into force in order to regulate trade and corporate restructuring practices that threaten competition. In order to do so, the Act delineates the kinds of transactions that are likely to have an adverse effect on competition, and requires that parties submit such transactions to scrutiny by the Competition Commission of India ["CCI"]. "Combinations" are a category of transactions that are required to be notified to the Commission for this purpose. Combinations can arise through various kinds of acquisitions – of shares, voting rights, assets, or *control*.

While acquisitions of shares and voting rights can be objectively identified, acquisitions of control are far more difficult to discern. The first section of this paper examines the legislative framework in India surrounding the definition of control, the decisions of the Commission interpreting the threshold for control, and the regulatory regime governing acquisitions of control in the US and EU. The second section of this paper examines the categories of combinations that are considered unlikely to have an appreciable adverse effect on competition and are exempt from the requirement to notify the CCI. In particular, the paper examines the scope of the "solely for investment" exemption, and compares it to the analogous exemption under US antitrust law.

II. DEFINING 'CONTROL'

A. Legislative Framework

Section 6 of the Competition Act requires any person who proposes to enter into a combination to give notice of the same to the CCI. Section 5 of the Act defines 'combinations' to include certain acquisitions, mergers, and amalgamations which reach a specified asset or turnover threshold. Acquisitions may be of shares, voting rights, assets, or control in an enterprise.

Schedule I of the Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 ["Combination Regulations"] lays down certain categories of transactions that are exempt from the requirement of notification under Section 6 of the Act. These include acquisitions leading to a less than 25% stake in shares when done solely as an investment or in the ordinary course of business, acquisitions by persons already holding 25% of shares when the resultant

shareholding does not result in more than 50% and does not lead to the accrual of sole or joint control and acquisitions by persons already holding 50% of shares so long as it does not result in a change from joint to sole control.

The concept of control is therefore relevant for determining both whether a transaction results in a combination under Section 5 of the Act as well as whether a transaction falls within the exemptions specified under Schedule I of the Regulations. However, there is no clear definition of the concept of "control" under either the Competition Act or the Combination Regulations. An explanation to Section 5 of the Competition Act defines control in simplistic terms as "controlling the affairs or management". This fails to identify the types of contracts that would have the effect of conferring control on the acquiring entity. Thus, the task has fallen upon the Commission to formulate tests for determining the existence of "control" based on the cases brought before it.

B. Judicial Interpretation

The 2012 order of the CCI relating to the acquisition of shares by IMT in RB Mediasoft Pvt. Ltd. and other target companies[1] was one of the first decisions to shed light on the meaning of control under the Competition Act. In this case, IMT had subscribed to optionally convertible debentures in the target company. Upon conversion, IMT would hold more than 99.9% of the equity share capital in the company. Since convertible securities fall within the definition of shares, the requirement of a merger notification was triggered due to the acquisition of shares, independent of any acquisition of control.

However, the Commission went on to hold that the acquisition of the right to convert the securities would confer on IMT the ability to exercise decisive influence over the management and affairs of the target company and would amount to control for the purposes of the Competition Act. Thus, this decision appeared to raise the threshold of control from "controlling the affairs or management" in the explanation to Section 5 of the Act to "exercising *decisive influence* over the management and affairs" of the target company.

This decision of the CCI in *IMT* is very similar to the decision of the UK Monopolies and Mergers Commission ["MMC"] (the precursor to the UK Competition Commission) in *Stora/Swedish Match/Gillette*,[2] in which the issue was whether Gillette's acquisition of 22 per

[1] *Independent Media Trust*, Combination Registration No. C-2012/03/47 (28 May, 2012).
[2] *Stora/Swedish Match/Gilette*, UK Monopolies and Merger Commission, Cm. 1473 (March 1991).

cent of non-voting convertible loan stock in Wilkinson would amount to control over the affairs of Wilkinson. Though Gillette had no voting rights or board representation, the MMC held that "*a prudent Wilkinson board would be bound constantly to take into account the fact that Gillette was a major shareholder [...], was its largest creditor and had important rights in relation to significant decisions affecting the future of the company*". Thus, the fact that the non-voting loan stock could convert to ordinary shares under a number of circumstances was found to have the effect of conferring control on Gillette over Wilkinson.

In the *MSM/SPE case*,[3] the CCI had occasion to consider the role of veto or affirmative rights when held by minority shareholders. In this case, Grandway and Atlas, minority shareholders in the target company, held affirmative rights for matters such as opening new businesses, opening locations in new cities, hiring, terminating or amending the material terms of their employment of key managerial personnel, and amending the material terms of employee benefit plans. This meant that their affirmative consent was an essential prerequisite for any decision on these matters.

The Commission held that by virtue of having affirmative rights in respect of such *strategic commercial decisions*, Grandway and Atlas were in joint control of the target company. Thus, this case affirmed that certain types of affirmative rights – those relating to strategic commercial decisions – would be indicative of control.

The *Century Tokyo case*,[4] similarly, dealt with a contract granting affirmative rights to Century Tokyo over the business decisions of the Leasing Division of Tata Capital Financial Services Ltd. ["TCFSL"]. Century Tokyo had entered into a Business Partnership Agreement with TCFSL, under which certain decisions relating to the Leasing Division of TCFSL could not be taken without the approval of a Century Tokyo member. These decisions included approval of business plans, approval of budget and annual operating plans, commencing a new line of activity or discontinuing an existing line of business, appointment of Key Managerial Personnel and determination of their compensation. The Commission found that this control over *strategic affairs* would amount to joint control over the assets and operations of the leasing business of TCFSL. This finding is closely analogous to that arrived at in the *MSM/SPE case*.

[3] *MSM/SPE*, Combination Registration No. C-2012/06/63 (9 August, 2012).
[4] Century Tokyo Leasing Corporation/Tata Capital Financial Services Ltd., Combination Registration No. C-2012/09/78 (4 October, 2012).

From the aforementioned cases, the Commission appeared to have settled on a standard that emphasised the importance of veto or affirmative rights in relation to strategic commercial decisions of the target company. However, this trend was disrupted by the decision of the Commission in the *Jet/Etihad case*,[5] which served to substantially widen the scope of "control" under the Act. In this case, Etihad had acquired a twenty-four percent equity stake and the right to nominate two (out of twelve) directors to the Board of Directors of Jet.

The Commercial Cooperation Agreement between the two entities also provided certain additional rights to Etihad, such as the right to recommend candidates for senior management of Jet, as well as the right to govern certain joint initiatives with Jet. However, there were no specific provisions for veto or affirmative rights relating to key commercial decisions. Yet, the Commission found that these agreements that were aimed at enhancing business through joint initiatives had the effect of establishing Etihad's joint control over the assets and operations of Jet.

The *Jet/Etihad* decision is significant not only for departing from the Commission's prior focus on linking control to affirmative rights but also for provoking the Securities and Exchanges Board of India ["SEBI"] to differentiate the interpretation of control under the Competition Act from the interpretation under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ["Takeover Code"]. Subsequent to the decision of the CCI, the SEBI was called upon to determine whether Etihad had in fact acquired "control" over Jet, which would trigger the requirement to make an open offer under the Takeover Code.

Drawing a distinction between the object and purpose of the Competition Act and the Takeover Code, SEBI held that the requirement of "control over affairs and management" under the Competition Act was much wider than the requirement of "control over management or policy *decisions*" under the Takeover Code.[6] Thus, the fact that Etihad had no affirmative or veto rights, no quorum rights, and no casting vote rights in relation to the policy decisions of Jet indicated that it did not meet the higher threshold under the Takeover Code for establishing control.

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[5] *Jet/Etihad*, Combination Registration No. C-2013/05/122 (12 November, 2013).
[6] *Jet/Etihad*, Securities and Exchange Board of India, Case No. WTM/RKA/CFD-DCR/17/2014.

The exact points of departure of the Takeover Code from the Competition Act on the definition of control remain unclear. Yet, there are certain contractual arrangements that receive distinct treatment under the competition regime and the securities regime. For instance, while affirmative voting rights are consistently considered a strong indicator of control under the Competition Act,[7] the interpretation of the Takeover Code is not as unequivocal.

The *Subhkam Ventures* case is infamous for having missed the opportunity to clarify the interpretation of the Takeover Code in this regard. In this case, the SEBI held affirmative rights to be indicative of control, the SAT reversed this finding, and the Supreme Court ultimately chose to neither confirm nor reverse the SAT's decision, deliberately leaving the question of law open.

More recently, the Whole Time Member ["WTM"] of the SEBI was once again faced with the question of whether affirmative voting rights would amount to control.[8] Ultimately, the WTM found this question unnecessary for determining the matter, since the agreement conferring affirmative rights had lapsed. Yet, the observation of the WTM in obiter that "[i]t is apparent that the scope of the covenants in general is to enable the Noticees to exercise certain checks and controls on the existing management for the purpose of protecting their interest as investors rather than formulating policies to run the Target Company" suggests that the SEBI is unlikely to arrive at a finding of control on the mere basis of affirmative rights. Another contractual arrangement that is viewed differently by these two regulatory regimes is the transfer of convertible securities. While the acquisition of convertible debentures in itself signifies control under the Competition Act,[9] it is not clear whether the same would hold true under the Takeover Code.[10]

Thus, the CCI's decision in *Jet/Etihad* stands out for substantially diluting the requirements of control and for proposing a definition of control that is markedly different from that followed by other regulatory bodies such as the SEBI or the erstwhile Foreign Investment Promotion Board ["FIPB"]. Having multiple definitions of "control" under

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[7] *MSM/SPE*, Combination Registration No. C-2012/06/63 (9 August, 2012); *Century Tokyo Leasing Corporation/Tata Capital Financial Services Ltd.*, Combination Registration No. C-2012/09/78 (4 October, 2012).

[8] In the matter of Kamat Hotels (India) Limited, Order number WTM/GM/EFD/DRAIII/20/MAR/2017 dated March 31, 2017.

[9] *Independent Media Trust*, Combination Registration No. C-2012/03/47 (28 May, 2012).

[10] *See* Mr. Victor Fernandes v. SEBI, Appeal No. 55 of 2015, SAT (13 April, 2016).

different legislations can lead to a great deal of uncertainty for parties involved in complex transactions.

At the same time, there is a need to account for the differing policy objectives of competition law and securities law.[11] The rationale behind the mandatory open offer requirement under the Takeover Code is to provide investors with an exit option since there may be a change in the management of the affairs of the company due to the change in control. Thus, it is relevant whether the "control" can be used to put in place policies unattractive to minority shareholders. However, the Competition Act is concerned with the broader economic impacts of acquisitions of control in the relevant market. Thus, competition law is concerned with whether the "control" can be used to influence price and supply in order to create an appreciable adverse effect on competition. Put simply, the SEBI focuses on the effects *within* the merged entity, while the CCI focuses on effects *external* to the merged entity, within the relevant market.

In the *Jet/Etihad case*, it was reasonable for the SEBI and the FIPB to find that there was no control by focusing on whether Etihad was acquiring significant control over the Board of Directors or other decision-making structures within Jet. On the other hand, the CCI was more concerned with intentions of Jet and Etihad to form *strategic alliances* and function as a single commercial entity for numerous projects, while maintaining their separate corporate identities. Thus, while Etihad did not exercise "control" over Jet in the strict sense, the joint control exercised by Jet and Etihad over a number of key initiatives made it a fit case for inquiry by the CCI.

Though the *Jet/Etihad* decision raised concerns that the net for merger notifications had been unreasonably widened, subsequent decisions of the CCI appear to have reverted to the standard of affirmative rights over strategic commercial decisions. In the *Alpha/Tata case*,[12] the acquirers subscribed to 17.36 percent of the equity share capital of SGSPL. The Investment Agreement further reserved certain matters in respect of which no action could be taken without prior written consent of the Acquirers. These matters included appointment and removal of key managerial personnel, modifying the annual budget or business plan, and amendments to the memorandum or articles of association.

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[11] SEBI, Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations", para. 14, available at https://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf.
[12] *Alpha/Tata*, Combination Registration No. C-2014/07/192 (9 September, 2014).

The CCI held that these amounted to strategic commercial decisions and therefore the requirement of consent of the acquirers for such decisions was not merely a minority protection measure but would amount to full-fledged control. Similarly, in the *Aviva case,*[13] the CCI held that the existence of affirmative rights on resolutions regarding carrying on of business and appointment or removal of directors would amount to control as per the decisional practice of the Commission.

Thus, the decisions of the CCI on the issue of control under the Competition Act show a general trend of emphasising on the requirement of affirmative or veto rights over strategic commercial decisions, despite the jurisprudential deviation of the *Jet/Etihad* case.

C. Comparative Law Analysis

The European Council Regulation on the control of concentrations between undertakings ["The EC Merger Regulation"] lays down a requirement for notification of "concentrations" above a certain threshold value to the Commission.[14] Concentrations, similar to combinations under the Competition Act, arise *only* when one entity acquires direct or indirect "control" in another.[15] This control may be acquired through purchase of securities or assets, or through other contractual rights. Unlike under Indian law, purchase of securities and acquisition of control are not considered to be separate types of transactions. Rather, purchase of securities may *result* in the acquisition of control. Thus, the simple acquisition of a shareholding in another company is not subject to EU merger control, unless it confers upon the acquirer either sole or joint control.

The Regulation goes on to define control as (1) Ownership or right to use all or part of the assets in the company; or (2) Rights that confer the ability to exercise *decisive influence* on the composition, voting or decisions of the organs of an undertaking.[16] This language is similar to that used by the CCI in the *IMT case*.[17] The scope of control under the Regulation is further explained in the European Commission Consolidated Jurisdictional Notice under

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[13] *Aviva International Holdings Ltd.*, Combination Registration No. C-2015/10/326 (9 November, 2015).
[14] Art. 4, Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings (20 January, 2004).
[15] Art. 3(1)(b), Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings (20 January, 2004).
[16] Art. 3(2)(b), Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings (20 January, 2004).
[17] *Independent Media Trust*, Combination Registration No. C-2012/03/47 (28 May, 2012).

Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ["EC Jurisdictional Notice"].

The Jurisdictional Notice also acknowledges that control can be acquired either through the acquisition of shares or assets or on a contractual basis. In order for control to be acquired on a contractual basis, the rights conferred by the contract should create a situation of control over management and assets similar to that in the case of share acquisition.[18] The Jurisdictional Notice also identifies the possibility of *de facto* control being established through situations of economic dependence, such as through long-term supply or credit agreements coupled with structural links.[19]

In EC law, therefore, the emphasis is on identifying situations in which *decisive influence* can be wielded over the target entity, rather than on specifying any precise shareholding thresholds. For instance, in the *News Corp/Premiere* case,[20] the acquisition of a 24.2% shareholding by News Corp was considered to confer on it a "de facto majority of the voting rights" and therefore de facto control, in light of the low attendance rates at annual general meetings. On the other hand, in *Ryanair/Aer Lingus*, the Commission found that a 25.17% stake in Aer Lingus did not grant Ryanair *de jure* or *de facto* control since Ryanair did not acquire any rights over and above those of an ordinary minority shareholder.[21]

In the US, the Hart-Scott-Rodino Act, 1976 ["HSR Act"] requires parties to mergers and acquisitions above a certain value threshold to file premerger notification reports with the Federal Trade Commission. The HSR Act stands apart from the Indian Competition Act as well as the EC Merger Regulation in that it only requires the notification of mergers when they involve the acquisition of "voting securities or assets" of a specified monetary value,[22] and not any other types of contractual rights or "control". Thus, unless there is an acquisition of voting securities beyond the threshold amount, the requirement to file a premerger notification is not triggered. This is a far narrower requirement than under Indian law, where the requirement to file a merger notification can be triggered by the mere acquisition of

[18] Para 18, Commission Consolidated Jurisdictional Notice under Council Regulations (EC) No. 139/2004 [2008/C-95/01] (16 April, 2009).
[19] Para 19, Commission Consolidated Jurisdictional Notice under Council Regulations (EC) No. 139/2004 [2008/C-95/01] (16 April, 2009).
[20] Case No Comp/M.5121 – News Corp/Premiere, European Commission (25 June, 2008).
[21] Case No Comp/M.4439 – Ryanair/Aer Lingus, European Commission (11 October, 2007).
[22] s.18a(a), Hart-Scott-Rodino Antitrust Improvements Act (1976).

convertible options or contractual rights to participate in the management and affairs of the target entity.

III. THE 'SOLELY FOR INVESTMENT' EXEMPTION

While Section 5 of the Competition Act lays down the positive test for determining whether a 'combination' for the purposes of the Act exists, Schedule I of the Combination Regulations lists certain categories of combinations that are exempt from the requirement to file a notification with the CCI since they are ordinarily not likely to cause an appreciable adverse effect on competition in India. The very first item in the Schedule refers to an acquisition of shares or voting rights which does not result in a holding of more than 25%, when done *solely for investment*. The second item in the schedule refers to an acquisition of shares by persons already holding 25% of shares when the resultant shareholding is no more than 50% and does not lead to the accrual of sole or joint control. The third item refers to acquisitions by persons already holding 50% of shares so long as it does not result in a change from joint to sole control.

In January 2016, the Competition Commission amended the provisions of Schedule I in order to further exempt transactions which are likely to have little or no effect on competition. The first item has been amended through the addition of a proviso specifying that an acquisition of less than ten percent of the total shares or voting rights shall be treated solely as an investment so long as it does not result in the acquirer gaining rights beyond those of an ordinary shareholder. Thus, the first item in the Schedule now divides share acquisitions into three different categories:

- Acquisitions up to 10%, which are to be treated as solely an investment and are therefore exempt, so long as the acquisition does not confer rights beyond those held by ordinary shareholders;
- Acquisitions between 10% and 25%, which may be exempted *if* they are shown to be solely an investment or in the ordinary course of business;
- Acquisitions by a person previously holding less than 25% of the shares that result in a holding of more than 25% of the shares, which are not entitled to an exemption.

The acquisitions covered by the exemption in item 1 do not apply if they result in an acquisition of control over the target company. Thus, for the exemption to apply, it must be

shown that *first*, the acquisition resulted in a holding of less than 25%; *second*, the acquisition was solely for investment or in the ordinary course of business; and *third*, there was no acquisition of control.

The "solely for investment" exemption also exists under the United States HSR Act, where share acquisitions of up to 10% are exempt from merger notification requirements so long as they are *investment-only* acquisitions.[23] The HSR Rules state that an acquisition is investment-only if the acquirer has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.[24] As per the official interpretation of the exemption given in the Federal Register, if an investment is made by a *competitor*, that is sufficient to disqualify it from being investment-only. Accordingly, this exemption is widely recognised as having an extremely narrow scope. This is best illustrated by the *Third Point LLC case*.[25]

In this case, Third Point LLC made multiple acquisitions of Yahoo voting securities. Third Point did not make the requisite HSR filings, claiming that the acquisitions were exempt as investment-only acquisitions resulting in a less than ten percent holding. However, Third Point had taken certain actions that were inconsistent with an investment-only acquisition, such as contacting individuals to gauge their willingness to be CEO of Yahoo, and assembling an alternate slate for the Yahoo Board. For these reasons, the Commission found that their investment amounted to more than a passive investment, and Third Point was required to file notice with the Commission. Importantly, no actual *conduct* on the part of the acquirer is necessary to make an investment non-passive. Mere intention on the part of the acquirer to participate in the affairs of the target company is sufficient to establish a non-passive investment and prevent the applicability of the exemption.

The CCI interpreted the "solely for investment" exemption in the *SCM/DFPCL case* in August 2016.[26] In this case, the acquirers had obtained a 24.46% equity stake in MCFL. The acquirers did not file a combination notification, claiming to be exempted under the "solely for investment" exemption. The acquirers had not acquired any substantial contractual rights in respect of the management or affairs of the target company, and it could not be said

[23] s.18a(c)(9), Hart-Scott-Rodino Antitrust Improvements Act (1976).
[24] Rule 801.1(i)(1), Rules, Regulations, Statements and Interpretations under the Hart-Scott-Rodino Antitrust Improvements Act (1976).
[25] *United States of America* v. *Third Point LLC*, Case No. 1:15-cv-01366 [District of Columbia] (18 December, 2015).
[26] *SCM/DFPCL*, Combination Registration No. C-2014/05/175 (30 July, 2014).

that they had acquired "control" in any form. However, the COMPAT, upholding the decision of the CCI, held that certain actions of the acquirers, including a press release referring to the investment as a "strategic fit with company's business", resulted in the investment taking the character of a *strategic investment* as opposed to a passive investment.[27]

The COMPAT also observed that the distinction in Schedule I between investments up to 10% and investments between 10% and 25% meant that acquisitions above 10% have to be scrutinised more rigorously in order to qualify as passive investments. Accordingly, the COMPAT upheld the finding of the CCI that the acquirers ought to have filed a combination notification. In April 2018, the Supreme Court affirmed the decision of the COMPAT.[28]

What is noteworthy in this case is that the parties were directed to file a combination notification based on the finding that the acquisition did not fall within the solely for investment exemption, in the absence of any separate finding on whether the acquisition actually resulted in *control*. The implication of this is that any case of share acquisition resulting in a holding of more than 10% will trigger a requirement to file a combination notification *unless* it is a passive investment. Given that the Supreme Court in this case has followed the extremely narrow interpretation of passive investment that was adopted under the HSR Act, this interpretation has the effect of catching a large number of unnecessary transactions within the net of combination regulation.

This case effectively renders the requirement to prove "control" redundant, since it does not even consider whether control has been established between the parties. While it is unclear whether the Supreme Court intended for its decision to have such sweeping implications, there is a need for the Commission to clarify the scope of the "solely for investment" exemption. Else, this ruling could have a chilling effect on shareholder advocacy, since investors will be wary of engaging in any level of participation in the affairs of the target company for fear of having to file a combination notification.

In conclusion, the introduction of the "solely for investment" exemption materially alters the extent of notifiable transactions under Section 6 of the Competition Act. It is worrying, however, that such a substantive amendment to the Commission's regulatory reach

[27] *SCM & DFPCL* v. *CCI*, Appeal No. 59/2015 [Compat] (30 August, 2016).
[28] SCM Solifert Ltd. & ANR. v. CCI, [Civil Appeal No(S). 10678 of 2016].

has been effected by the Commission itself through the Combination Regulations, instead of by Parliament through an amendment to the parent statute. It is worth considering, therefore, whether these Regulations suffer from the vice of *ultra vires* for having substantively amended the scope and meaning of "control" under the Competition Act.

IV. CONCLUSION

The combined effect of decisions such as *Jet/Etihad* and *SCM/DFPCL* has been to dilute the requirement for establishing control while simultaneously narrowing the scope of the "solely for investment" exemption. This has resulted in an uncertain and wide applicability of the requirement to file combination notifications under the Competition Act. While the 2016 amendments to the Combination Regulations heralded a shift toward investor-friendly regulations aimed at reducing unnecessary costs and filings, the decisions of the Commission and the COMPAT could be pulling the regulatory regime in the opposite direction.

BRIDGING MEDIATION AND PSYCHOLOGY: MEDIATOR'S MINDFULNESS AND RAISING CONSCIOUSNESS OF UNCONSCIOUS BIASES

MAYANK SAMUEL*

ABSTRACT

The role of psychology in mediation has remained relatively unexplored, especially in the Indian context. Mediator training has failed to take into account psychology-based techniques for dealing with parties' negative emotions and assisting in increasing their emotional intelligence during mediation. By reexamining the facts of the dispute with mediator's assistance, parties are more likely to move towards objective reality. To avoid the direct-indirect communication dilemma, mediators have to appreciate the communication styles of both parties, and alter their own style whenever needed to suit parties' needs. A mediator should nudge the parties from competition to cooperation by helping them prevail over their biases in order to take rational decisions. The paper suggests developing a closer relationship between mediation and psychology so that veteran mediators can pass on their experience in understanding people to the younger mediators. This will enable the next generation of mediators to alter parties' choice structure by eliminating their irrational biases which lead to sub-optimal decisions and reduce negative emotional behaviors.

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I. RESOLVING CONFLICTS: THE PSYCHOLOGY OF MEDIATION

A. Understanding 'conflict'

Conflict, in terms of human psychology, refers to the opposing stands or irreconcilable differences between two or more parties, leading to a confrontation. Coleman describes a conflict as an "*anticipated frustration entailed in the choice of either alternative*."[1] However, a universal definition of the term is not feasible since every individual has a different perception of conflict. Conflicts, irrespective of their nature, cause disturbance in the minds of interested parties which is resolved only when an outcome has been agreed upon. Simply put, a conflict is a clash of contradicting desires, needs, interests or ideologies, with the stronger party dominating the outcome. In such situations, parties sense a threat to their power, status, emotions, or even body.

Though warring parties have contradicting versions of the same dispute, the fundamental difference is the reversal of good and bad characters in their stories. Both parties think that they are right while alleging that the other side has been the unreasonable aggressor. Likelihood of disputes will decrease if people stop judging behavior of other individuals from their point of view- instead, they should put themselves in the other party's shoes to gain a holistic perspective. After all, what is obvious to one person might not be so obvious to the other.

B. Mediation: Third-party involvement (Not intervention)

Mediation—giving primacy to parties' interests—focuses on a constructive conflict management to assist disputants in thinking 'out of box,' wherever necessary. Negotiations in protracted disputes often fail since parties approach the resolution of underlying issues with a limited perspective.[2] A mediator understands the needs and interests of both parties and assists them in arriving on a mutually satisfactory compromise.

Mediators, through skills such as active listening, try to connect with parties in order to understand their explanation of the conflict. One of the biggest challenges for a mediator is to encourage parties to move away from the deeply-rooted first person perspective and look at the dispute from the other party's and an independent, third-party perspective. Quite often,

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[1] SK Mangal, Abnormal Psychology 42 (1987).

[2] Michael Roberts, *Why Mediation Works When Negotiations Fail*, Mediate.com (Jul. 2002), https://www.mediate.com/articles/roberts4.cfm

we hear expressions like 'stepping into the shoes of other party' in mediation. However, that is easier said than done since human beings comprehend reality subjectively even though they consider it as the objective reality.

Currently an underrated theme in mediation, the role of psychology in understanding cognitive biases and irrational errors which shape the subjective realities of individuals can be promoted by mediators with grasp over functioning of human mind.[3] Since psychology covers aspects of conscious and unconscious decisions taken by an individual, bridging it with mediation can open a whole new array of possibilities for amicable resolution of complex disputes.

C. Cognitive biases: Irrationality in Homo sapiens

Psychology and behavioral economics validate the prevailing irrationality in the 'rational' Homo sapiens- with cognitive biases and irrational errors distorting our thought process, we often end up taking catastrophically bad decisions. Daniel Kahneman, Nobel Prize winner in behavioral economics for his breakthrough work on role of cognitive biases in decision-making, described it as the human tendency to reach conclusions based on limited information.[4] Cognitive biases are psychological blunders in evaluation and reasoning caused by overly simplified information processing strategies, and is extremely difficult to avoid.[5] One of the most common examples of cognitive bias is the Bandwagon effect, commonly known as herd mentality.

Associated with executive functioning, pre-frontal cortex is the part of the brain which is responsible for controlling our behavior and thought process as well as preventing us from taking impulsive decisions.[6] However, with all emotional information going directly to the primitive paleo-mammalian brain consisting of the limbic system,[7] the role of pre-frontal cortex in decision-making is limited to the second-hand, biased information it receives from

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[3] Alex Azarov, *What color is this dress? – a mediator's perspective*, Kluwer Mediation Blog (Mar. 9, 2015), http://kluwermediationblog.com/2015/03/09/what-colour-is-this-dress-a-mediators-perspective/

[4] Katherine L. Milkman, Dolly Chugh & Max H. Bazerman, *How Can Decision Making Be Improved?* 1-4 (Harv. Bus. Sch., Working Paper No. 102, 2008), http://www.hbs.edu/faculty/Publication%20Files/08-102.pdf

[5] *What Are Cognitive Biases?* , Cent. Int. Agcy. (July 7, 2008 10:32 AM), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/psychology-of-intelligence-analysis/art12.html

[6] Dr. Jim Taylor, *How Do We Humans Ever Make Good Decisions?*, Dr. Jim Taylor (Apr. 24, 2013), http://www.drjimtaylor.com/4.0/how-do-we-humans-ever-make-good-decisions/

[7] Surrounding the core of the human brain (proto-reptilian brain), the paleo-mammalian brain is responsible for enhanced emotion and motivation and is referred to as the seat of emotion.

the seat of emotion.[8] According to Paul MacLean, who proposed the Triune Brain concept in 1968, the paleo-mammalian brain and not the rational neo-mammalian brain is responsible for perceiving the reality.[9] This observation has far-reaching implications overall, but we shall, for the purposes of this essay, limit ourselves to its role in mediation.

Influenced by psychological and social factors, we often take decisions which are *prima facie* irrational. The emotional state of an individual also determines his/her decisions. For instance, decisions taken when one feels stressed will be considerably different from when such person is happy, which will further be different from when he/she is in a state of loathing.

Consistent and predictable in nature, cognitive distortions can be attributed to beliefs and preferences of people which they hold on to despite contrary data.[10] For instance, both parties during mediation claim vehemently that they are right and the other side is wrong. Their claims might even be true, but only partially- their perceptions of truth are nothing but emotions from limbic system cloaked as neocortical rationalizations.[11]

II. PSYCHOLOGICAL APPROACH TO MEDIATION: MAKING THE PROCESS MORE 'PARTY-FRIENDLY'

Mediation can be described as a 'rendezvous discipline', requiring knowledge from various disciplines.[12] Since mediation is not restricted to the four walls of law, a mediator might be called to answer emotional, psychological, economic and even, philosophical questions. However, we shall limit ourselves to studying the role of psychology in mediation.

A closer relationship exists between mediation and psychology than one might think. It is impossible for the parties to arrive on an optimal decision without employing the mental faculties. Veteran mediators attempt to understand parties' psychology from the moment they

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[8] Id.

[9] Jay E. Gould, *Paul MacLean's Triune Brain Concept*, University of West Florida (Sep. 10, 2003), http://uwf.edu/jgould/triunebrain.pdf

[10] Amy Wenzel, Modification of Core Beliefs in Cognitive Therapy, Standard and Innovative Strategies in *Cognitive Behavior Therapy*, InTech (2012), http://www.intechopen.com/books/standard-and-innovative-strategies-in-cognitive-behaviortherapy/modification-of-core-beliefs-in-cognitive-therapy

[11] Burkey Belser, *Part 2: The Reptilian Brain - Surprising Results from Brain Science*, Greenfield Belser (Aug. 25, 2008), http://greenfieldbelser.com/big-ideas/part-2-the-reptilian-brain---surprising-results-from-brain-science

[12] Charlie Irvine, *Breadth or depth? Why mediation should be proud to be a 'rendezvous discipline'*, Kluwer Mediation Blog (Sep. 8, 2011), http://kluwermediationblog.com/2011/09/08/in-praise-of-the-rendezvous-discipline/

enter the room and over the course, as mediation proceeds. Understanding how the parties will react in a given situation, a mediator is better equipped to communicate to parties that bargains have to be made for settlement.

Where the party(s) comes to mediation with a 'my way or the highway' approach, a mediator will make them see reason in relying on intellect and avoid emotional decision-making. The mediator, in his role as a facilitator, sets the right tone for bargaining and negotiation dance[13] between parties. Warring sides thus understand each other's perspectives, along with their needs and interests, keeping negative emotions aside. Free-flowing conversation between parties enables the mediator to identify their motives and driving forces which is important for a productive mediation session.

The best way to resolve a conflict is to approach the core issues creatively, in order to come up with out-of-the-box solutions. Parties during failed negotiations ponder over various outcomes, all of which are unacceptable to the either party. Involving a neutral third party with a possibly, different understanding of the dispute provides a fresh perspective. This is crucial for exploring innovative solutions, the importance of which cannot be undermined.

Conflicts can also be described as a disagreement blown out of proportion. More often than not, the perceived disagreement is much more exaggerated than the real disagreement. Such exaggeration is attributable to cognitive distortions[14] like personalization[15], assumptions based on mind-reading,[16] cognitive labeling,[17] self-serving bias,[18] cognitive exaggeration[19] and tendency to overestimate.[20] By facilitating conversation between parties, a mediator seeks to understand their psychology to anticipate the possible outcomes of the dispute.

For parties, talking to each other is crucial- it helps them in understanding the real issues and exploring outcomes agreeable to both parties. One of the senior most mediators at

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[13] Erik H. Schlie & Mark A. Young, *The Rhythm of the Deal: Negotiation as a Dance*, European School of Management and Technology (Jun. 12, 2008), https://d-nb.info/1012728048/34

[14] Alice Boyes, *50 Common Cognitive Distortions*, Psychology Today (Jan. 17, 2013), https://www.psychology today.com/blog/in-practice/201301/50-common-cognitive-distortions

[15] Personalization refers to an individual taking an incident or event personally that may not be necessarily personal in the first place.

[16] People often presume what is going on in someone's mind even though they might not be thinking about it.

[17] Once a party labels the other mentally (usually, negative labels), he/she will be prejudiced and reject any subsequent evidence suggesting the contrary.

[18] People often attribute positive events to their character while assigning negative qualities to other individuals.

[19] Parties to a dispute (or humans generally) tend to blow the other side's faults out of proportion, whether consciously or unconsciously.

[20] Human beings have the tendency of overvaluing things belonging to them. In a dispute, this bias is extended to undervalue entities that belong to others.

Samadhan Mediation Centre, Delhi once remarked in one of his sessions- "*Human beings have a chance to be proactive or reactive*". Made in context of a commercial dispute between two brothers, it encouraged parties to think practically instead of acting instinctively. True success in mediation amounts to the parties' ability to make intelligent choices from limited options available.

III. OBJECTIVE AND SUBJECTIVE REALITIES: RECOGNIZING THE DIFFERENCES

The underlying assumption of every 'what happened' conversation initiated by the mediator in joint sessions and carried on in caucuses is the existence of an objective reality. However it is impossible for the human brain taking in enormous information at any given time, to focus on each and every piece of it. Such information, filtered by the nervous system in terms of relevance,[21] is affected by cognitive biases- this filtered data constitutes the subjective reality of an individual. No issue arises if subjective realities of two individuals are similar, however that is highly unlikely since their ideas, memories and behavior will be different.

Termed as a distorted shadow of objective reality, subjective realities let people see clearly only parts of the former, while other parts remain inaccessible to the active mind.[22] Experience shows that subjective realities of disputants are often quite different from not only the objective reality but also from each other's- this is precisely why disputes arise. In this light, it is important to understand why these subjective realities—which also influence our behaviors—differ from the objective reality and the implications that they can have.

According to Joel Lee,[23] the real problem lies in the failure to appreciate this difference as it is incorrectly presumed that subjective reality equates objective reality.[24] Subjective realities are created by people through an unconscious process of selection of

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[21] Jordan Gaines Lewis, *This Is How the Brain Filters Out Unimportant Details*, Psychology Today (Feb. 11, 2015), https://www.psychologytoday.com/us/blog/brain-babble/201502/is-how-the-brain-filters-out-unimportant-details

[22] Stephen A. Diamond Ph.D., *Redefining Reality: Psychology, Science and Solipsism*, Psychology Today (Jan. 01, 2010), https://www.psychologytoday.com/us/blog/evil-deeds/201001/redefining-reality-psychology-science-and-solipsism

[23] One of the first proponents of mediation in Singapore, Joel Lee is a principal mediator and trainer with the Singapore Mediation Centre.

[24] Joel Lee, *Ramblings of A Neuro-Linguist: Dealing with the Problem of Perception*, Kluwer Mediation Blog (Apr. 14, 2013), http://kluwermediationblog.com/2013/04/14/ramblings-of-a-neuro-linguist-dealing-with-the-problem-of-perception/

particular aspects of objective reality.[25] Misunderstandings prevail between both parties due to varying subjective realities, causing them to attribute blame to each other. Aware that the disputants will have incompatible stories, one of the primary tasks of a mediator is to understand the two versions of objective reality and assist in recreation of a third which is mutually acceptable to both parties.

Once parties understand the inadequacy of their subjective realities, they are more likely to be open to considering other aspects of objective reality which could alter their deductions. After understanding the variance in parties' subjective realities, a mediator can share it along with complete information and underlying reasoning provided by each party with the other side. Both parties will then be in a better position to understand their own conclusions.

Through reframing and rephrasing parties' statements, mediators attempt to effect changes in their behavior and approach to the conflict. Through usage of soft phrases, parties are encouraged to reconsider their subjective realities and realign the same with objective reality to the extent possible. However before doing so, the mediator has to gain the confidence of parties to ensure that they do not feel threatened during this process.

IV. DIRECT OR INDIRECT COMMUNICATION (?): BRIDGING THE COMMUNICATION GAP BETWEEN PARTIES

A mediator can communicate with the parties either directly or indirectly while conveying ideas and opinions. While direct communication refers to stating what a person feels or thinks without mincing his/her words, indirect communication is a more subtle way of communicating the same point which requires the listener(s) to read between the lines.[26] Consider the case of a person disappointed with the conduct of other party. While a direct communicator will express his frustration, stating 'I am annoyed with your behavior', an indirect communicator will not only use words but also non-verbal behavior or articulate his displeasure metaphorically.

The manner of communication can provide a great deal of insight into a person's psychology. An indirect communicator might think that acting in the heat of the moment

[25] Diamond, *supra* note 22.
[26] Cynthia Joyce, *The impact of Direct and Indirect Communication*, Indep. Voice (Int'l. Omb'n Ass'n.), November, 2012 at 1.

hurts the feelings of the other party as well as is detrimental to the settlement process itself. However, that does not mean that direct communicators intend to hurt the listener- their thought process could be to avoid any ambiguities during communication.

Parties' approach in communicating their opinion can play a crucial role in escalation or de-escalation of a conflict. For instance, where the listener prefers direct communication, an indirect communicator might come across as evasive, ambiguous and suspicious[27]- this makes it hard for such listener to believe in the communicator's offer. Conversely, a direct communicator comes across as rude, uncompromising and inconsiderate to listeners preferring indirect communication. In both cases, negotiations between parties will most likely fail with the conflict escalating into a formal dispute.

Involvement of a mediator facilitating communication between disputants can give rise to numerous possibilities. A mediator should understand not only the parties' preference of communication—from their body language and behavior—but also their own range in order to avoid the direct-indirect communication dilemma. The mediator having the same style of communication as parties is the best case scenario- practically speaking, that does not happen much though. Where parties' approach is distinct from that of the mediator's, the latter is advised to change their communication style accordingly to gain the former's trust and mediate the dispute more effectively. This can be suitably illustrated with the help of two examples:-

Illustration 1: Two parties, sharing a long-standing commercial relationship, are embroiled in a dispute over payment terms. While one party seeks full payment, the other side considers the demand unjustified in light of deficiency in the former's service. Negotiations between them have failed in the past. During mediation, parties prefer to communicate indirectly since their relationship is at stake. Feeling that parties are unable to make any real progress towards settlement, the mediator seeks to encourage direct communication between them. However, parties see it as an insensitive move, and attribute this to mediator's failure to understand the complexities associated with their dispute.

Illustration 2: In a family property dispute, emotional tension prevails amongst the parties. Preferring direct communication with each other, they often engage in taking potshots

[27] Joel Lee, *Thoughts on Direct and Indirect Communication*, Kluwer Mediation Blog (May 14, 2012), http://kluwermediationblog.com/2012/05/14/thoughts-on-direct-and-indirect-communication/

during the session. The mediator seeks to prevent parties from doing so which, in his opinion, will be detrimental to settlement. Keeping this in mind, he encourages parties to communicate indirectly which will also give them time to think and ponder over their actions. However parties see him as an indecisive, spineless figure who avoids getting to the point, while raising questions on his authority in the whole process. The mediator on the other hand feels that parties' impatience and aggressive nature might wreck the mediation process.

The abovementioned illustrations are limited to cases where conflicting parties share the same communications approach. However, a situation where both parties have opposing styles is equally likely. In such cases, one party may perceive the mediator to be biased in another's favor with similar communication style (since, broadly speaking, there can be only two styles). To avoid such situations, mediators are suggested to find a middle ground and develop their own style of communication, tailored to meet the needs of both parties.

One might ask how mediators can develop their own style when there are only two possible approaches. The answer lies in the mediator's role of a translator[28]- he/she often puts his reframing skills into use during mediation. For parties with contrasting approaches, a direct communicator might probably be unable to understand the exact meaning of the statements of the opposite party. In such cases, the mediator can use his reframing and reiteration skills to reduce the communication gap and ensure that there is no information asymmetry.

For mediators, it is equally important to address the biased perception of parties towards one another, based on their divergent communication styles. Most likely to come out in caucus with respective parties, these labels can be done away with through reframing their behaviors. Eliminating these labels is an important step towards countering the irrational biases of a party, and can be achieved with mediator's assistance.

Where a party is open to the possibility of modifying their communication style, the mediator can act as a coach and guide such party (preferably in private sessions) in conversing in a manner more suited to the other party's needs. Obviously, the mediator will have to first illustrate to such party the importance and necessity of arriving on a settlement in mediation, before it can be convinced to change the approach.

[28] Lee, *supra* note 27.

V. INTUITIVE AND DELIBERATE (ANALYTICAL) THINKING

Individuals arrive on decisions either through intuitive (rapid) or deliberative (slow) thought processes,[29] or in some cases, a fusion of both. According to Gordon Pennycook (Canadian psychologist) and his team, all human beings are primarily intuitive driven by emotional factors during decision-making.[30] All individuals however, can think both intuitively and analytically. People with years of experience in deliberate thinking can also rely on intuitive thinking, especially in matters outside the ambit of their specialization. At the same time, highly instinctive people can also think deliberately in certain situations.

Reliance on instincts can be both a good and a bad thing.[31] Good, because honed over millennia of human evolution, intuitive thinking helps us in taking efficient decisions where rapid response is crucial. In such cases, rational, analytical thinking is likely to cause 'paralysis by analyses.'[32] How many times has it happened that we go to a restaurant for the first time and order an exquisite-sounding dish? Going for analytical decision making in such cases could take a long time since there are numerous options on the menu. Worst to worst, even if we end up hating the dish, we know now what not to order the next time.

Intuitive thinking is bound to let us down in cases—like the 'bat-ball problem'[33]—requiring effortful analytical thinking. Intuition played a crucial role in the life of early hunting groups living closer to nature and often faced with the choice of 'fight or flight.' However, modern world is a different story altogether. The quick response associated with it

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[29] Thea Zander, Michael Öllinger, and Kirsten G. Volz, *Intuition and Insight: Two Processes That Build on Each Other or Fundamentally Differ?*, National Center For Biotechnology Information (Sep. 13, 2016), https://www. ncbi.nlm.nih.gov/pmc/articles/PMC5020639/

[30]David Ludden, *Are You an Intuitive or Analytical Thinker?* , Psychology Today (Feb. 21, 2016), https://www.psychologytoday.com/blog/talking-apes/201602/are-you-intuitive-or-analytical-thinker

[31] Adrian F. Ward, *Scientists Probe Human Nature--and Discover We Are Good, After All*, Scientific American (Nov. 20, 2012), https://www.scientificamerican.com/article/scientists-probe-human-nature-and-discover-we-are-good-after-all/

[32]John Tauer, *Paralysis by Analysis in Athletes*, Psychology Today (June 1, 2011), https://www.psychologytoday.com/blog/goal-posts/201106/paralysis-analysis-in-athletes

[33] The Bat-ball problem is a simple test of reasoning ability given by Pennycook in 2015.
"A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost?"
A New Twist on a Classic Puzzle, Ass'n for Psychol. Sci. (May 11, 2015), https://www.psychologicalscience.org/publications/observer/obsonline/a-new-twist-on-a-classic-puzzle.html#.WSFRnpKGPIU

might be useful in the social realm; however beyond that, important decisions must be taken through a slower but more efficient analytical process.[34]

Focusing on one thing at a time, deliberative thinking is brain centered (unlike intuitive, which is heart centered) and lacks perspective, tending to be abstract in nature.[35] Deliberative thinking thrives in relatively stable conditions where there is no time pressure. This approach is ideal for dealing with complex issues requiring serious, effortful deliberations. For example, it assists the parties during mediation in pursuing the best available options. Apt in cases where guidelines have been established for analysis, this approach can be taught in classrooms.[36]

Though intuitive thinking has completely opposite features[37], it steps in where deliberative thinking proves to be inadequate- the former contains perspective and helps in understanding the bigger picture. Intuitive thinking relies on an individual's experience in a particular situation to produce rapid action.[38] Acting on unexplained intuitions, this thought-process gives up the 'best' option in favor of a 'workable' one, especially where time is of essence.[39]

Intuitive thinking tends to produce a restricted scope of thought, overlooking new perspectives. Focusing only on what is visible[40] and often plagued with irrational biases, this approach must be avoided during mediation entailing intense negotiations between parties. Parties should employ deliberative thinking more often in order to consciously analyze all information and arrive on a logically sound conclusion. As of now, there is no clarity on the nature of thought processes that parties implement to take decisions in mediation.[41] Even

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[34] David Ludden, *Which Is More Important: Intuitive or Analytical Thinking?*, Psychology Today (Oct. 30, 2016), https://www.psychologytoday.com/blog/talking-apes/201610/which-is-more-important-intuitive-or-analytical-thinking

[35] Charles B. Parselle, *Analytical/Intuitive Thinking*, Mediate.com (Nov. 2005), http://www.mediate.com/articles/ parselle6.cfm

[36] Id.

[37] For instance, intuitive thinking lacks focus since it considers many things at once.

[38] Jean E Pretz, *Intuition versus Analysis: Strategy and Experience in Complex Everyday Problem Solving*, Semantic Scholar (2008), https://pdfs.semanticscholar.org/6e30/400ce3e4e913edd8640a02ce3a2d6c99dbf5.pdf

[39] Id.

[40]Steven Sloman, *The Battle Between Intuition and Deliberation*, American Scientist (2012), http://www.americanscientist.org/bookshelf/pub/the-battle-between-intuition-and-deliberation

[41] Diane Levin, *Thinking for ourselves: better decision making at the dispute resolution table*, Kluwer Mediation Blog (Nov. 27, 2011), http://kluwermediationblog.com/2011/11/27/better-decision-making-dispute-resolution/

though intuition is seen as an unexplainable force leading to erroneous decisions in tricky situations, it is important to note that deliberate thinking suffers from infirmities too[42].

Specializing in analytical thinking, lawyers are often dismissive of intuitive skills. The undue importance accorded to analytical thinking in legal profession is arguably one of the reasons for inadequacies in the present legal system. Mediation is an attempt towards recognition of the role of intuitive skills in providing the right context for analytical thinking.[43] A combination of intuitive and analytical skills—referred to as Holistic thinking—enables an individual to perceive with a whole eye. Holistic thinking encourages parties to move from their 'win-lose' mindset to a 'mutual gains' approach, which effects settlements in mediation.

VI. BREAKING AND SUBSEQUENT RE-BUILDING OF TRUST

Any individual might tend to be more favorably inclined towards believing in him/her own self than others. Assuming ourselves to be free of flaws, we have no doubts about our trustworthiness. However when it comes to trusting any other person, the first question that we ask is- 'Can he/she be trusted?' This is arguably essential since too less information might be available on their integrity to arrive on an informed decision.

On getting a warm, cozy feeling in respect of an individual, one might say that the threshold for trust is met by him/her. However this feeling is considered to be unreliable, for it is fraught with confirmation bias.[44] Confirmation bias refers to the human tendency to seek information supporting their preconceived beliefs[45]- surrounded with information that reiterate our beliefs, it causes us to ignore contrary facts. This can be suitably demonstrated with the help of an example:

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[42] The experiments conducted on potential dangers associated with deliberative decision making showed that trumping intuitive thinking will lead to inferior moral outcomes. Deliberate thinkers were seen to be more likely to lie for their personal benefit at the expense of others. This was especially true in cases where monetary payoff was involved. They were also less likely to make charitable donations as compared to people who considered the same as an intuitive reaction. Intuitive thinking performed better than deliberation vis-à-vis morality by deterring immoral behaviors in situations of conflict of interest. For further explication, *see* Chen-Bo Zhong, *The Ethical Dangers of Deliberative Decision Making*, 56 Admin. Sci. Q. 1,25 (2011).

[43] Parselle, *supra* note 35.

[44]Joel Lee, *More Reflections on Trust*, Kluwer Mediation Blog (Aug. 14, 2015), http://kluwermediationblog.com/2015/08/14/more-reflections-on-trust/

[45] Shahram Heshmat Ph.D., *What Is Confirmation Bias?*, Psychology Today (Apr. 23, 2015), https://www.psychologytoday.com/us/blog/science-choice/201504/what-is-confirmation-bias

"'A' is of the opinion that 'B' cannot be trusted. Any information pointing out the trustworthiness of 'B' will be—consciously or unconsciously—ignored by 'A'. Conversely, where 'A' considers 'B' to be trustworthy, information suggesting the contrary will be either unconsciously ignored or at best, efforts will be made by the former to seek evidence countering the same."

When conflicts happen, the prevailing trust between parties goes for a toss. Repairing this broken trust thus gains paramount importance in managing and successfully resolving conflicts. Mediators, while attempting to rebuild trust between parties, should distinguish between emotional and strategic trust.[46] While emotional trust refers to the aforementioned warm feelings in respect of an individual which assures us about his/her reliability, strategic trust is built subject to our understanding, ability and willingness to meet the other person's interests.[47]

Re-building emotional trust takes a lot of time and often proves to be extremely challenging for the mediator. However, that is not the case in strategic trust which is context-specific. Mediators focus on the interests of parties to develop strategic trust, and how they can satisfy each other's concerns. In case a party is unable or unwilling or fails to understand the interests of the other side, there can be no strategic trust between them.

Joint and private sessions with parties enables the mediator to improve their understanding of each other's needs and interests, develop abilities and create options for them and finally, incentivize parties' performance of obligations by associating it with their concerns or motivations. Where emotional relationships are involved, building strategic trust in the short run may lead to the revival of lost warmth and amiability between parties in future. Keeping this in mind, a mediator must encourage behavior contributing in the building of strategic trust.

VII. 'PERCEPTION IS PROJECTION': IRRATIONAL ERRORS BY 'RATIONAL' FORCES

[46] Lee, *supra* note 44.
[47] Interview with Paul Haenle, Director, Carnegie-Tsinghua Center for Global Policy, in Beijing (Nov. 6, 2014). Also, Natalie Sambhi, *Indonesia and 'strategic trust'*, Australian Strategic Policy Institute (Mar. 26, 2013), https://www.aspistrategist.org.au/indonesia-and-strategic-trust/

Even though all human beings are fundamentally different, a common misperception prevails that every person sees the world in the same light and reacts to it in the same way as us. As our brain receives a large number of sensory signals, the limbic system is required to filter and prioritize them leading to perception bias (such as, selective perception).[48] On the basis of filtered signals, basic emotions are generated which cause cognitive biases.[49]

Though intuitive thinking mostly produces these biases, they are equally likely to arise while thinking analytically. These biases cause parties to commit irrational errors like fundamental attribution error,[50] ego-centric bias,[51] stereotyping, halo effect,[52] overconfidence, confirmation bias, fixed pie perception[53] and irreconcilable differences between the competitive and cooperative approach.[54]

For instance, because B perceives the world as an unsparing place (he might have arrived on this conclusion on the basis of past experiences, cognitive biases etc.), he commits an irrational error by thinking that no person can ever be merciful. Since B has made up his mind that genuinely nice people do not exist, any information pointing to the contrary will be ignored by him.

C is a kind-hearted, honest person who goes out of his way to help fellow human beings in times of need. Suffering from the cognitive distortion of overgeneralization,[55]

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[48] Neil Vidmar & Milton Rokeach, Archie Bunker's Bigotry: A Study in Selective Perception and Exposure, 24(1) J. of Comm. 36,47 (1974)

[49] GR Norman, SD Monteiro, J Sherbino, JS Ilgen, HG Schmidt & S Mamede, The Causes of Errors in Clinical Reasoning: Cognitive Biases, Knowledge Deficits, and Dual Process Thinking, Academic Medicine (Jan. 2017), https://journals.lww.com/academicmedicine/fulltext/2017/01000/The_Causes_of_Errors_in_Clinical_Reasoning__.13.aspx#

[50] Fundamental Attribution Error refers to the individuals' tendency to exaggerate internal explanations for the behavior of another person while completely underplaying the specifics of the situation.

[51] Thinking from their own point of view way too much, people with egocentric bias overestimate their importance in a particular setting. For instance, people working in teams at workplace often feel that they contribute far more than they really do. Resulting in a distorted view of reality and skewed perception, this bias causes people to re-explain events putting themselves in a favorable position.

[52] Coined by psychologist Edward Thorndike in 1920, halo effect is a bias in which our overall impression of an individual determines our opinion on his/her character and specific traits. This bias commonly manifests itself as the physical beauty stereotype and people's tendency to rate attractive people more favorably than the lesser attractive ones even though both might be equally good in a given scenario.

[53] Fixed-pie bias is the erroneous perception amongst negotiating parties that one party's interests directly contradicts the other. This is due to the underlying assumption that the total pie is fixed. Parties often fail to achieve optimal outcomes during negotiations for failing to look beyond the win-lose mindset.

[54] John M. Grohol, *15 Common Cognitive Distortions*, Psych Central, https://psychcentral.com/lib/15-common-cognitive-distortions/

[55] Overgeneralization is an irrational error which refers to reaching a general conclusion on the basis of a single incident or piece of information. A one-off horrid event can be seen as the commencement of a never-ending, vicious pattern of setbacks.
Also, Grohol, *supra* note 54.

confirmation bias and delusion,[56] B will project his world view on C's behavior and ignore his virtues since it goes against the former's pre-conceived notions. Worse, he may even ascribe negative intent to C's good deeds to justify his own irrational biases.

When a dispute comes for mediation, the level of trust between parties is about to or has already hit rock bottom- this is attributable to the communication gap. A mediator's job in this light is to revive the communication channels for rebuilding trust between parties. However, equally important for him/her is to change the perception of parties- mediator's involvement is significant in light of the self-fulfilling prophecy.[57]

The way parties see each other will determine their actions (or inaction) over the course of mediation. Their perception can be reformed through information sharing—facilitated by the mediator—which is likely to force them to think holistically, saving them the harm that irrational errors can cause. Parties should also be encouraged to identify and manage their emotions (emotional intelligence) to ensure that they do not impact the unrelated decisions.[58]

VIII. MEDIATING WITH A PSYCHOLOGICAL PERSPECTIVE: SHIFT FROM 'COMPETITION' TO 'COOPERATION'

Mediation is the only mode of conflict resolution which duly addresses the needs, interests and underlying concerns of parties before arriving on 'mutually-agreed' outcome. Experienced mediators make it a point to understand the psychological implications of conflict at hand for the parties. While some individuals fear conflict, others might try to avoid the same thinking that all disagreements are bound to end badly. Some may even consider it a threat to their existence. Such parties will never be able to sort out the outstanding issues in a healthy atmosphere, with negative emotions such as anger, frustration and disappointment prevailing over common sense.

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[56] Delusion refers to clinging on to an incorrect belief in spite of compelling evidence pointing out the contrary.

[57] According to the self-fulfilling prophecy, where people perceive the world in a certain manner, their actions would ultimately result in a world that they had projected in the first place.
Joel Lee, *Movie Mediation Musings – Arrival*, Kluwer Mediation Blog (Apr. 12, 2017), http://kluwermediation blog.com/2017/04/12/movie-mediation-musings-arrival/

[58] Amanda L. Chan, *6 Science-Backed Ways To Make Better Decisions*, Huffington Post, June 18, 2014, http://www.huffingtonpost.in/entry/rational-decision-making-strategies_n_5474861

O. Henry's short story "The Ransom of Red Chief" provides a great example of psychological game revolving around action and reaction.[59] To remove the impending deadlocks, a mediator has to understand the psychological needs of the disputants. A corollary to this observation is the need to establish closer ties between psychology and the practice of mediation. Though mediators—as legal practitioners—develop useful discovery skills over time, there is nothing like listening to both parties' version of the conflict.

Mediator's undivided attention not only encourages parties to vent out their emotions constructively but also helps him/her in understanding the latter's psychological interests. Currently the practice of understanding parties' psychology is limited to a few mediators, who have mastered the art over years of practice. Biases, especially where parties disagree on almost everything, can lead to competition instead of cooperation between them.[60] Conflicts can be better resolved where mediators understand these biases aggravating the conflict and assist in prevailing over them to take rational decisions.

To disrupt the vicious Bias- conflict cycle, mediators should persuade parties to question their cognitive biases in order to gain a 'complete' perspective of the dispute, overcome their perception biases, adopt a problem-solving conflict resolution approach and finally, avoid emotional decision-making. A mediator, like a fly on the wall, is best situated to understand the perspectives of both parties and recognize their biases. In this light, mediators can raise their awareness vis-à-vis the role of unconscious biases in a conflict to encourage problem solving.

Active listening is considered an essential trait for a mediator; however it is equally important for parties to listen carefully to not only the other side's version but also to their own story during mediator's summarization. Reexamining the specifics of the dispute and the facts leading up to it with mediator's assistance, parties are more likely to take an unbiased view and move towards the objective reality.[61]

A closer relationship between mediation and psychology is proposed to be developed so that senior mediators could pass on their experience in understanding people to the

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[59] The Ransom of Red Chief by O. Henry, https://www.gutenberg.org/files/50543/50543-h/50543-h.htm#Page_143 (Pp. 143-158)

[60] Catherine Brys, *What Can Mediators Do To Help Parties Overcome Their Biases*?, Kluwer Mediation Blog (Feb. 3, 2017), http://kluwermediationblog.com/2017/02/03/what-can-mediators-do-to-help-parties-overcome-their-biases/

[61] Brys, *supra* note 60.

younger mediators. This will enable the subsequent generation of mediators to alter parties' choice structure by eliminating their irrational biases and cognitive errors (like, overconfidence) which lead to sub-optimal decisions. For example, mediators can set ground rules to facilitate cooperation between the parties. By setting ground rules and encouraging parties to separate people from the problem, mediators urge them to assume a cooperative problem-solving approach. At the same time, decisional autonomy of parties will be respected and maintained at all times.

In psychology, Kahneman effect postulates that the party perceiving losses during negotiations seeks a higher compensation as compared to the party under the perception of gaining from such negotiations.[62] Appropriate framing and reframing by mediators will nudge the parties away from suboptimal decision-making through altering the meaning of gain and loss and offering a range of choices to the parties.[63]

IX. CONCLUSION: ACTIVE LISTENING COMES AT A COST FOR MEDIATORS

As mediators sit listening to parties complain and indulge in negative behavior, they are vulnerable to 'dumbing down' effect.[64] According to latest research, exposure to negativity over continued periods damage such part of listener's brain used in decision-making.[65] Quite ironically, mediators seem to be compromising on their issue-resolving and decision-making capabilities while trying to get the parties to settle their conflict amicably.

The mediation process should be structured in a manner providing timely breaks for everyone involved therein and to break the vicious circle of action and reaction between parties. A mediator has to maintain complete detachment from negative emotions and impulsive behavior, especially in intense conflicts.[66] Such timely breaks will enable the mediator to take a step back from the conflict and collect his/her thoughts. The mental and

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[62] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47(2) Econometrica 263,292 (Mar. 1979)

[63] Nadja Alexander, *What's in a frame? (or the power of emotions and subliminal messaging)*, Kluwer Mediation Blog (Aug. 26, 2012), http://kluwermediationblog.com/2012/08/26/whats-in-a-frame-or-the-power-of-emotions-and-subliminal-messaging/

[64] Nadja Alexander, *Hazards of the Job: good listening and mental health*, Kluwer Mediation Blog (Dec. 21, 2015), http://kluwermediationblog.com/2015/12/21/hazards-of-the-job-good-listening-and-mental-health/

[65] Christopher Bergland, *Chronic Stress Can Damage Brain Structure and Connectivity*, Psychology Today (Feb. 12, 2014), https://www.psychologytoday.com/blog/the-athletes-way/201402/chronic-stress-can-damage-brain-structure-and-connectivity

[66] Joel Lee, *Mindfulness and Mediation*, Kluwer Mediation Blog (Oct. 14, 2015), http://kluwermediationblog.com/2015/10/14/mindfulness-and-mediation/

emotional state of the mediator has a real impact on the process as well as parties. A mediator has to be a calm and composing player amidst forces with a volatile relationship.

However, this is merely a short-term solution. In the longer run, a deeper involvement of psychology in mediation is suggested as mediators should be trained to deal with both human emotions and psychology for making mediation more party-centric. Engaging the discipline of psychology in mediation can have far-reaching effects. For example, a recent psychology study indicated that lighting can intensify both positive and negative emotions of an individual which in turn influences his/her rational decision-making capabilities.[67] Bright light is likely to aggravate the initial emotional reactions of a person towards people and objects.

Though veteran mediators might already be aware of it, this observation is a food for thought for the younger mediators who struggle to exercise authority while mediating with older parties. Incorporating the discourse of psychology within mediation would bring numerous findings on human nature to mediators' view- this is likely to assist them in understanding parties psychologically and reducing negative emotional behaviors.

[67] NK Park & CA Farr, The Effects of Lighting on Consumers' Emotions and Behavioral Intentions in a Retail Environment: A Cross-Cultural Comparison, 33 J. of Int. Des'n, 17, 32 (2007).

ABOUT POSTMODERN FEMINISM AND THE LAW: A POSTMODERN FEMINIST CRITIQUE OF THE INDECENT REPRESENTATION OF WOMEN (PROHIBITION) ACT, 1986

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ABSTRACT

This essay attempts to analyze section 2(c) of the Indecent Representation of Women (Prohibition) Act, 1986 through the lens of postmodern feminism. The theoretical tool of postmodern feminism provides the author with a framework to unearth how the Act contributes to existing legal discourse in producing and legitimizing the cultural construct of women whose sexuality it subsequently seeks to regulate. The essay challenges the unwitting validation of constructed binaries, of culture/nature, mind/body, gender/sex, male/female, masculine/feminine, through the violence of legal rules that have far-reaching implications beyond the parties present before it; law not only governs those whose claims are being adjudicated upon directly, but it also provides tools of sexual negotiation and regulation in molding identities outside the courtroom. In deconstructing the representation of a woman to that of a body, the essay investigates the materiality of the body that the regulatory sexual regime, through the instance of the law, seeks to rigidify. Further, the author attempts to unpack visages of paternalism in the provision and unmask a theorized male gaze that only views women's bodily representation as instrumental to something—paradoxically, ascribing instrumental power to bodies and simultaneously denying female agency. The essay finally addresses a concern that demands for prohibition on a form of representation of women, and proposes an adjustment rooted in a nuanced understanding of consent and privacy rights that shifts the focal lens from that of the allure of a universal Woman to individual representations.

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I. INTRODUCTION

A. About "Postmodern Feminism"

Reality has no intrinsic meaning; such meanings are produced by and only exist within language. Language is situated within historically specific frameworks that organize social power and discursive strategies in different ways. A lens provides the theoretical tools to conduct an analysis within an existing structured framework. The theoretical lens that has informed this essay is that of postmodern feminism. In investigating meanings and power relations as constructed outcomes of discourse itself, postmodernism attempts to dismantle identities by making their existence and content contingent upon and constructed by language and institutions, including law. Postmodern feminism is then concerned with interpretation of legal, cultural and political discursive practices that legitimize categories of power and construct the identities of women. Postmodern feminists, as theoretically diverse as they may be, attempt to debunk hegemonic assumptions of a whole, rigid, unified and coherent subject. This theoretical tool allows for and mandates bringing into question stable categories of sex, gender, body, identity and discourse, in order to embrace a conception of gender that is fluid and contingent upon history and context, and reject essentialist approaches and binary categorizations to and within feminist legal theory.[1]

B. About The "Law"

The Statement of Objects and Reasons for the Indecent Representation of Women (Prohibition) Act, 1986[2] expressly speaks of a need to introduce such a legislation because the existing corpus of anti-obscenity laws contained within the Indian Penal Code is insufficient to deal with the growing body of indecent representation of women notwithstanding a specific intent requisite. The definition of "*indecent representation of women*" is as follows:

> "*indecent representation of women means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to*

[1] Laura A. Rosenbury, "Postmodern Feminist Legal Theory: A Contingent, Contextual Account", in Cynthia Grant Bowman (ed.), Feminist Legal Theory in the United States and Asia (2016).
[2] Statement of Objects and Reasons, Indecent Representation of Women (Prohibition) Act, 1986 [Hereinafter "the Act"].

have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals…"[3]

This essay attempts to analyze section 2(c) of the Indecent Representation of Women (Prohibition) Act, 1986 through the lens of postmodern feminism. The theoretical tool of postmodern feminism provides the author with a framework to unearth how the Act contributes to existing legal discourse in producing and legitimating the cultural construct of women whose sexuality it subsequently seeks to regulate.

The essay challenges the unwitting validation of constructed binaries, of culture/nature, mind/body, gender/sex, male/female, masculine/feminine, through the violence of legal rules that have far-reaching implications beyond the parties present before it; law not only governs those whose claims are being adjudicated upon directly, but it also provides tools of sexual negotiation and regulation in molding identities outside the courtroom. In deconstructing the representation of a woman to that of a body, the essay investigates the materiality of the body that the regulatory sexual regime, through the instance of the law in the present case, seeks to rigidify. Then, the author attempts to peel visages of paternalism in the statutory provision and unmask a theorized male gaze that views women's bodily representation as instrumental to something—paradoxically, ascribing instrumental power to bodies and simultaneously denying female agency. The essay finally addresses a concern that demands for a prohibition on a form of representation of women, and proposes an adjustment rooted in a nuanced understanding of consent and privacy rights that shifts the focal lens from that of the allure of a universal Woman to individual representations.

II. THE PROBLEM OF INDECENT REPRESENTATION OF WOMEN

The Act is titled, "Indecent Representation of Women (Prohibition) Act, 1986." A commonsensical question that arises is that in not sanctioning indecent representation of men (or genders other than those identified by and as women), does the legal regime premise itself on failure and/or neglect to identify and accept a certain representation of men as fathomably indecent (as interpretatively problematic the term may be)? Intuitively, one would answer in the negative, and justify the same by referring to general criminal law that would implicate obscene representations of men.

[3] Section 2(c), Indecent Representation of Women (Prohibition) Act, 1986.

Simone de Beauvoir argues that the feminine gender is marked as irredeemably "*particular*," the Other, and that the masculine encompasses the epistemological subject of universal personhood; the Other is necessarily outside of and exclusive to that abstract universality of personhood embodied by the man.[4] Monique Wittig contends that the category of gender is a singular linguistic index and necessarily feminine in a heterosexual regime that preponderates the universality and/or generality of the unmarked masculine subject.[5] The act of particularly regulating indecent depictions of women despite the presence of a general code of criminal law that sanctions universal representations would then seemingly feed into the legal parallel that controls the particular feminine and leaves the universal man (or person) unmarked.

There are, however, admittedly semiotic flaws in such a structural parallel; for instance, the particular (feminine) gender is not restrained from being implicated under the (masculine) universal subject, i.e. a representation deemed indecent under the Act may also be obscene under section 292 of the Indian Penal Code, 1860 (IPC).[6] Further, the standards of obscenity and indecency may linguistically and structurally differ, which would then imply that an indecent, yet not obscene, representation of a man (or genders other than those identified by and as women) may not fall within the domain of criminal law. The larger argument that views the particularity of this legislation feeding into the narrative that recognizes the particularity of the feminine gender would arguably still stand, and reiterate the gendered matrix of relations that both Beauvoir and Wittig attempt to resist and annihilate.

Returning to the definition, one finds that the Act targets a certain representation of the figure, form or body (or part thereof) of the woman, which leaves ample room to inquire into the nature of such figure, form and body. Feminist attempts to distinguish between sex, as biologically ordained, and gender, as a free-floating cultural construct independent of sex, would lead to the logical consequence of the body as a passive site that is encoded with cultural meanings ascribed to it by gender, which allows for the signification of a female or male body equally by that of a man or woman.[7] However, Judith Butler treats sex and the sexed body as culturally constructed and produced within and as the matrix of gender

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[4] Simone de Beauvoir, The Second Sex (1952) 16; *See also*, Judith Butler, *Sex and Gender in Simone de Beauvoir's Second Sex*, 72 Yale French Studies 35, 39 (1986).
[5] Monique Wittig, *The Point of View: Universal or Particular?*, 3(2) Feminist issues 59, 64 (1983).
[6] Section 292, Indian Penal Code, 1860.
[7] Judith Butler, Bodies That Matter: On the discursive limits of "sex", 20 (1993).

relations itself.[8] Butler's heterosexual matrix is a "*hegemonic discursive/epistemic model of gender intelligibility*" which requires coherence between the materiality of bodies, stability of sex and a correspondingly aligned stable gender, which is situated within a compulsory practice of heterosexuality.[9]

In such a regulatory sexual regime produced and legitimated by the normative law, feminine ought to express *female* and desire masculine which ought to express *male*. The reference to the (sexed) body of the woman, then, is a mere correlational reference to the female (and necessarily feminine) body of the woman in the Act. The violence of language excludes from its purview the conceivability of a male body of a (trans)woman, and thereby obfuscates their plural experiences of representation as being fathomable in the public realm. Michel Foucault understands juridical systems of power to produce the subjects they come to represent, limit, prohibit, regulate, control and protect.[10] The law first produces the subject before the law and then subsequently conceals its productive power in order to "*engender, naturalize and immobilize*"[11] the subjective premise that is invocative of the law's hegemony. However, in producing the subject, in all its forms and constructs, who falls within the protection or target of the law, the law inevitably produces an exclusionary corollary of the unintelligible who falls outside the definitional ambit of the subject itself. That exclusion is not only naturalized and legitimated by contemporary juridical structures; it is materially manifested in a statutory provision that conflates the feminine, female and woman, thereby erasing bodies and identities that are deemed legally illegible.

An inquiry into the materiality of the body whose public representation is sought to be constrained would require a postmodern analysis of the body itself. Section 2(c) produces a set of prohibitions that lay down normative "*criteria of intelligibility*"[12] whereby indecency, denigration, derogation, or the likelihood of injury to public morality serve as qualifiers that produce the qualitatively signified body and oust that from the realm of legible and acceptable publication that fails to reiteratively constitute itself within such criteria of intelligibility. Lacan questions the reality of bodily contours themselves by using the instance of identifiability of an infant's own morphology when placed before a mirror.[13] The

[8] *Id.* at xvi.
[9] Judith Butler, Gender Trouble: Feminism and the Subversion of Identity, 194 (1990).
[10] Michel Foucault, The History of Sexuality, Volume One, 82-83 (1978).
[11] Butler, *supra* note 9, at 8.
[12] Butler, *supra* note 7, at 27.
[13] Jacques Lacan, "The Mirror Stage", in Alan Sheridan (trans.), Merits: A Sdccrion (1977) 4.

imaginary psychic formation of the body, which allows for the "*idealization of the body as a spatially bounded totality*" is then contested by Butler to the extent that the mirror does not merely represent the already existent body, but produces that body and naturalizes and reiterates the privileged signification of certain bodily organs through discursive performatives.[14]

The law then serves as one of many opportunities for institutional reiteration of such performatives that not only naturalize the referent of a "*phantasmatic moment in which a part suddenly stands for and produces a sense of the whole*";[15] in particularly prohibiting the representation of certain bodily parts as indecent, which in itself contributes to the constant constructive referencing and equating of certain (and case law reaffirms, sexual) parts with the whole, the Act actively legitimates such signification. Furthermore, an attempt that regulates the body of women and not men (operating in the binary gender matrix for the purposes of this argument) is in and of itself an institutional endorsement of the mind/body binary. The gendered categories of mind and body have been tainted with certain attributes ascribed to both: "*the [masculine] mind not only subjugates the [feminine] body, but entertains the fantasy of fleeing its embodiment*."[16] The passive site of the feminine body awaiting the agency of the reasoned masculine mind to signify and encode the pre-discursive surface is drawn as an analogical parallel to the absorption and displacement of the body by the mind, which then becomes a mere prelinguistic site which can be accessed only through the markers of the mind.

III. LAW AND THE "SEXY, TERRIFIED, MATERNAL" FEMALE BODY

Till now, the essay has attempted to establish the process of signification ascribed to the female body. What is then the contribution of the impugned legal rule in such signification? The forcible materialization of the body through a regulatory sexual regime has been interpreted by Mary Joe Frug to impute the role of the law in terrorizing, sexualizing and maternalizing the female body. Frug illustrates the gendered nature of law as an instrumental framework that molds the female body with meanings attached thereto, otherwise non-existent outside the domain of discourse.[17] In so doing, she is consistent with Butler's analysis of citationality which produces that which it seeks to control. This

[14] Butler, *supra* note 7, at 57.
[15] *Id.* at 55.
[16] Butler, *supra* note 9, at 17.
[17] Mary Joe Frug, Postmodern Legal Feminism, 18 (1992).

productive power of juridical structures does not confine itself to the claimant and respondent, but extends to constructing the female (and feminine) identity it subsequently seeks to regulate.

Sexualization of the female body is manifested through individual women's experiences wherein the subconscious interrogates the sexuality, sexual practices and representations of every female body. This reiterative and citational sexual interrogation is a product of performativity, theorized by Butler to mean produced and (often violently) compelled by regulatory regimes of gender coherence within a matrix of compulsory heterosexuality; the identity that routine enactments purport to express are phantasmatic constructs, manufactured and preserved through social institutions and discursive means backed by sanction.[18] "…*In directly or indirectly penalizing conduct which does not conform to a particular set of sexual behaviors, legal rules promote a model of female sexuality*…"[19] The normative in the present case is signified and acquires legible meaning within the subjective framework of decency and morality. An analysis of case law interwoven into the argument of legal rules validating regulation of female sexuality reflects a by and large uniform condemnation of what the author terms as 'Nudity +':

> "*A brazenly nude body may evoke a feeling of disgust and revolution. If nudity is properly covered, human body whether of male or female cannot be regarded as objects of obscenity without something more. That something more is to be found in the facial expression or pose in which it is photographed*…"[20]

Courtroom narratives not only clinically scrutinize the objective degree of nudity in a representation, but also subject such scrutiny to a consequentialist test that renders the (in)decency of such representation contingent upon its effect to "*arouse sexual feelings in an ordinary human being.*"[21] In so doing, the Indian judiciary has firstly conceded to nudity, being intrinsically connected with bodily representations, as a necessary though not sufficient condition for a valid conviction under the Act. The absence of any exposure of a woman's breasts or genitalia has been treated as decent,[22] while the conscience of the judiciary has

[18] Butler, *supra* note 9, at 186.
[19] Frug, *supra* note 17, at 141.
[20] P.K. Somanath v. State of Kerala and Ors., 1990 Cri LJ 542.
[21] *Id.*
[22] Babban Prasad Mishra v. P.S. Diwan, 2006 Cri LJ 3263.

been shocked at the indecent sight of a low-cut blouse and see-through gown that visibilizes the contours of the breast.[23]

Secondly, the invocation of a standard of "*an ordinary man of common sense and prudence*,"[24] "*ordinary decent man or woman [who] would find [such representation] to be shocking, disgusting and revolting*,"[25] a "*reasonable and prudent reader*,"[26] or an "*average moral citizen*"[27] is in itself a construction and forcible reiteration of the heterosexual hegemonic matrix that compels conformity with hegemonic sexual regimes, and produces a normative standard of a universal person that it then assesses sexual deviation from. There is in fact, nothing ordinary about such decency, but for the cultural constructivism that reiterates and cites the authority and sustenance of such. In foundationally grounding bodily decency beyond the bodily contours of concealment to include within its ambit sexual expressions and sexual postures, the operation of the law has effectively created a gendered category of indecent sexual expressions and indecent sexual postures. Sexualization of the female body, even in attempting to condemn and in extension purportedly obfuscate such expressions and postures, has had the inevitable implication of sexualizing the normative asexual. The sexualized terrain of the female body, loaded with sexual messages created and reproduced as naturalized by the law, coercively monitors and regulates each movement of the female body.[28]

Frug's second line of reasoning percolates into the institutional maternalization of the female body.[29] While section 2(c) in itself may not ascribe maternal attributes to the female body, case law under the Act have opportunistically uncovered the legal justification for this law and premised it upon prevention of "*depravity and demoralization of women*," who constitute the "*womb of the whole human race*."[30] The inherent personality of womanhood is inextricably related to the "*great born virtue called modesty, to mean 'womanly propriety of behavior, scrupulous chastity of thought, speech and conduct, reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions'*."[31] Legal mechanisms of pervasive control, regulation and condemnation of variation is an effect of the product of

[23] Vinay Mohan Sharma v. Delhi Administration, 2008CriLJ1672.
[24] Ajay Goswami v. Union of India and Ors., 2007 (1) SCC 143.
[25] Dr. Ramesh Prabhu v. Prabhakar Kashinath Kunte & Ors. AIR 1996 SC 1113.
[26] S. Khushboo v. Kanniammal and Anr., AIR 2010 SC 3196.
[27] R. Basu v. National Capital Territory of Delhi and Anr., 2007CriLJ4254.
[28] Frigga Haug, Female Sexualization: A Collective Work of Memory, 48 (1987).
[29] Frug, *supra* note 17, at 138.
[30] Chandra Rajakumari and Anr. v. Commissioner of Police, Hyderabad and Ors., AIR 1998 AP 302.
[31] *Id.*

the law in itself; legal rules create the sexualized and maternalized Woman subject whose sexual presentation and conduct they seek to regulate and reiteratively sanction through the lure of standards of universal personhood subscribing to the law's self-created virtues. These in effect reaffirm the law's continued hegemony.

Thirdly, terrorization of the female body operates in the form of paternalistic State intervention in order to construct a body signified by subjection to terror, "*a body that has learned to scurry, to cringe and to submit*," "*to seek refuge against insecurity*."[32] The theoretical tool of the male gaze situated within asymmetrical power configurations perceives all representations from the perspective of a male (and man) who necessarily conforms to Butler's stable heterosexual matrix. The ostensible agenda for sanctioning indecent representation of women, as described in section 2(c), was to curtail and eventually obliterate objectification of female bodies and women. However, the male gaze in itself is not erased; it is merely deprived of its sexualized fodder by virtue of the legal sanction imposed under the Act.

Laura Mulvey would rationalize the institution of complaints by men and women by virtue of the internalization and unquestioning naturalization of constructed ideological assumptions appropriated by the male gaze that dictate sexual conduct of marked female bodies.[33] The materiality of the male gaze, notwithstanding who institutes criminal proceedings, operates at the level and behest of (mostly male) police officers and (all male) judges. The legal appropriation of the female voice by the male gaze is then complicit in protecting female sexual passivity and condemning sexual indecency of the female from the standards of the universal (and necessarily Male, according to Wittig and Beauvoir) mind. Interestingly, the representation of a woman (and legally, her female body) is construed to be instrumental and not an end in and of itself.

While conceding to the impressing power of female bodily representations in molding minds[34] and increasing crimes against women,[35] courts have effectively shifted the burden of culpability for sexual, and often power-based interpersonal, violence onto a contributory role of representations deemed indecent by a male gaze. The instrumental means of such representation is not intrinsically problematized as violative of a right (if any), but is

[32] Frug, *supra* note 17, at 129.
[33] Laura Mulvey, *Visual pleasure and narrative cinema*, 16(3) Screen 6, 6–18 (1975).
[34] Anonymous letter-un-signed v. Commissioner of Police and Ors., 1997(2)ALD125.
[35] Dharmendra Dhirajlal Soneji v. State of Gujarat, 1996GLH(2)727.

expunged to accommodate causes of gender-based violence. In so doing, the law mandates a certain terrorization of the female body to shield its own inability to adequately protect women against physical abuse.[36]

IV. ABOUT CONSENT?

Let us return to the definitional provision one last time: the representation of women is deemed to be indecent for and guided by its effect, be it derogatory to or denigrating women or likely to injure, deprave or corrupt public morality or morals. The representation of women is legally deemed to be indecent regardless of consent of the woman so represented. Publication of such representation is prohibited under section 3 of the Act.[37] The Act is seemingly unable to fathom the possibility of agency being ascribed to a woman, who may of her own volition, represent herself in a manner that the law deems indecent, purportedly for the protection of her (who is subsumed within the universal Woman, which will be discussed in the next section).

The postmodern project does not expressly concern itself with agency (or a nuanced problematic thereof).[38] The agenda of postmodern feminism has typically been to provide tools of analysis that explicate the performativity of constructs to constitute the identity that they purport to be, become and effectively control. The process of construction however has been a subject of critique, for the agent, according to Butler, does not exist prior to the language of construction, but is produced within and as a result of the matrix (or matrices) of gender relations. The agency to "*initiate a transformation of relations of dominance*" is accounted for within the crevices of the possibility of a variation to repetitions that otherwise signify constitutive subjects:[39]

> "*The reconceptualisation of identity as an effect that is as produced or generated, opens up possibilities of agency that are insidiously foreclosed by positions that take identity categories as foundational and fixed. Construction is not opposed to agency; it is the necessary scene of agency, the very terms in which agency is articulated and becomes culturally intelligible*…"

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[36] Frug, *supra* note 17, at 129.
[37] Section 3, Indecent Representation of Women (Prohibition) Act, 1986.
[38] See generally Rosenbury, supra note 1; Sue Clegg, The problem of agency in feminism: a critical realist approach 18(3) Gender and Education 309, 315 (2006).
[39] Butler, *supra* note 9, at 185.

In failing to account for sexual agency of a woman to voluntarily represent herself, albeit as a variation to the performative reiterations, the Act grounds itself in an ostensibly feminist theory which presumes the incapacity or illegibility of female consent.

V. TOWARDS A NEW PARADIGM?

A pertinent question that arises, and concerns the seeming justification for the enactment, is whether certain representation ought to be prohibited or not, and if so, on the basis of what qualifier or criteria would such representation justify a prohibition on expression. Here, the author returns to the conception of the Woman in the Act; the reference to "women" in the title is arguably of no relevant significance to the postmodern task, for notwithstanding its semantic plurality, the law constructs the category of Woman as a coherent, stable unity relying upon routine phallocentric orthodoxy.[40] The essentialized notion of a Woman, which has been central to the feminist project, ought to be challenged for reifying forcible materialization of gender relations.[41] The solidarity of the identity of a Woman is seemingly premised upon a common identity of sorts, however in so doing, the cause of representational politics excludes and erases politics of plural identities from the stable and abiding Woman.[42]

The postmodern subject is meant to be "*fluid rather than stable, constructed rather than fixed, contested rather than secure*."[43] The presupposition of a commonality, of shared oppression or otherwise, needs to be displaced by the feminist project and be subjected to the critique of exclusionary politics that erases the concrete existence and experience of intersectionality.[44] The author suggests abandoning this universal category of subjecthood of the Woman, and sanctioning representations through a nuanced understanding of individualistic consent and privacy. The essay condemns the criteria of legal legibility located in decency and public morality, for the subjectivity of such constructs are not only reflective of a legal institutionalization of the compulsory heterosexual matrix that regulates female sexuality and stabilizes the woman, the female and her heterosexual desire for a male (who is necessarily a man); the construct further disembodies the individual woman and sanctions her variation from roles of gender performativity (such as female sexual passivity and chastity)

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[40] Carol Smart, Feminism and the Power of Law, 41 (2002).
[41] Butler, *supra* note 9, at 9.
[42] *Id.* at 4.
[43] Stephanie Genz and Benjamin A. Brabon, Postfeminism: Cultural Texts and Theories, 107 (2009).
[44] Butler, *supra* note 9, at 7.

through the male gaze that appropriates the hegemonic construct of what is deemed as (in)decent and (im)moral.

Instead, in situating consent at the core of the representation, this essay proposes a model that transgresses previous theoretical premises of false consciousness, and attempts at acknowledging and strengthening agency, sexual and otherwise, of women in legal discourse and socio-political engagements. A failing of often elitist academia has been to couch the universal Woman as devoid of her social reality through a perpetuation of de-subjected structuralism.[45] Fortunately, the structuralist overemphasis on denial of sexual agency has been countered by a growing acknowledgment of social, legal, cultural, political and economic forces that constantly shape and restrain decision-making and exercise of agency in patriarchal structures.[46] "Free" consent ought not to be accepted unquestioningly; however, that is not to say that the existence of only women's consent be dismissed under the garb of false consciousness. So, for instance, in a case wherein a woman has posed voluntarily in a magazine,[47] such representation ought not to be prohibited.

What then would be the legal consequence in cases of depictions other than self-representations? When the consent of the subject (as critically problematic the term may be, given its connotation of a hierarchy situated in juridical structures of power) is absent, the situation would then fall within the ambit of whether the right to privacy of the subject has been violated or not. This requires a theorization and perhaps reformulation of privacy in itself; in so doing, the author assumes that interests purport to further wellbeing, and only rights grounded in underlying interests justify imposition of duties on others to protect these interests.[48] A privacy right can then be grounded in the interest that secures the ability of individuals to exercise a reasonable measure of control over what aspects of themselves they choose to reveal and to whom.[49] This interest can be secured in a reasonably predictable environment that shapes normal information flows, wherein individuals can reasonably anticipate causal links between their conduct and others' ability to access information

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[45] Elisa Glick, *Positive Feminism, Queer Theory and the Politics of Transgression*, 64 Feminist Review 19, 36 (2000).
[46] Sharon Cowan, "Choosing freely: theoretically reframing the concept of consent", in Rosemary Hunter and Sharon Cowan (eds.), Choice and Consent: Feminist Engagements with Law and Subjectivity (2007) 95-104; Sharon Cowan, "Freedom and capacity to make a choice: a feminist analysis of consent in the criminal law", in Vanessa Munro and Carl Stychin (eds.), Sexuality and the Law: Feminist Engagements (2007) 51-71.
[47] P.K. Somanath v. State of Kerala and Ors., 1990CriLJ542.
[48] Andrei Marmor, *What is the Right to Privacy?*, 43 Philosophy and Public Affairs, 1, 4 (2015).
[49] *Id.* at 7. One of the first to suggest this to be the underlying interest protected by the right to privacy was James Rachels (*See* James Rachels, *Why Privacy Is Important*, 4 Philosophy and Public Affairs, 323 (1975)).

regarding their conduct.[50] A manipulation of the relevant environment without adequate justification that diminishes one's ability to control how they choose to present themselves to others would constitute a violation of the right to privacy.[51] The harm accruing in cases of such violation would then not be rooted in a male conception of standards, but on the basis of the female complainant's ascertainment of concrete harm measured in terms of the manipulation of the relevant environment that disables or substantially hampers her ability to control what aspects of herself she chooses to reveal to others. So, for instance, a case wherein the absence of a woman's consent to a painting representing her was supplemented with a real manipulation of her environment that molds normal information flows between her and her servants to the extent that she was unable to control what aspects of herself she chose to reveal to them,[52] would be implicated as a prohibited representation within such a model.

VI. CONCLUSION

Section 2(c) of the Indecent Representation of Women (Prohibition) Act, 1986 is a legitimation of binaries, man/woman, mind/body, culture/nature, gender/sex; it is a validation of the heavily encoded gendered body that is ascribed culturally constructed meanings to be reiterated and cited within the legal hegemonic framework that encourages, and at times mandates, conformity to a heterosexual matrix. It actively regulates female sexuality in ascertaining female bodily representations judged according to standards prescribed by and subscribing to the male gaze. The particularity of the female is problematically maternalized and terrorized through the corpus of case law, and representations thereof are considered merely instrumental through the adoption of a 'Nudity +' threshold, and not permissible or impermissible intrinsically in and of themselves.

Furthermore, the Act considers sexual agency and consent inconceivable and thereby is a blatant disservice to the feminist legal project. Reformulating the law of affirmative consent, even while rethinking the degree of freedom in consent, is essential to abandon the protectionist regulatory sexual regime that refuses to engage with the female "subject" and its decisions without adorning its situatedness in a structure of power configurations tainted by unquestioning gender hierarchies. Reconceptualizing harm in terms of individual harm to

[50] *Id.* at 12.
[51] *Id.* at 14.
[52] Chintan Upadhyay v. Hema Upadhyay and Anr., 2013(4)ABR337.

individual complainants based on a privacy violation and not through standards of community mores that impose a gendered universal (and necessarily male) notion of decency and morality, is integral to acknowledging the plural subject of *women*.

JUSTICIABILITY OF A PRESIDENTIAL PROCLAMATION OF EMERGENCY UNDER ARTICLE 352(1) OF THE CONSTITUTION

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ABSTRACT

The nature of emergency powers granted to the President under Article 352 and under Article 356 of the Constitution of India varies greatly in scope, implications, and manner of invocation, among others. Therefore, the judicial review for both actions is required to be differently made. However, judicial decisions have had the effect of conflating the standard of review for proclamations issued under Article 356 with that issued under Article 352, resulting in a two-stage review process for proclamations issued under Article 352 – first, on the material on which such proclamation was issued, and second, on legislations passed pursuant to the proclamation of national emergency. The question that arises is of creating a balance between establishing a check on the executive's powers to protect against the threat of abuse, and of prudent judicial restraint in a sphere that requires highly political assessments to be made. The paper seeks to analyse whether or not such a position is best-suited for a democracy like India pursuant to a comparative analysis made with the American and Canadian approaches.

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I. INTRODUCTION

There often occur abnormal situations that threaten a country on numerous fronts including war, economic or financial breakdown, or aggression from within the country, and require extraordinary responses to address them in order to ensure the continuation of governance in accordance with the constitution. Various constitutions around the world provide for emergency provisions to address such situations. Traditionally, the invocation of emergency powers facilitate a departure from the ordinary functioning of the organs of state. They are extremely important but also dangerous, for they potentially provide scope for the obliteration of the constitutional order.

Across the world, states of emergency have garnered attention on account of their impact on protection and enforceability of human rights,[1] the proliferation of emergency regimes of questionable provenance and prolonged, institutionalised states of emergency.[2]

The Indian Constitution provides for Emergency Powers under Part XVIII, to be invoked in cases of a security threat due to war or external aggression or armed rebellion or an imminent threat thereof,[3] financial emergency, or a failure of constitutional machinery in the state.[4] The power to proclaim the state of emergency vests with the President. The Centre has overriding powers to control and directs all aspects of administration and legislation throughout the country. However, the Constitution (Forty-Fourth Amendment) Act was enacted in 1978 to provide for safeguards against the arbitrary exercise of power akin to that exercised in June 1975.

The proclamations invoking the emergencies are based on the President's satisfaction, which is not his personal satisfaction, but that supplemented by the recommendations of the Cabinet Ministers headed by the Prime Minister. The issue of justiciability of the proclamation has been widely contested, and addressed by the courts in various decisions.

It has come to be held through a series of decisions which shall be further discussed, that a presidential proclamation issued under Article 356(1) is amenable to the jurisdiction of

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[1] Scott P. Sheeran, *Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 Michigan Journal of International Law 491 (2013).; Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/1997/19 (23 June, 1997).
[2] Commission on Human Rights, U.N. Doc.E/CN.4/Sub.2/1993/23 (23 June, 1997).
[3] Article 352, Constitution of India.
[4] Article 356, Constitution of India.

courts on limited grounds.[5] The implications of the position enunciated by the court in later decisions, most recently that of *Rameshwar Prasad (VI) v. Union of India*,[6] where it was observed that the grounds of review of a presidential proclamation issued under Article 356(1) of the Constitution shall extend to review of the proclamation issued under Article 352(1) as well, shall be discussed. It has been held that judicial review as part of the basic structure of the Constitution[7] cannot be wholly excluded. Therefore, the material based on which the presidential proclamation invoking national emergency in the face of war, external aggression or armed attack has been made amenable to judicial review on limited grounds. These include – whether there was any material upon which the president based his satisfaction, whether the President acted *mala fide* and whether the power exercised was *ultra vires.*

The difficulty that arises with this position is the direct conflation of the grounds of review of a proclamation issued under Article 356 with that of a proclamation issued under Article 352. As shall be discussed, the nature of the emergencies are at variance from each other, and so are their effects and their procedure. They are also invoked in different contexts which require different kinds of political assessments to be made, which have been vested with the Union executive's judgement by the Constitution. The competing consideration to preventing the courts' interference into a matter which is to be solely decided based on subjective political considerations left to the wisdom of the executive, is that of a misuse of emergency powers by the executive, which India has been witness to in the past. There is a reliance placed on constitutional values and constitutional supremacy, and the principle of rule of law. However, this conflation has been criticised and supported from different perspectives.

Part II of the paper shall discuss the scheme of emergency powers within the Indian constitution, after which Part III shall lay down the trajectory of judicial interpretation through various decisions. After arriving at the present position of law, Part IV will adopt a brief comparative perspective with respect to the exercise of emergency powers in the United States and Canada. Part V concludes with the acknowledgement of the debate and the requirement of establishing a balance between the protection and promotion of the rule of law and constitutionality on the one hand, and of a workable doctrine of separation of powers and

[5] S. R. Bommai v. Union of India AIR 1994 SC 1918.
[6] AIR 2006 SC 980.
[7] Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461.

of executive wisdom in times of crisis. Not much literature exists on the debate discussed in the present paper, that is, of the parity of standards of review. However, the author has surveyed other literature for the strands of argument concerning the rule of law, emergency excesses and judicial review.

II. SCHEME OF EMERGENCY POWERS

Article 356(1) provides that the President, on receipt of a report from the Governor of the state or otherwise, if satisfied that a situation has so arisen whereby the government of a state cannot carry out its functions in accordance with the provisions of the Constitution, may issue a proclamation to suspend the government and assume the position of the Governor of the state,[8] part the functions of the legislature of the state to the Parliament,[9] or carry out any such actions which may in his prudence be best suited for giving effect to the objects of the proclamation.[10]

In comparison, a proclamation of emergency under Article 352(1) may be issued by the President if he is satisfied that a grave situation exists whereby the security of India or any part thereof is threatened by external aggression or war or armed rebellion.[11] Such a proclamation may be made even before the actual occurrence of the abovementioned situations, if the President is satisfied regarding an imminent danger thereof.[12] Proclamations passed due to failure of constitutional machinery in a state cease to be operative after two months, unless they have been approved by both Houses of Parliament before expiration of the same.[13] On approval, a proclamation continues to be in operation for a period of six months.[14] A proclamation of national emergency ceases to operate a month after its issuance unless approved by resolutions of both Houses of Parliament,[15] after which it continues to operate for a period of six months.[16]

The effects of a proclamation of emergency issued under Article 352(1) are far-ranging and have been incorporated in various other provisions of the Constitution, for

[8] Article 356(1)(a), Constitution of India.
[9] Article 356(1)(b), Constitution of India.
[10] Article 356(1)(c), Constitution of India.
[11] Article 352(1), Constitution of India.
[12] Id.
[13] Article 356(3), Constitution of India.
[14] Article 356(4), Constitution of India.
[15] Article 352(4), Constitution of India.
[16] Article 356(5), Constitution of India.

instance, Article 83(2), Article 250, Article 353, Article 354, Article 358 and Article 359. It provides no authority to suspend the functioning of the Constitution in a state. Although the State Government continues to function normally and exercise functions assigned to them under the Constitution, the behaviour of Indian federalism undergoes a transformation; the Parliament is empowered to make law with respect to any matter in the State list which is operative until six months after the proclamation ceases to have effect.

Under Article 356, the State Legislature is either dissolved or kept under suspended animation, and thus, ceases to function for the duration of the emergency. Laws for the state are made by the Parliament, which the Governor administers on behalf of the President. The relationship of all States with the Centre changes on the imposition of Article 352, whereas the effects of imposition of an emergency under Article 356 is restricted only to the particular state and the Centre. Furthermore, the imposition of a national emergency has direct implications on the exercise of fundamental rights by citizens, as opposed to the invocation of a state emergency. As may be observed, the affects and implications of both kinds of emergencies are vastly different.

III. JUSTICIABILITY OF THE PROCLAMATION

A. Procedure

National emergencies have been proclaimed in India on three occasions so far; in 1962 in light of the Chinese aggression in the North East Frontier Province, in 1971 due to the war engaged into with Pakistan and in 1975 due to internal aggression. The 38th Amendment Act passed in 1975 to address litigation challenging the validity of the Proclamation issued under Article 352[17] inserted clauses (4) and (5), which were intended to exclude judicial review of the President's satisfaction based on which the Proclamation was issued and subsisted.[18] The pre-1976 position was sought to be reverted to by the 44th Amendment Act passed in 1978.[19] The deletion of clause (5) enabled the court to examine proclamations which were sought to be continued beyond one month without the Parliament's approval by resolution as required under the amended clause (4), or beyond six months from the date of approval so obtained by the Parliament's resolution,[20] or if it is

[17] The Constitution (Thirty-Eighth) Amendment Act, 1975.
[18] *Id.*
[19] The Constitution (Forty-Fourth) Amendment Act, 1978.
[20] Article 352(6), Constitution of India.

sought to be continued even after a resolution is passed by the Parliament disapproving it,[21] or if the President does not call a sitting of the House after receipt of the notice under clause (8).

B. Judicial Evolution

The above constitutes a procedural review that the courts have been granted post the 44th Amendment Act. However, the scope of judicial review of the Presidential Proclamation of a national emergency has been addressed by the judiciary on two levels, *first,* a review of the requirement of satisfaction of the President in arriving at the decision; and *second,* a review of action undertaken by the President in exercise of his emergency powers. The judicial review of proclamation issued under Article 356 however, has remained at the level of reviewing the material relied upon to satisfy the need for issuance of the proclamation.

The courts have taken varying views regarding justiciability, often collapsing the distinction between proclamations issued under Article 356 and those issued under Article 352, treating them as part of the same family of emergency provisions. In the decision of *Mohan Chowdhury v. Chief Commissioner,*[22] the court declined a *habeas corpus* petition filed by a detenu under the 1962 Defence of India Act on the grounds that the individual did not have the locus standi to enforce his right during an Emergency. By virtue of the President's Order passed under provisions of Article 359(1) in furtherance of the emergency declared under Article 352, the individual was held to have lost the locus standi to claim for the enforcement of fundamental rights under Articles 21 and 22. The Supreme Court subsequently ruled against the appellants when the High Court of Punjab and Haryana sought to justify their refusal to entertain detentions made under the Defence of India Act and the constitutionality thereof.[23]

Although the court was in consonance with its earlier decision in *Mohan Chowdhury* in restricting its amenability to writ petitions in the nature of habeas corpus, it addressed the avenues available to detainees wishing to challenge the legality or propriety of legislations, in *Makhan Singh.*[24]

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[21] Article 352(8), Constitution of India.
[22] AIR 1964 SC 173.
[23] Makhan Singh Tarsikka v. State of Punjab, AIR 1964 SC 381.
[24] Id.

The decision came in light of a challenge against detentions made by the Central Government under the Defence of India Rules enacted in furtherance of powers granted to it by the Defence of India Ordinance. The petitioners could not be precluded by the Presidential Order from proving that their detentions were made outside the provisions of the Act, or in excess of the power conferred to them or if the detention was made *mala fide* due to a fraudulent exercise of power. The court refused to expand the scope to address situations of prolonged emergencies leading to infringement of fundamental rights of individual citizens.[25] It categorised the political nature of the question as delimiting its scope. The onus of safeguarding against the potential abuse of powers was left to the vigilant public opinion and debate, and direct engagement with the political system.

The court in later decisions of *Ananda Nambiar v. Chief Secretary*[26] and *Ram Manohar Lohia v. State of Bihar*[27] solidified the position in *Makhan Singh,* and added two additional grounds of challenge – of the detention order being employed by an unauthorized person, or if the detention was sought to be justified on grounds different from that mentioned in the act under which it was being carried out.

However, the court's opinion voiced by Subba Rao CJ in the decision of *Ghulam Sarvar v. Union of India*[28] addressing an argument of the existence of a possibility of abuse of power leading to totalitarianism, seemed to concur with *Makhan Singh* when it observed that the safeguard against such a situation is the wisdom of the executive and public opinion. It however refused to address the question of whether courts can ascertain the nature of executive action in declaring or continuing emergency being actuated by *mala fides* and an abuse of the power thereof.

With *ADM Jabalpur v. Shivkant Shukla,*[29] the bar to the jurisdiction of courts was held to be total and absolute when a proclamation under Article 352 was followed by an Order under Article 359(1). A review was held not to lie even in cases of *mala fide* or *ultra vires* exercise of power as the entertainment of such a plea would amount to an enforcement of that fundamental right. Khanna J's vociferous dissent in the decision was based on the violation of rule of law as a consequence of ousting judicial supremacy, which he opined not

[25] Venkat Iyer, States of Emergency: The Indian Experience, 118 (Butterworths India, 2000).
[26] AIR 1966 SC 657.
[27] AIR 1966 SC 740.
[28] AIR 1967 SC 1335.
[29] AIR 1976 SC 1207.

to have extinguished due to a statute negating it. His reliance on a "brooding omnipotence" was considered unsustainable in light of positive law which provided for the very opposite. The majority in *ADM Jabalpur* did not address the objection raised regarding the intolerance of absolute power that rule of law envisaged.

The question of justiciability of the proclamation was addressed once again in the case of *Bhutnath v. State of West Bengal*,[30] where it classified the correctness, adequacy or sufficiency of the grounds of satisfaction or the facts on which such satisfaction was based, as a political question, incapable of redress by courts, even in a situation where it posed peril to the exercise and enjoyment of fundamental rights. The appeal against such grounds was opined to be made to the polls rather than to courts.[31] It was post *Bhutnath* that the 38th Amendment Act was passed, declaring the satisfaction of the President to be final and conclusive, unamenable to scrutiny of the courts.

The assessment of the situation of danger mandating recourse to the extraordinary power is left to the subjective satisfaction of the executive, which has the responsibility of protecting the state against threats from external aggression, armed rebellion or war. Courts are, with the objective assessment available to them, necessarily unfit to make such a determination. On addressing the question, Justice Bhagwati in the decision of *Minerva Mills v. Union of India*[32] held that a mere political complexion adduced to the issue at hand would not in entirety exclude judicial review by courts, which would continue to exist as long as a constitutional question is involved, and as reinforcing the basic structure of the Constitution.[33] Herein, the court reserved the power to examine the executive's exercise of powers within the contours of constitutionality, while being simultaneously cognizant of the constitutional values that all the organs of the state are committed to preserve and further.[34]

It however qualified this observation with the acknowledgment that the satisfaction of the President under Article 352 is a subjective one and cannot be based on 'judicially discoverable and manageable standards'. Therefore, where the satisfaction is absurd, perverse, *mala fide,* or based on wholly extraneous or irrelevant considerations, it amounted to no satisfaction at all, inviting judicial intervention notwithstanding Article 352(5). Despite

[30] AIR 1974 SC 1207.
[31] *Id*, at 811.
[32] AIR 1980 SC 1789.
[33] State of Rajasthan v. Union of India, AIR 1977 SC 1361
[34] Minerva Mills, ¶368.

expanding the scope of judicial review, the court also excluded from its purview the challenge of a state of emergency whose grounds have ceased to exist, in light of Article 352(2) which provides for two grounds under which a proclamation of emergency could be brought to an end. However, it continued to reserve the possibility of judicial intervention in cases where there is no justification at all for the continuance of the proclamation of emergency, in all but the most extreme cases.[35]

In the decision of *SR Bommai v. Union of India*[36], the nine-judge bench unanimously ruled in favour of reviewability of the Presidential Proclamation under Article 356, though the judges differed on the question of the scope of review available. The grounds of judicial review largely followed from those discussed in the above mentioned decisions. It was observed that even though the proclamation is issued on subjective grounds, it must be based on an objective determination which is reviewable. Further, the materials relied upon by the President in taking the decision must be such as would induce a reasonable man to come to a conclusion in that respect. The action of the President under Article 356 was classified as a constitutional function which though wrapped in political thicket, per se would not avail immunity from judicial review. This expanded scope of judicial review of the President's proclamation was further expanded in the decision of *Rameshwar Prasad (VI) v. Union of India,*[37] where judicial review of the Governor's satisfaction, regardless of it being based on ministerial advice, was held not to be excluded on the basis of immunity.

The expansion of the extent and scope of judicial review of presidential proclamations may be observed through the above outlined judicial decisions. It is pertinent to note how the discussion on Article 352 existed in parallel alongside the debate surrounding the scope of review under Article 356, without the courts having undertaken a conscious effort to address the question of standards of review *differently* for both.

A pertinent question that arises herein for deliberation is, whether the foregoing observations made with regard to issuance of proclamations under Article 356(1) can be straightaway applied to a proclamation issued under Article 352(1) as they are similarly worded with respect to the President's satisfaction. In issues concerning national emergency under Article 352, there already exists scope for challenge on the post-proclamation stage

[35] States of Emergency, *supra n.* 25, p. 266.
[36] AIR 1994 SC 1918.
[37] AIR 1977 SC 1361.

with respect to the validity of the Presidential Order issued under Article 359, and their implications on fundamental rights.

The challenge against the Presidential Proclamation issued under Article 356, however, exists on the very material based on which the President grounds his satisfaction for the need to issue the proclamation and invoke the procedure under Article 356. However, it may be observed that post the decision in *Bommai,* the scope of review available under Article 352 has been extended to the stage of issuance of the proclamation as well, in addition to the review that already existed over the actions executed after such issuance. Therefore, there now exists a two-stage review process under Article 352 – *first*, the satisfaction on which the President based his assessment of the situation warrantying the issuance of national emergency, and, *second*, of orders and ordinances passed under Article 359, post declaration of national emergency. The extension of a two-stage judicial review to the power to proclaim a national emergency granted to the President by the Constitution, to be exercised in situations gravely threatening the nation, raises pertinent questions about the extent of actual power vested with the President, and of separation of powers.

There are a range of opinions that go both ways, which shall further be examined. According to the learned author M.P. Jain, judicial review has come to be regarded as part of the basic structure of the Constitution, which has been expanded to review of the President's proclamation under Article 356(1). He has opined that in furtherance of the same, it would be safe to extend the reasoning to a proclamation to Article 352(1) as well, with the grounds of review being those enunciated by Bhagwati J. in *Minerva Mills.* D.D. Basu draws a stark distinction between the emergencies under Article 352 and 356, one being a response to the very existence of a state and the other, a response to the failure of constitutional machinery in a state.[38] He further goes on to highlight the practical difficulties of establishing the review of *mala fides.*

Wade and Forsyth[39] acknowledge the political nature of the decision that the executive takes which the courts are manifestly incapable of, while also being cognizant of a situation of misuse of such powers. The considerations that require to be balanced in this situation are, on one side, the independence of the executive, the political wisdom it possesses and must be trusted to exercise, the subjective nature of the decision that requires

[38] DD Basu, Commentary on the Constitution of India, Vol. 9, (8th ed., 2011).
[39] Wade on Administrative Law, (9th ed.), p. 420-421.

consideration of multiple circumstantial concerns, and on the other hand, the possibility of misuse of power, the idea that the Constitution does not envisage an unlimited power on any organ or authority, that of rule of law and the need to assess if the powers are being exercised in the manner envisaged by the Constitution.

IV. COMPARATIVE PERSPECTIVE

A comparative perspective may assist us in making a more informed decision in the approach best suited for the Indian democracy. A caveat may be added at this juncture however, of the differences in the forms of government adopted by the countries under consideration, which have impacted their understanding of separation of powers and exercise of extraordinary powers. The understanding of the exercise of emergency powers in the United States and Canada has evolved over the decades.

They both began with statute-based systems of regulating emergency powers post World War I. Canada delegated broad powers to the executive in times of emergency situations through the War Powers Act, whereas a delegation was undertaken in the United States through a series of smaller statutes. Post 1970s however, the approach adopted by the two countries branched out differently.[40] On recognition of the abuses of emergency powers that the two countries had faced, their responses to the same formulated the approach they adopted in the future. Canada underwent a constitutional revolution of sorts, which produced a different sensibility of the rule of law, the possibilities of exceptions from it and the accountability of exercise of governmental power to constitutional principles. Through this new understanding, it sought to limit the powers exercised by the executive within the contours of the constitution where it rooted its powers, which has been considered a preferred alternative to claiming that executive powers swallow the rest in a time of crisis. This may be evidenced by the various measures it undertook to streamline the exercise of executive powers in times of emergency brought about due to threats of war or terrorism, economic emergencies, health emergencies, natural disasters and other such disruptive situations.[41]

The United States in contrast, underwent no such revolution in constitutional understanding of exercise of emergency powers. The scheme of the allocation of powers

[40] For a detailed historical and legislative discussion on the United States and Canada's use of emergency powers, *see*, Kim Lane Scheppele, *North American emergencies: The use of emergency powers in Canada and the United States*, 4 International Journal of Constitutional Law 213–243 (2006).
[41] Id.

allowed the executive to claim power and exercise it, and receive post-facto ratification for the same. Presidents have continued to assume disproportionate amounts of power, especially post the attacks on 9/11. The policies have been far more draconian, and are not always grounded on statutory enactments.[42] The considerations of national security have overwhelmed the regard for individual rights and freedoms, and may be evidenced by the statistics and grounds used for the detention of thousands of people without fair trial.

Thereby, the legislative trajectory adopted by the United States has provided the executive branch with a higher prerogative in addressing emergency situations, with courts giving a go-ahead to executive assessment.[43] Canada's constitutional revolution came about on acknowledgement of the wide abuse of powers that the executive had engaged into on multiple occasions, which was sought to be protected against. It rooted its understanding of emergency powers with that of the Canadian Charter of Rights and Freedoms.[44] It sought to strike a balance by enabling the exercise of emergency powers in times of crisis, provided its consonance with its constitutional values.

With the United States' excesses on one end and the renewed constitutional understanding that Canada has adopted, the Indian judiciary has carved out a position for itself to ensure a movement from the former to the latter. Since there already existed one level of justiciability of a presidential proclamation of national emergency, a balance needs to be struck by courts regarding the extent of review to be established.[45] The nature of a national emergency continues to remain extremely sensitive and political, and has been conferred by the Constitution to the elected representatives in the Indian democracy. Important comparative constitutional learnings assist us in formulating the need to streamline the manner of exercising emergency powers along with establishing a cogent, precise system of review, which also requires to be flexible to an extent to account for political changes.[46]

V. CONCLUSION

[42] Id.
[43] United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003).; In re Sealed Case, 310 F.3d 717, 734 (Foreign Int. Surv. Ct. Rev. 2002).; Hamdi v. Rumsfeld, 316 F.3d 450, 460 (4th Cir. 2003), vacated and remanded by 124 S. Ct.
2633; 159 L. Ed. 2d 578. Rumsfeld v. Padilla, 159 L. Ed. 2d 513, 124 S. Ct. 2711 (2004).
[44] *Supra n.* 39, at 241.
[45] Imtiaz Omar, Emergency Powers and the Courts in India and Pakistan (Martinus Nijhoff Publishers) (2002)
[46] Supra n. 24.

The two-stage review process that the Indian judiciary exercises over the proclamation of emergency on the breakdown of the constitutional machinery of a state under Article 356 has been extended to the proclamation of a national emergency under Article 352 through various judicial interpretations discussed above. The extension of the review process not only impedes the executive's decision making powers to a certain extent, but it also fails to recognize the differences in the nature of emergencies proclaimed; where one deals with purely centre-state relations, the other has the potential to impact the fundamental rights of citizens.

Further, the workability of the parity of standards is noted with concern, *first*, in terms of the subjectivity of the political considerations that the executive must necessarily engage with in making such decisions, and *second*, with respect to the ability of courts to engage into such subjective decisions, given the limited information and exposure that they have. The larger concern that the debate revolves is around the preservation of the rule of law. The judiciary's response and its eagerness to involve itself within the loop of the executive's decision making that potentially affects the population at large, stems from its commitment to constitutionality. One need only examine the executive excesses of other jurisdictions and the concurrent use of emergency powers in response to acknowledge the merit in creating limits in the exercise of emergency powers to narrow the scope of potential misuse. The Canadian recourse to its constitution, as opposed to the United States' reliance on statutory law, has enabled it to remain in consonance with its constitutional values, and provides a pertinent lesson for India. Furthermore, in its quest to uphold the rule of law, the evolution of an understanding rooted in constitutionality has the potential to preserve and uphold the basic structure of the constitution and the rights and freedoms of its citizens. However, the courts must strive to create a balance between prudent judicial restraint where informational or operational drawbacks exist on the institution, and in providing for a redressal forum in order to perform its function as a check on the other organs of the state. An understanding premised on the preservation and furtherance of the rule of law and rooted in the constitution may assist in creating the balance.

A PROPOSAL FOR A MODEL WITNESS PROTECTION PROGRAMME: NEED AND LEGAL RAMIFICATION

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ABSTRACT

In the criminal justice system, witnesses and their testimonies play a decisive role in reaching the conclusion of the case. Witnesses, being the most crucial participants in the procedure, are often threatened or induced by the parties involved in the case to change or retract their statements. Thus, cases do not reach a truthful and rational conclusion. The judicial machinery fails the victims in their quest for justice. The rights given to witnesses and victims are quite limited in comparison to the wide range of rights of the accused. Therefore, protecting the witnesses becomes indispensable for achieving the foremost objective of the criminal justice system. The authors propose a possible model for a witness protection programme in India, keeping in mind such programmes existing across the globe.

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I. INTRODUCTION

"Witnesses are the eyes and ears of justice"- Jeremy Bentham.

A witness is one who sees, knows or vouches for something and gives testimony under oath or affirmation in person, by oral or written deposition or by affidavit.[1] In a criminal justice system, the conviction of a guilty accused depends primarily on the testimonies given by witnesses. Thus, a witness turning hostile is a major problem which plagues the criminal justice system.

Reportedly, twenty- four witnesses have died in the *Vyapam* scam,[2] nine witnesses have been attacked and three crucial witnesses have been killed in the *Asaram Bapu* case,[3] five people connected with the National Rural Health Mission scam died in Uttar Pradesh.[4] In most of these cases, the deceased had been threatened and subsequently died under mysterious circumstances in 'accidents and suicides.' These cases remain unsolved till date. In 2003, the *Supreme Court in NHRC v. State of Gujarat* emphasised the need for protection of witnesses for the successful prosecution of criminal cases.[5] Later, *in Zahira Habibulla Sheikh v. State of Gujarat*, the apex court for the first time expressly asked for "*legislative measures to emphasise prohibition against tampering with witness, victim or informant*."[6] Recently, the Supreme Court has expressed serious concerns over this problem and has called for a witness protection scheme.[7]

In 2006, the Law Commission of India, in a detailed report, recommended the enactment of a legislative act for the protection of witnesses and their identities.8 Following these recommendations, in 2015, the state of Delhi came up with an elaborate and detailed

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[1] Witness, Black's Law Dictionary (6th ed. 1995).

[2] *Another accused in Vyapam scam dies, number up to 24,* Hindustan Times (June 29 2015), http://www.hindustantimes.com/bhopal/another-accused-in-vyapam-scam-dies-number-up-to-24/story-41kf0lzQWtVx3ZcQAdA2XO.html.

[3] Security for Asaram witness The Hindu (July 16 2015), http://www.thehindu.com/news/national/ other-states/security-for-asaram-witness/article7426972.ece.

[4] *NRHM scam: Supreme Court asks CBI to examine 'vital witnesses' in three months* The Hindu (October 18 2016), http://www.thehindu.com/news/national/other-states/NRHM-scam-Supreme-Court-asks-CBI-to-examine-%E2%80%98vital-witnesses%E2%80%99-in-three-months/article10192840.ece.

[5] NHRC v. State of Gujarat 2003, (9) SCALE 329.

[6] Zahira Habibulla Sheikh v. State of Gujarat, (2004) 4 SCC 158.

[7] *Supreme Court pitches for witness protection programme,* Hindustan Times (November 28, 2016), http://www.hindustantimes.com/india-news/supreme-court-pitches-for-witness-protection-programme/story-sINaQQHH1RxCc19TVlp5nJ.html.

[8] *198th Law Commission Report, Witness Identity Protection and Witness Protection Programmes,* Ministry of Law and Justice, Govt. of India, available at http://lawcommissionofindia.nic.in/reports/rep198.pdf.

witness protection scheme which has been implemented successfully.[9] Acting on the directions of the Bombay High Court, the Maharashtra government drafted the Maharashtra Witness Protection Bill.[10] In April 2016, a private member of Parliament introduced the Witness Protection Bill in Lok Sabha but it remains stuck in the parliamentary logjam.[11] Since there was no consensus among the states, the matter was referred to the Bureau of Police Research and Development to examine the feasibility and financial implications of the programme.[12]

This paper attempts to come up with a model witness protection programme in India. Section II examines the role of witnesses in the administration of justice, while Section III analyses the causes of witnesses turning hostile and the consequences thereof. Subsequently, in Section IV, a brief overview of such schemes across the globe have been described, with an examination of the current scenario in India which is far from satisfactory. The authors in Section V then propose a possible model for a witness protection programme in India, keeping in mind the demographics of the country. In Section VI, the article assesses the possible hurdles in the implementation of the model and provides suggestions for bypassing such obstacles. It concludes by recommending the essential steps need to be taken by the Central and State governments for the successful implementation of the scheme.

II. WITNESSES AND THEIR ROLE

Witness is any person who is acquainted with the facts and circumstances, or is in possession of any information or has knowledge necessary for the purpose of investigation, inquiry or trial of any crime involving an offence and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case and includes a victim of such offence.[13]

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[9] Jatin Anand, *First step towards witness protection,* The Hindu (July 31, 2015), http://www.thehindu.com/news/cities/Delhi/first-step-towards-witness-protection/article7483593.ece.

[10] *Extend witness protection scheme to cops: HC to Maharashtra govt.*, Hindustan Times (February 9, 2016), http://www.hindustantimes.com/mumbai/maharashtra-must-extend-witness-protection-benefits-to-ios-bombay-hc/story-b6N8C9LLDAwU6GfVQnoUsL.html.

[11] Sanjay Hegde, *Witness against the Prosecution,* The Telegraph (August 3, 2016) https://www.telegraphindia.com/1160803/jsp/opinion/story_100145.jsp#.WJwWyvl97Dd.

[12] *No consensus among states on witness protection bill: Govt*, The Indian Express (February 3, 2017) http://indianexpress.com/article/india/no-consensus-among-states-on-witness-protection-bill-govt-45145 03/.

[13] Section 3(ed), The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015.

The witness is an important player in the administration of justice. His role is vital both at the stage of investigation and at the trial stage.[14] Without the witness's active support, the investigation of a crime may not come to a logical end.[15] Underlining the significance of witnesses, Wadhwa J. in *Swaran Singh v. State of Punjab* said, "*A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence*."[16] But, due to loopholes in the machinery of the criminal justice system, most of the witnesses are unable to perform this duty as they turn hostile due to various reasons.

III. EFFECTS OF WITNESSES TURNING HOSTILE

Witnesses may turn hostile because of a number of reasons,[17] threat being the primary reason in a majority of cases. The cases dealing with offences committed by people who belong to an influential section of the society often end in acquittals due to lack of evidence. In some cases, the investigating officer does not even record witnesses' testimonies under Section 161 of Code of Criminal Procedure, 1973 ("Cr.P.C.") by actually examining them. Important witnesses retract their initial statements which could be crucial in getting the accused convicted.[18] This mainly happens because the witness or someone in whom they are interested might be exposed to some danger if they give a statement which is averse to the interests of the politically influential accused.[19] As a result of the absence of protection from such dangers, witnesses turn hostile.[20] In Mau district, two rape victims were shot dead who were due to testify against the accused. Their family members stated that they were being harassed by the accused to withdraw their complaints.[21]

Another prevalent reason is the inducement offered to the witness for changing his statements. A disinterested witness, who is otherwise gaining nothing from the process, can be easily lured by monetary or other inducements. Varun Gandhi, the general secretary of the

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[14] Justice M. Jagannadha Rao, *Witness protection* (December 1, 2015), https://sabrangindia.in/article/witness-protection-justice-m-jagannadha-rao.
[15] *Id.*
[16] Swaran Singh v. State of Punjab, (2000) 5 SCC 668.
[17] Nithya Nagarathinam, *Rape, Compromise, and the Problematic Idea of Consent,* The Hindu Centre (July 20, 2015), http://www.thehinducentre.com/the-arena/current-issues/article7443765.ece.
[18] *Truth, lies and red tape- In over 70 per cent of cases in India, witnesses tend to turn hostile,* The Telegraph (December 3, 2006), https://www.telegraphindia.com/1061203/asp/insight/story_7084130.asp.
[19] *Committee on Reforms of Criminal Justice System,* Ministry of Home Affairs, Govt. of India, available at http://www.mha.nic.in/hindi/ sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf.
[20] *Id.*
[21] Nita Bhalla, *Twin murders of rape victims spark calls for witness protection in India*, Reuters (September 14, 2015), http://www.reuters.com/article/india-rape-victim-murders-idUSKCN0RE1H520150914.

Bharatiya Janata Party, was exonerated of all charges in the alleged hate speeches he made in 2009.[22] The number of witnesses turning hostile in this case was as large as eighty- eight.[23] Later, an explosive sting operation conducted by Tehelka revealed that most of the witnesses had been bribed to change their statements.[24]

Apart from these, the whole machinery of the criminal justice system also discourages witnesses to be truthful and consistent.[25] Frequent adjournments during judicial proceedings frustrate witnesses.[26] Convicting an obviously and visibly guilty accused becomes a cumbersome process because of such procedural difficulties. A witness, who may have been a mere bystander and who has no interest in the victim of the crime does not have any incentive to go through the tiresome judicial process. Witnesses are not provided adequate allowances and have to face humiliation in the courtrooms. Thus, there are no reasons for which they should bear the mental agony caused as a result of the trial.

The witnesses are left with two options- either they can turn hostile and save themselves from all the mental or physical harm they may be subjected to, or they can remain resolute and truthful. The tedious judicial process forces a witness to opt for the former alternative.

This leads to low conviction rates. According to the latest statistics issued by the National Crime Records Bureau in 2015, out of the 1,05,02,256 cases, trial has been completed in 13,25,989 cases only.[27] The percentage of cases tried by courts to total cases for trial during 2012 to 2015 was around 12.6% whereas three decades ago i.e. in 1984, it was 29.9%.[28] The conviction rate, which was as high as 62.7% in 1985, has come down to 46.9% in 2015.[29] In rape cases, victims turning hostile account for over 80 percent of the total acquittals.[30]

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[22] Rahul Kotiyal and Atul Chaurasia, *How Varun Gandhi silenced the system*, Tehelka (May 25, 2013), http://www.tehelka.com/2013/05/how-varun-gandhi-silenced-the-system/.
[23] *Id.*
[24] *Id.*
[25] Aditi Prasad, *Witness Hostility sabotaging fair trials and Frustrating the Courts in India*, (November 14, 2011), http://legalsutra.com/3243/witness-hostility-sabotaging-fair-trials-and-frustrating-the-courts-in-india/.
[26] *Id.*
[27] *Crime in India 2015: Compendium*, (2015), National Crime Records Bureau, , Ministry of Home Affairs, Govt. of India, available at http://ncrb.gov.in/Stat Publications/CII/CII2015/FILES/Compendium-15.11.16.pdf.
[28] *Id* at 72.
[29] *Id.*
[30] Nithya, *supra* note 17.

The effectiveness of a criminal justice system is measured in terms of its effects on the offending.[31] Reduced conviction rates result in a negligent attitude towards crime in the society. The fear of conviction erodes and criminal incidents rise in number. Thus, the effectiveness of the criminal justice system is compromised. Delay in the administration of justice and punishment of offenders are the causes of increasing apathy and distrust towards the judicial machinery which subsequently results in witnesses turning hostile. Thus, the effect becomes the cause and it results in an endless cycle. The prime consideration before us is to ensure a fair trial which can happen only if the witnesses are able to depose without fear, freely and truthfully.[32] Thus, the current situation urgently calls for a scheme for the protection of witnesses.

IV. WITNESS PROTECTION PROGRAMMES: NATURE AND SCOPE

A Witness Protection Programme is a scheme which aims to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination.[33] It is aimed to identify a series of measures that may be adopted to safeguard witnesses and their family members from all threats.[34]

A. Statutory Recognition

1. International Instruments and Statutes

There are a number of international instruments which recognize the need to protect witnesses from intimidation, threats and harm. Article 24 of the United Nations Convention Against Transnational Organized Crime deals with protection of witnesses from potential retaliation or intimidation.[35] Article 13 of Convention against Torture provides for similar protection.[36] Article 6(d) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power directs the states to take measures to minimize inconvenience to victims, protect their privacy and ensure their safety.[37] Similar protection is given in Articles

[31] Anthea Hucklesby and Azrini Wahidin, *Criminal Justice* 6 (2009).
[32] State of Bihar v. Rajballav Prasad, Criminal Appeal No. 1141 of 2016.
[33] Delhi Witness Protection Scheme 2015.
[34] *Id.*
[35] Convention against Transnational Organized Crime available at http://www.unodc.org/unodc/treaties/CTOC/.
[36] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, available at http://www.ohchr.org/EN/ProfessionalInterest /Pages/CAT.aspx.
[37] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations, available at http://www.un.org/documents/ga/res/40/a40r034.htm.

32 and 37(4) of UN Convention against Corruption, 2003.[38] UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime provides special protection, assistance and support to child victims and witnesses.[39]

In addition to international instruments, major international criminal tribunals provide for such protection in their statutes. Article 68 of the Rome Statute of the International Criminal Court provides for protection of the victims and witnesses and their participation in the proceedings.[40] It empowers the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.[41]

B. Witness Protection in Indian statutes

No specific rules, regulations or laws have been enacted by Parliament to protect witnesses. However, various statutes have provisions for witnesses. Sections 151 and 152 of the Indian Evidence Act, 1872 protect the witnesses from being asked indecent, scandalous, offensive questions, and questions which intend to annoy or insult them.[42] Under Section 312 of Cr.P.C. a criminal court may order payment of reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court.43 Section 195A of the Indian Penal Code penalises threatening or inducing any person to give false evidence.44

It is ironic that draconian penal laws like the Terrorist and Disruptive Activities (Prevention) Act, 1987 ("TADA") and the Prevention of Terrorism Act, 2002 ("POTA") provide for protection of witnesses. Section 16 of TADA empowers the court to take measures for keeping the identity and address of a witness secret.45 The court may avoid the mention of names and addresses of the witnesses in its judgments or in any records of the case accessible to public and issue directions for securing the identity and addresses of the witnesses.[46] Section 17 of the National Investigation Agency Act, 2008 and Section 30 of

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[38] Convention against Corruption, United Nations, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.
[39] Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council, United Nations, available at https://www.unodc.org/pdf/criminal_justice/Guidelines_on_Justice_in_Matters_involving_Child_Victims_and_Witnesses_of_Crime.pdf.
[40] Article 68, Rome Statute of the International Criminal Court.
[41] *Id*.
[42] Sections 151, 152, Indian Evidence Act, 1882.
[43] Section 312, Code of Criminal Procedure, 1973.
[44] Section 195A, Indian Penal Code.
[45] Section 16, Terrorist and Disruptive Activities (Prevention) Act, 1987.
[46] *Id*.

POTA have exactly the same provisions.[47] In addition to this, Section 3 of POTA punishes a person who threatens a witness with violence or wrongful restraint or confinement.[48]

V. EXISTING WITNESS PROTECTION PROGRAMMES

A. In Major Democracies

The United States has one of the most developed Witness Protection Programs in the world. The U.S. Federal Witness Security Program, commonly known as the Witness Security (WITSEC) Program provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence.[49] Protection may also be provided to the immediate family of, or a person closely associated with such witness or potential witness.[50] The services provided to the protected individuals may include physical protection, documents for a new identity, housing, transportation, subsistence for living, assistance in obtaining employment, and other services needed to make the individual self-sustaining.[51]

In U.K., Section 51(1) of the Criminal Justice and Public Order Act, 1994 provides that it is an offence to harm and threaten victims or witnesses knowing or believing that they are assisting in the investigation of an offence.[52]

Japan has evolved a comprehensive Witness Protection Programme under its Code of Criminal Procedure. An accused may be denied bail if there is reasonable ground to believe that he may threaten or may actually injure the body or damage the property of a victim or of a witness or relative of the victim/witness.[53]

B. In India

On July 30, 2015, Delhi became the first state in the country to enact and notify a Witness Protection Scheme.[54] Section 7 of the scheme provides that the witness protection

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[47] Section 17, The National Investigation Agency Act, 2008; Section 30, Prevention of Terrorism Act, 2002.
[48] Section 3, Prevention of Terrorism Act, 2002.
[49] Section 3521(a)(1), 18 U.S. Code, 2000.
[50] *Id*.
[51] Sections 3521(b)(1)(A)-(F) and (I), 18 U.S. Code, 2000 (US).
[52] Section 51(1), Criminal Justice and Public Order Act, 1994 (UK).
[53] Sections 96.1(4), 89(5), Code of Criminal Procedure (Japan).
[54] Jatin Anand, *First step towards witness protection*, The Hindu (July 31, 2015), http://www.thehindu.com/news/cities/Delhi/first-step-towards-witness-protection/article7483593.ece.

measures shall be proportional to the threat and shall continue for limited duration.[55] It provides for protection measures such as installation of security devices in the witness's home, close protection and regular patrolling around his house, temporary relocation by granting financial aids from Witness Protection Fund, escort to and from the court in a state funded conveyance, etc.[56]

Additionally, specially designed 'vulnerable witness courtrooms' have been established to conceal the identity of witnesses.[57] These courtrooms have special arrangements like live links, one-way mirrors, separate passages for witnesses and accused, option to modify the audio feed and images of witnesses, etc.[58] Similar protection has been provided to child victims, sexual offence and disabled in the protocols issued by the Delhi High Court.[59]

The Bombay High Court suggested the Maharashtra government to formulate a witness protection scheme on somewhat similar lines as enacted in Delhi.[60] The Government submitted a draft scheme in the High Court which had provision for protection for witnesses, whistleblowers, and RTI activists.[61]

The Witness Protection Bill, 2015 which has not yet been passed, contains provisions for the protection of witnesses. These provisions ensure that there is no harm to the witness' body, property, mind or any associated people and thus maintains their right to life. Such protection is provided during the process of investigation and inquiry, during the trial as well as after the trial as warranted by the court.

VI. SUGGESTED MODEL

As stated above, there is no Central or State Act or scheme regarding protection of witnesses in India except in Delhi. To come up with a feasible scheme for witness protection

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[55] Section 7, Delhi Witness Protection Scheme, 2015.
[56] *Id*.
[57] *Id*.
[58] Id.
[59] Guidelines for recording of evidence of vulnerable witnesses in criminal matters 2013, available at http://delhihighcourt. nic.in/writereaddata/upload/Notification/NotificationFile_LCWCD2X4.PDF.
[60] *Extend witness protection scheme to cops: HC to Maharashtra govt.,* Hindustan Times (February 9, 2016), http://www.hindustantimes.com/mumbai/maharashtra-must-extend-witness-protection-benefits-to-ios-bombay-hc/story-b6N8C9LLDAwU6GfVQnoUsL.html.
[61] *Id*.

in consonance with the Indian criminal procedure, it is essential to identify the hurdles faced by witnesses.

1. No incentives- A person who has merely witnessed a criminal incident but is not related to the victim in any way, would not be interested in going through a tiresome process to assist the court to arrive at a truthful conclusion. In the absence of any incentives, such persons would not participate, leading to acquittals due to lack of evidence. Although several High Courts have implemented provisions for allowances in their rules, such provisions are not complied with.[62]
2. Inconvenience- Witnesses face inconvenience during every stage of the procedure including investigation and trial. They are humiliated and harassed as they are asked indecent and irrelevant questions. This discourages them from going ahead and giving their testimony.
3. Threat and Inducement- Witnesses fear getting involved, particularly in cases involving influential and muscle power wielding accused,
4. Delay- The case remains pending for an unreasonable period of time due to frequent adjournments. As a result of which witnesses have to deal with aforementioned problems till the conclusion of the case, thus, magnifying their effect. Due to such delay, sometimes either their memories get distorted or they meet their natural death.[63]

After taking a holistic view of the aforementioned problems and protection given to witnesses under various protection schemes across the world, an attempt has been made to formulate a suitable model.

A. Framework

Independent National and State Witness Protection Councils may be established as proposed under the Witness Protection Bill, 2015.[64] They will have the same constitution as prescribed in the Bill.[65] In addition to this, a District Protection Council may be established on the same lines to implement the scheme at the ground level. Further, a separate and independent police unit may be allotted to councils to carry out the investigation and provide

[62] *See* Rule 38, Allahabad High Court General Rules (Criminal); Chapter 9, Delhi High Court Rules.
[63] *See* Article 3, International Covenant of Civil and Political Rights; Article 21, Constitution of India.
[64] Sections 8, 12, The Witness Protection Bill, 2015.
[65] Sections 9, 10, 11, 13, 14, The Witness Protection Bill, 2015.

protection to the witnesses. Funds may be allocated to these councils in the manner provided under the 2015 Bill.[66]

B. Measures under the proposed scheme

The measures in the scheme may be provided at the following three stages -

1. During investigation

The time at which the incident has happened is very crucial as this is the stage when the person who has witnessed the crime makes his decision regarding participation in the process. Therefore, the scheme should have a provision for adequate arrangements for the convenience of the witness and a provision of allowance to enable them to arrive for testimony promptly and thus avoiding delay.[67]

Apart from incentives, they should be assured of guaranteed protection and anonymity, otherwise, they would not come forward to give evidence.[68]

- The witnesses may be provided state funded conveyance for the purpose of escorting them to the police station. If such arrangement is not possible then provision should be made for reimbursing the cost incurred in transportation.
- Since they are already traumatized, they should not be made to go through any humiliation or harassment once they reach the police station. The surroundings of the station should be welcoming. Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused.[69]
- They should not be asked irrelevant and indecent questions. Questions expressing doubts on their character should not be asked especially in cases of victims or witnesses of sexual offences.
- Arrangements should be made so that witness and accused do not come face to face.[70] Efforts should be made for isolating both the parties from each other from the time of the incident.

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[66] Sections 9, 13, The Witness Protection Bill, 2015.
[67] *See 14th Law Commission Report, Reform of Judicial Administration,* Ministry of Law and Justice, Govt. of India, available http://lawcommissionof india.nic.in/ 1-50/Report14vol1.pdf.
[68] Committee, *supra* note 19.
[69] *154th Law Commission Report, The Code of Criminal Procedure,* Ministry of Law and Justice, Govt. of India, available at http://lawcommissionof india.nic.in/101-169/Report154Vol1.pdf.
[70] State of Punjab v. Gurmit Singh, (1996) 2 SCC 384; Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14.

- In case of non-compliance, the witnesses can approach the District Council online or offline and get their grievances redressed.
- In case of any threat received by the witness, he can immediately report to the District Council. The council may be made accessible through helpline numbers, instant messaging applications like WhatsApp, etc.
- The council will make a preliminary inquiry and if the complaint is found to be genuine then it will register the witness and make him sign a Memorandum of Understanding (MoU).[71] The MoU will list out the obligations of state and the witnesses. Breach of MoU by the witness will result in his being taken out of the programme. The witnesses can demand different levels of protection (like CCTV cameras around his house, patrolling at night, personal guard, tapping of phone, relocation, protection of identity, etc.) and can nominate people (like family members or nearby relatives) for whom he wants such protection. The council will take into consideration the following factors: *Firstly*, the gravity of threats which depends upon the type of the case and the background of the accused[72]; *secondly*, significance of their testimonies; *thirdly*, whether they are sole witness in that case or any other factor the council deems fit. After examination of these factors, the council will decide the level of security and the persons to whom it may be provided.
- After registration, the council will bear the complete responsibility for the protection of convenience of witnesses.
- In case of any irregularity in compliance, the police officer in charge of the investigation shall be personally accountable and would be subjected to departmental enquiry and disciplinary action.

2. During Trial

- Victims and witnesses do not get the respect that they are worthy of and are prone to double victimization. Thus, during the proceedings, the outlook of advocates and judges towards the witnesses and victims should be sensitive. The procedure should be made pro-victims and pro-witnesses because the whole machinery has been established to protect and serve them.

[71] Law Com No 198, *supra* note 8.
[72] Committee, *supra* note 19.

- Indecent, scandalous, offensive questions and questions which intend to annoy or insult them should not be asked.[73] The questions to be put by accused in cross-examination should be given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing.[74]
- The court should keep the identity and the address of the witness as secret and avoid the mention of the names and addresses in its order or judgment.[75] During the proceedings, the accused and the witnesses should not come face to face as the mere sight of the accused may induce an element of extreme fear in the mind of the witnesses.[76] In such a situation he or she may not be able to give full details of the incident which may result in a miscarriage of justice.[77] A screen or some such arrangement should be made where the victim or witness do not have to undergo the trauma of seeing the body or face of the accused.
- If the safety of the witnesses and victims is in peril by commotion, tumult, or threat on account of pathological conditions prevalent in a particular venue then the venue of the trial can be changed.[78]
- To reduce the probability of witnesses getting threatened or induced within the court campus, arrangements regarding security should be made. CCTV cameras and metal detectors should be installed in every courtroom and within the premises.
- The diversion of personnel from the Police Stations for various relatively unimportant duties such as '*Bandobust*' is a common phenomenon.[79] Therefore, a police unit independent from the main unit may be provided which is under the control of the District Judge.
- Efforts should be made to record the statements of witnesses in one hearing to save them from the inconvenience of multiple visits to the court.
- 'Vulnerable Witness Courts' having special arrangements should be established following the Delhi scheme.[80] Trials in these courtrooms should take place in special

[73] Sections 151, 153, Indian Evidence Act, 1872.
[74] Sakshi v. Union of India, AIR 2004 SC 3566.
[75] Committee, *supra* note 19.
[76] Sakshi, *supra* note 74.
[77] *Id*.
[78] Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 S.C.C. 167; Zahira Habibulla Sheikh v. State of Gujarat, (2004) 4 SCC 158. *See* Sections 406, 407, Code of Criminal Procedure, 1973.
[79] 239th Law Commission Report, Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities, Ministry of Law and Justice, Govt. of India, available at http://lawcommissionof india.nic.in/reports/report239.pdf.
[80] Section 7, Delhi Witness Protection Scheme, 2015.

cases such as a child under 18 years of age, a witness of a sexual offence,[81] a disabled person or any witness who comes under the category of vulnerable witnesses in the opinion of the council.

- To prevent witnesses getting lured by monetary or other inducements, the council may conduct an inquiry if it finds that the statements of the witnesses have changed ludicrously. If they are found guilty of taking a bribe, then the council can impose fine and separate criminal proceedings under Section 344 of Cr.P.C. can also be initiated. Persons found guilty of intimidating the witnesses or offering inducements should be penalized. The accused should be denied bail if there are chances that he would threaten or harm the witness once he is out of jail.[82]
- If the procedure prescribed by the scheme is not followed during the trial, then the witness can approach District Judge for the redressal of the grievances. The District Judge while coordinating with the District Council will ensure the proper implementation of the scheme. He will submit a monthly report to the concerned High Court and will be answerable for the implementation.

3. After Trials

- After the conclusion of the case, the protection will continue for a reasonable period of time decided by the council depending on the circumstances of the case. The scheme can be revised either by the council or on the application of the witness if the chances of threat reappear.
- If the council is of the opinion that the threat is so high that the expenses incurred to provide appropriate protection would be unreasonably high, then it would relocate the witnesses permanently. They will be provided a new residence, new identity and new profession or vocation for their sustenance.[83]
- The council will provide for reimbursements and allowances to the witness for all the expenses (medical, travel, etc.) incurred by him during the whole procedure.

VII. COMPLEXITIES IN IMPLEMENTATION

[81] *See 172nd Law Commission Report, Review of Rape Laws*, Ministry of Law and Justice, Govt. of India, available at http://www.lawcommissionofindia.nic. in/rapelaws.htm.
[82] Akhtar v. State of U.P., 2014 (87) AllCC 482.
[83] Law Com No 198, *supra* note 8.

There can be following problems in the implementation of the Witness Protection Scheme:

- Huge amount of funds will be required for its implementation. However, such expenditure would only enhance the efficiency of the criminal justice system and would assist in the fulfilment of its primary objective.
- In the year 2015, there were 91,76,267 criminal cases pending in Indian courts. Providing protection to all the witness is not practically possible.[84] Therefore, the scheme will only provide protection to certain witnesses and not all of them. The degree of protection will depend upon the level of threat which will be examined by the council.
- The scheme cannot be used for ulterior motives and frivolous reasons as the persons applying for protection and incentives will be registered after a preliminary investigation by the council.
- Tapping of phones, CCTV camera near witnesses' house, constant monitoring, etc. will not be done without their consent as it would infringe their privacy.

VIII. CONCLUSION

The Witness Protection Bill, 2015 which is still pending in the Lok Sabha provides only the constitution and functioning of the authorities responsible for implementation. It lacks a detailed substantive framework as to what measures the scheme will employ and under what circumstances. The Parliament may either amend the Bill or come up with supplementary regulations which contain such framework. Moreover, police and public order are State Subjects while criminal law and criminal procedure are concurrent subjects under the Seventh Schedule to the Constitution. Therefore, the state governments are also responsible for protecting the life and property of the citizens including witnesses. Thus, all the state governments may also frame rules which are compatible with the geographical and political atmosphere of their respective states.

Once the scheme comes into existence, the general public of the country should be made aware of its scope and extent. The facilities and rights available to the witnesses in the scheme should be published in widely circulated vernacular newspapers, on websites, etc., in

[84] Compendium, *supra* note 27.

easy and accessible language. This would help in minimizing the social stigma attached with going to courts.

If the scheme is implemented in the desired manner, then greater number of witnesses will give their testimonies fearlessly and there would be a decrease in number of witnesses turning hostile. But, this is not enough. There is a general perception among people that criminals will be acquitted despite their testimonies due to flawed investigation. Thus, there is a need for an impartial and fair criminal investigation mechanism. Witness protection is only one aspect of this mechanism.

COPYRIGHT VIOLATION OR ACCESS TO EDUCATION: NAVIGATING LEGAL DICHOTOMIES

ARPAN BANERJEE[*]

ABSTRACT

This article is an analysis the recent judgement of a single judge bench of the Delhi High Court regarding the legality of unauthorised photocopying of academic works for the creation of university course-packs. Having explored the reasoning of the Court, which decisively ruled in favour of unauthorised photocopying, the article not only proceeds to elucidate the legal dichotomies that the Court's textualist approach creates and fails to resolve, but also provides an alternative reading of the law within its temporal context that seeks to balance the conflicting interests in a nuanced manner. The article also engages with the publishers' concerns of economic dis-incentives that might arise from unauthorised photocopying for the creation of course-packs, highlighting the specious nature of such an argument. Finally, it questions the Court's dismissal of concerns regarding Indian's international obligations, arguing that the Court's position is an explicit departure from the same. Based on the above analysis, this article evaluates the contribution of the judgement to the global discourse on the apparent dichotomy between concerns of education and copyright protection, concluding that the judgement provides a progressive jurisprudence of user rights founded upon the exigencies of access to affordable education.

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I. INTRODUCTION

Can a university department legally authorise the photocopying of copyright protected works while designing course packs for their curriculum? This was the primary question before a single judge bench in the High Court of Delhi,[1] in a lawsuit filed by three global publishing giants, namely Oxford University Press, Cambridge University Press and Taylor & Francis, who alleged large scale copyright infringement by Delhi University and Rameshwari Photocopy Service, the licensed agent of the former.

Determining an issue that goes to the very heart of concerns regarding access to education in India, Justice Endlaw emphatically ruled against the copyright holders, noting that the Indian Copyright Act[2] includes an exception, which permits the "reproduction" of copyrighted works for educational purposes, and hence does not amount to copyright infringement. Although the judgement has been widely celebrated as a landmark victory for education in India, certain apprehensions have been voiced. First, whether viewing photocopying for an educational purpose, as an absolute exception to copyright infringement, is a suitable approach that adequately balances conflicting interests. Second, whether the judgement implies that entire copyrighted works may be reproduced for the purpose of education, and if so, the impact of the same on the economic interests of the publishers. And finally, whether the Court's reading of the education exception is in consonance with international norms governing copyright protection and fair use. In light of the above, this analysis seeks to elucidate the dichotomous perspectives that inform the legal debate regarding access to education and protection of intellectual property rights, and critique the above judgement on its contribution to the same.

II. TEXTUALISM: CONSTRUCTING LEGAL BINARIES

The Indian Copyright Act 1957 lays out a set of instances or acts, which are not to be deemed as infringements of copyrights. The education exception, enumerated in Section 52(1)(i) refers to *inter alia* "a reproduction of any work by a teacher or a pupil in the course of instruction".[3] In this context the plaintiffs raised the contention that the aforementioned exception was limited to lectures, tutorials and other instances of direct interaction wherein

[1] The Chancellor, Masters & Scholars of the University of Oxford & Ors v Rameshwari Photocopy Services & Anr CS(OS) 2439/2012 I.As. No 14632/2012, 430/2013 & 3455/2013 (Delhi High Court 16 September 2016).
[2] The Indian Copyright Act 1957.
[3] The Indian Copyright Act 1957, S. 52(1) (i).

copyrighted material may be used.[4] Rejecting the argument, the Court examined various judicial interpretations of the phrases "instruction" and "in the course of", and concluded that they would include prescription of syllabus which both student and teacher must prepare for prior to the actual lecture, studies undertaken by students post lecture and framing of questions for examinations based on the same works, which the students may reproduce while answering the same.5 This finding was fundamental to the outcome of the case, due to the following reason.

One of the first issues to be determined by the Court, was whether the making of course packs by the two defendants amounted to a copyright infringement. It was submitted by the defendants, and accepted by the Court, that the question of licensing raised by the plaintiffs would only arise, if the said use amounted to a copyright infringement in the first place. The Court's interpretation of the law thus operated within the following binary. Either, as contended by the plaintiffs, the present systematic photocopying constituted a copyright infringement, which thereafter could be contained within a negotiated licensing framework, *or* the defendants had the legal *right to use* the copyrighted material to make course packs, thus precluding the question of negotiating a licensing agreement altogether. The adoption of this approach by the Court was rooted in its textualist reading of Section 52, which prima facie enumerated certain acts not amounting to infringement of copyright. Therefore upon finding that the instant case of photocopying was within the ambit of Section 52(1)(i) Justice Endlaw promptly concluded that there had been no infringement, for the defendants had a *statutory right* to use the works copyrighted by the plaintiffs, and dismissed the suit as no trial was required.

A. Reading the law in context

The Court's reading of the Indian Copyright Act, particularly Section 52, at first glance, appears to be quite an accurate and cogently reasoned interpretation of the legal text, concluding that the instant use falls within an exception to the publishers' copyright.[6] Despite being widely celebrated as a major victory for a framework of access to affordable

[4] The Chancellor, Masters & Scholars of the University of Oxford & Ors, supra note 1, ¶ 59.
[5] *Id* ¶ 72.
[6] Liang, L. (2010). Exceptions and Limitations in Indian Copyright Law for Education: An Assessment. The Law and Development Review, 3(2), p.199.

education,[7] counterviews have pointed out a fundamental flaw in the Court's reading of the law, which impaired its appreciation of copyright, and fair use exceptions. While a textual reading of the Act may agree with the binary approach of the Court, the conclusion of such an approach, the complete deprival of the publishers of rights over their works within the broad scope of educational use, fails to balance the interests that Copyright Law in principle seeks to protect. In other words, critics of the judgement argue that the absolute nature of the binary approach precludes an alternative and more balanced understanding of the relationship between copyrights and reproduction of works for educational purposes under the Indian Copyright Act.

In order to appreciate the above argument, a certain historical perspective is required. The original enactment of the Indian Copyright Act was in 1957, an era that predated technologically facilitated reproduction that was affordable. Thus concerns regarding widespread systematic and unregulated reproduction of copyrighted work were understandably absent. However, the potential of large-scale reproduction, with the development of photocopying machines, represents a crucial consideration while determining the contours of a post photocopier-era education exception, for it may diminish the incentives of publishers to publish high quality academic works, knowing that the same may be reproduced and used without any benefit accruing to them. Therefore any balanced reading of the law must be *contextual*, not a mere *textual* interpretation as in the instant case.

While a broader construction of 52(1)(i) may have been relevant to the mid twentieth century, the advent of the photocopier has created realities which legal interpretation must be sensitive to. In order to address *both* the rights of the copyright holder, and the concerns of affordable education in a developing country, a system of compulsory licensing is arguably the most suitable approach.

The premise of Justice Endlaw's conclusion, that the question of licensing only arrives upon affirming an infringement of copyright, results in a binary, which in the instant case failed to provide any protection to the copyright holder, for the limited exception under 52(1)(i) is interpreted as the governing norm. In light of the above, critics argue that

[7] Kumar, A. (2017). *Delhi High Court strikes a fine balance between the right to copy and copyright.* [online] Scroll.in. Available at: http://scroll.in/article/816791/delhi-high-court-strikes-a-fine-balance-between-the-right-to-copy-and-copyright [Accessed 14 May 2017].

compulsory licensing may be a more suitable approach which balances interests by providing access to copyrighted works under 52(1)(i) but for a nominal fee.

The proposal of a licensing regime for educational uses of copyrighted works is perhaps the greatest concern of proponents of access to affordable education. First as discussed above, a plain reading of the law suggests that the same is unnecessary under the present copyright framework.[8] Second, licensing schemes have, in recent international experience, a poor record of ensuring that access remains affordable for Universities. In 2011, for instance, more than 25% of Canadian Universities opted out of blanket licensing agreements, in favour of open source materials and fair dealing copying exceptions, when faced with a license fee hike.[9] Similarly in 2013, all eight of New Zealand's universities were taken to the country's Copyright Tribunal when they refused to accept a fee hike upwards of 20%, proposed by the licensing authority.[10] Instances of this nature greatly weaken the desirability of licensing in India, given the concerns of access and affordability.

India's own limited experience with the Indian Reprographic Rights Organisation (IRRO), a society that represents the rights of copyright holders and issues licenses, has been mixed. In 2013, the Government of India refused to re register the IRRO due to its failure to comply with the latest copyright rules.[11] Critics of a licensing system have pointed out that while initial fees may be inexpensive, acknowledging copyright in the domain of educational use, would consolidate and broaden the exercise of property rights, thus facilitating claims of subsequent fee hikes, similar to the above international experiences. Acknowledging the lobbying power of the large global publishing conglomerates, only serves to add to the above apprehensions when negotiating a 'fair' and 'affordable' licensing framework. Another concern with a licensing system is that organisations like the IRRO do not hold rights to license all copyrighted works. Thus Universities would have to individually track down every

[8] 52(1)(i) suggests that educational use does not amount to copyright infringement, which precludes, as pointed out by Justice Endlaw, the question of licensing, for users have a statutory right to the same.
[9] Lumsden, K. (2017). *Break-Ups Are Never Easy: York University Declines to Renew Blanket Copy Licence With Access Copyright.* [online] Iposgoode. Available at: http://www.iposgoode.ca/2011/08/break-ups-are-never-easy-york-university-declines-to-renew-blanket-copy-licence-with-access-copyright/ [Accessed 14 May 2017].
[10] Lewis, J. (2017). *Universities face copyright action* [online] The New Zealand Herald [10 March 2013] Available at: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10870331 [Accessed 14 May 2017].
[11] Basheer, S. (2017). *Breaking News: IRRO Registration Refused!*. [online] SpicyIP, [9 December 2013] Available at: https://spicyip.com/2013/12/breaking-news-irro-registration-refused.html [Accessed 14 May 2017].

copyright owner to negotiate a license in such instances, a process that would significantly complicate and delay the creation of course packs.

The fundamental premise underlying the publishers' claims in the instant case is that of the adverse impact of photocopying on markets and revenue.[12] Publishers' incentives to sell, it is argued, are diminished if one can create a photocopy of an original work[13], under a broad construction of the education exception, thus not requiring the purchase of the book, revenue from the sales of which would otherwise belong to the copyright holder.[14] While the economic logic of this argument is apparently sound, a critical perspective reveals a crucial flaw.

The copyright exception for the creation of course packs does not necessarily adversely impact the market for publishers' works. Students, who are the target users of these course packs, are not the target consumers of worldwide publishing houses.[15] Rather, universities and independent libraries are the primary consumers of academic titles used in course packs, for unlike the ordinary student, they can afford to purchase the expensive works. In the absence of a course pack containing an extract from a copyrighted work, a student would ordinarily refer to the same from the library, rather than purchasing an entire book to merely read a prescribed portion. In other words, the claim that reproduction for the purpose of making course packs adversely affects the market for academic titles is one that requires further corroboration in order to constitute a viable argument.[16] While the above discussion is conspicuous by absence in the analysis of Justice Endlaw, the Division Bench of the Delhi High Court acknowledged the above reasoning.[17] The latter judgement not only found that the course packs did not compete with the primary market of the book, but also

[12] Reddy, P. (2017). *The publishing wars*. [online] Business Standard [9 September 2012] Available at: http://www.business-standard.com/article/opinion/prashant-reddy-the-publishing-wars-112090900023_1.html [Accessed 14 May 2017].
[13] Gordon, W. and Watt, R. (2003). *The economics of copyright*. 1st ed. Cheltenham, UK: E. Elgar.
[14]*The Chancellor, Masters & Scholars of the University of Oxford & Ors*, *supra* note 1, ¶ 14. In the words of Justice Endlaw, the plaintiffs argued that, 'the only market for textbooks was the field of education, and if it were to be held that in the field of education textbooks could be copied, then publishers would not be able to sell and ultimately be compelled to shut down'.
[15] Basheer, S. (2017). *Delhi high court virtually busts 'property' rhetoric in the IPR narrativ* [online] DNA. [22 September 2016] Available at: http://www.dnaindia.com/analysis/column-delhi-high-court-virtually-busts-property-rhetoric-in-the-ipr-narrative-2257650 [Accessed 14 May 2017].
[16] Hudson, E., *Copyright and Course Packs: A Collision of Competing Values?* Oxford Intellectual Property Research Centre Speaker Series, England, (November 2016) Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/delhi_copying_eh_slides.pdf [Accessed 2 January 2017].
[17]The Chancellor, Masters & Scholars of the University of Oxford & Ors, supra note 1, ¶ 23.

went further to suggest that course packs may actually stimulate further reading which could potentially add to the market of the copyrighted work.[18]

Here it is important to note that a crucial element of this finding is that it is specific to the context of creating course packs within the course of instruction. Appreciating this specificity is crucial to acknowledging the damage to the market incentives of publishers, had all instances of photocopying by educational institutes been allowed. For example, when a university creates a course pack, its distribution to students does not damage publishers' market for the above-mentioned reasons, as long as the university is lawfully purchasing the book from the publishers. The publishers' market is only affected when the university, being the consumer in the market, no longer needs to purchase copyrighted work due to legalised photocopying. However this is not the case with the instant judgement.

The Court's reading of the phrase 'in the course of instruction' does not operate as a blanket exception in the field of education, one that would allow the university to legally purchase a photocopy of the original book, rather it only allows reproduction to the limited extent of teacher student exchange. In this manner the judgment adopts a position that is not only sensitive to the economic interests in the market for academic works, but also conducive to affordable education.[19]

III. IS THERE A QUANTITATIVE LIMIT TO REPRODUCTION?

Amongst the many questions that the instant judgment has raised, perhaps the most important is regarding the extent to which the books may be reproduced for the purpose of making course packs. Given Justice Endlaw's approach, this question was unnecessary, for reproduction in the course of instruction amounted to no infringement altogether, which, in the absence of specific statutory provisions, precluded the question of how much of the text could be reproduced. Critical responses to the judgment elucidate divergent opinions. Some have suggested that the specific facts of the case, where the average percentage of entire book copied was 8.81%, were within an acceptable limit, so as to not engage the Court with the question. Others however have been more concerned about the Court's silence on the matter,

[18] The Chancellor, Masters & Scholars Of University Of Oxford & Ors v Rameshwari Photocopy Services & Ors, RFA(OS) 81/2016 (Delhi High Court, 9 December 2016), ¶ 36.

[19] Keeping this very concern in mind it is important to ensure that a broad construction of the phrase 'course of instruction' does not extend to permitting universities to obtain reproductions of copyrighted works citing unaffordability. This would severely diminish publishers' incentives in the Indian market.

which leaves room to suggest that entire books could be reproduced within 'the course of instruction'.

While the Division Bench judgement has clarified the matter, the answer is apparent from a closer reading of Justice Endlaw's opinion itself, which clearly permits a qualified copying of entire books. This conclusion is based on the following reasoning. First, several of the works in dispute are edited volumes of essays by various authors, where each chapter constitutes an independent literary work protected under the Copyright Act. Thus reproduction of a chapter, despite being a small part of the entire collection, constitutes infringement of an entire copyrighted work, which the judgment permits insofar as it falls within the 'course of instruction'. Second, the law only permits reproduction that is in the course of instruction. Thus even if an entire copyrighted work was to be reproduced for a course pack, it would have to be within the course of instruction, a threshold that considers requirements of the syllabus, lectures, and examinations. This has a dual effect of not only preventing the insidious reproduction of books exceeding the course of instruction, but also facilitating photocopying of entire works when they fall within the ambit of the threshold. This was clarified by the Division Bench, which observed that fairness in use must be determined upon whether the said reproduction was reasonably required for the purposes of instruction,[20] irrespective of its proportion. Thus, the instant case permits the reproduction of copyrighted works not on a quantitative, but rather a qualitative standard basis that may extend to the entirety of a copyrighted work.

IV. INTERNATIONAL OBLIGATIONS

Before concluding, it may be noteworthy to examine the interplay between the judgment of the Delhi High Court, and India's obligations under the global intellectual property rights regime.[21] Responding to arguments based on international covenants in favour of the plaintiffs, Justice Endlaw remarked that ensuring municipal law's consonance with international covenants was primarily entrusted upon the legislature, over which the Court cannot impose its own reading. However an equal consideration that perhaps escaped the Court was to interpret municipal law in a manner that does not derogate from international

[20] The Chancellor, Masters & Scholars of University Of Oxford & Ors, *supra* note 18, ¶ 33.
[21] India is signatory to both the Berne Convention for the Protection of Literary and Artistic Works, 1886, and the Agreement on Trade Related Aspects of Intellectual Property Rights, 1995 (TRIPS).

covenants.[22] In the 1967 revision conference to the Berne Convention at Stockholm, the Indian delegation articulated demands in favour of wide exceptions to copyright for educational purposes. This included the right to use copyrighted works for educational purposes without providing the author any compensation, a demand that was categorically rejected, in favour of paying just compensation. This, along with similar reforms, was inserted in a Protocol appended to the Convention for the benefit of developing countries. The text of Article 9 of the Convention was also amended to include a three-pronged test, the satisfaction of which would permit unauthorised reproduction of copyrighted works.

The above history is important in the present context, for it elucidates the categorical rejection of a blanket exemption of educational use from copyrights, a position that Justice Endlaw's binary reading of the law appears to endorse. Article 9 of the Berne Convention, permits unauthorised reproduction insofar as the same "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[23] Based on the analysis in the previous section, it may be argued that the requirements of Article 9 are not jeopardised, for the unauthorised use of copyrighted material in course packs is unlikely to have a significant impact on the market for academic titles India. This justification however, is absent in the judgment as it dismisses the interpretative relevance of international obligations to the instant case.

V. CONCLUSION

The decision of the Delhi High Court goes to the very heart of the central concern of any intellectual property rights regime, with the specific context being that of copyrights. Is the law primarily designed to protect the proprietary rights of creator, or is it a framework of *user rights*, which is sensitive to the concerns of creators' incentives? While the dominant intellectual property rights discourse would point to the former, the decision of the High Court tends towards the latter. Here it is crucial to appreciate that the Court arrived at its conclusion upon a plain textual interpretation of the law, thus implying that, the Indian legal framework *prima facie* does not entirely prescribe to the globally dominant paradigm of intellectual property rights. The judgement tends to affirm this by rejecting the dominant common law objective 'four factor test' of fair use,[24] in favour of an indigenous qualitative

[22] Gramophone Company of India Ltd v Birendra Bahadur Pandey, (1984) 2 SCC 534.
[23] Berne Convention Article 1886, article 9 (2).
[24] *Folsom* v *Marsh*, 9 F. Cas. 342, (1841, C.C.D Massachusetts).

‘reasonable nexus’ test. Thus it lays the foundation for a progressive framework of user rights, from within the very text of the Indian Copyright Act, elucidating its sensitivity to concerns of access to affordable education in India.

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PROSECUTING THE ISLAMIC STATE IN INDIA: REVISITING THE APPLICATION OF THE PASSIVE PERSONALITY PRINCIPLE

ASHRAY BEHRUA*

ABSTRACT

Ranging from the destruction of cultural sites to barbaric murders, the crimes committed by the Islamic State of Iraq and Syria are unparalleled, so much so that such atrocities are no longer restricted to the territories of Iraq and Syria, but have in turn inspired attacks to be committed from within the territories of a multitude of states. India is no exception, and even though no special provisions have been adopted to quell this ever-increasing reign of terror, the existing laws along with the provisions pertaining to the active-personality principle would not only thwart domestic attacks, but would also ensure that Indians committing crimes upon territories of Iraq and Syria, and subsequently fleeing such lands to avoid prosecution, don't go unpunished. However, unlike countries such as the United States which have gone to great lengths to provide protection to their citizens abroad, India is yet to adopt provisions relating to passive-personality principle, even though such provisions are need-of-the-hour in protecting Indians overseas. In order to remedy India's regressive approach, this paper will attempt to argue in favour of India mimicking the efforts of US by establishing jurisdiction over crimes of terrorism and hostage-taking against Indians which are not committed in India. This would not only offer protection to Indians abroad, but would also result in the ancillary satisfaction of India's international law obligations. A legal framework including the application of active and passive-personality principles would have the cumulative effect of not only deterring crimes committed against Indians abroad, but would also prevent domestic IS inspired attacks.

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I. INTRODUCTION

The heinous crimes committed by the Islamic State of Iraq and Syria[1] are well-documented and the failures to obviate them even more so. These crimes encompass a wide-array of violations of fundamental human rights and attacks carried out by the members of the IS are often barbaric with different methods being adopted by such agents to instil and perpetuate fear.[2] Crimes carried out by IS are no longer limited to the territories of Iraq and Syria but have inspired splinter groups to carry out attacks in 29 other countries culminating in this carnage to attain a global character.[3] Within the period from 2002 to 2016,[4] these attacks have resulted in over 2,000 deaths[5] bringing the toll to 33,000 deaths attributable to the IS and their ancillary groups, with no sight of an impending end of the same.

It is imperative that countries independently adopt a robust and stringent mechanism in order to protect their citizens from the growing threat of the IS. States must not bank upon the formation of any special court in relation to the crimes committed by the IS in Syria and Iraq, or for the domestic courts in Iraq and Syria to step in and prosecute these agents once the arms are finally laid down and the dust is settled. Instead provisions must be incorporated, the application of which would permit them to protect their citizens from crimes regardless of where they are present. The safety of a state's citizens can be developed through reliance on the passive personality principle. Provisions relating to such passive personality principle have been incorporated within various domestic laws, with the United States' Hostage Taking Act, 1984,[6] being a premier example of the application of the same. This legislation is effective in guaranteeing the safety of such citizens in foreign lands, as it grants the US the power to exercise jurisdiction over the crime of committed on US citizens, regardless of where the crime is committed, i.e. within the US territory or outside.

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[1] Hereinafter 'IS.'
[2] Human Rights Watch, World Report 2015 27 (1st ed. 2015).
[3] Ewelina Ochab and Kelsey Zorzi, *Effects of Terrorism on Enjoyment of Human Rights: ISIS/Daesh and Boko Haram*, OHCHR (Sep. 23, 2016) http://www.ohchr.org/Documents/Issues/RuleOfLaw/NegativeEffectsTerrorism/ADF.pdf.
[4] Julia Glum, *How Many People Has ISIS Killed? Terrorist Attacks Linked to Islamic State Have Caused 33,000 Deaths*, IB Times (Oct. 8, 2016) http://www.ibtimes.com/how-many-people-has-isis-killed-terrorist-attacks-linked-islamic-state-have-caused-2399779 ; Patterns of Islamic State - Related Terrorism, 2002 – 2015, START Background Report (Aug., 2016, http://www.start.umd.edu/pubs/START_IslamicStateTerrorismPatterns_BackgroundReport_Aug2016.pdf.
[5] Tim Lister, *ISIS goes global: 143 attacks in 29 countries have killed 2,043*, CNN (Jan. 16, 2017) http://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/.
[6] The Hostage-taking Act, 18 U.S.C.A. § 1203 (1984).

Protection can be extended to nationals of a particular country be applying the passive personality principle, i.e. extending the jurisdiction over offences which are committed against a State's nationals, by a foreign national.[7] This principle is based upon the nationality of the victims and is completely independent of where the crime was committed (territorial jurisdiction),[8] and the nationality of the offender (active personality jurisdiction).[9] By virtue of the application of this principle, India can extend its jurisdiction over crimes committed against Indian nationals in Syria and Iraq, similar to the US courts' powers contained within the Omnibus Diplomatic Security and Antiterrorism Act of 1986[10] and the Hostage Taking Act, 1984 for the limited crimes of taking hostages and international terrorism committed against US citizens by foreign authors abroad.[11]

States can therefore theoretically (jurisdiction would be extended if such provisions are incorporated within their domestic framework such as the US Hostage Taking Act) extend their own jurisdiction to crimes committed upon their own nationals based upon the passive personality principle and deter their own citizens from committing crimes elsewhere outside the territory of their own state in furtherance of the active personality jurisdiction, as can evinced from the Maher H. prosecution[12] in the Netherlands.

Though, the passive personality principle has made enormous strides over the past 30 years by gaining recognition within the international law sphere and also the domestic laws of various European countries, it is merely at an embryonic stage of development in India at this current juncture. Apart from explicit provisions recognizing the active personality principle,[13] the legislature has not adopted any measures to create inroads for the implementation of the passive personality principle.

Various international instruments such as Convention against the Taking of Hostages, 1979,[14] Convention for the Suppression of Terrorist Bombings, 1997[15] and the Convention

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[7] Edwin D. Dickinson, Introductory Comment to Jurisdiction With Respect to Crime, 29 Am. J. of Int'l L. 474 (1935).
[8] K.D. Gaur, Textbook on The Indian Penal Code 55 (4th ed. 2009).
[9] *Id*. at 57.
[10] S. 1202, The Omnibus Diplomatic Security and Antiterrorism Act 18 U.S.C.A. § 2331 (1986).
[11] Ss. (b), The Hostage-taking Act, 18 U.S.C.A. § 1203 (1984).
[12] Prosecution of Maher H., Case No. 09/767116 – 14 (District Court of The Hague, 1/6/2016).
[13] The Indian Penal Code, 1860 §§3, 4.
[14] Convention against the Taking of Hostages, 1979, 1316 *U.N.T.S.* 205 (1979), art. 5(1)(d) [Hereinafter 'Hostage Taking Convention.'].
[15] International Convention for the Suppression of Terrorist Bombings, 1998 2149 U.N.T.S. 284 (1998), art. 6 [Hereinafter Terrorist Bombing Convention.'].

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984,[16] enable the signatories to incorporate the passive personality principle regarding certain crimes in pursuance to their international obligations. These instruments provide member-states with the discretion to codify and subsequently assume the passive personality jurisdiction for crimes each respective convention seeks to proscribe. Apart from these conventions, other instruments do permit countries to adopt a passive personality jurisdiction for certain crimes,[17] however, the crimes committed by the IS against foreigners in Iraq and Syria fall squarely within the purview of the crimes proscribed by the aforementioned conventions, by reason of which emphasis would be laid upon the pertinent provisions of these conventions in the following chapters.

Therefore, countries such as India can take a page from the U.S's book and establish specific provisions pertaining to the passive personality principle especially in light of member states to these instruments being legally bound by the terms of those conventions which they accede to or ratify.

II. THE EXISTING LAW IN INDIA: A ROBUST LEGAL FRAMEWORK TO NEGATE DOMESTIC TERROR

In the current context of the armed conflict in Syria and Iraq, India has not adopted any special legislation to combat the ever-degenerating situation and to prevent its own citizens from travelling to these war-ravaged areas.[18] Therefore, to deter its own citizens from committing crimes in these war-afflicted areas, reliance can be placed only upon the already existing legislations, which in turn are adequate in putting a stop to this sprouting scourge.

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[16] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 [Hereinafter 'Convention against Torture.'].

[17] For instance, *see* UN Convention against Transnational Organized Crime, Res. 55/25 of 15 November 2000, Art. 15(2)(a)art. The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1400 *U.N.T.S.* 231 (1973); 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 178, Art. 5(3); International Convention for the Suppression of the Financing of Terrorism, 1035 U.N.T.S. 167 (1999), Art. 7.

[18] Library of Congress, *Treatment of foreign fighters in select Foreign Jurisdictions*, United States Congress (Dec., 2014) https://www.loc.gov/law/help/reports/pdf/2015-011419%20FINAL%20RPT.pdf.

The pertinent legal framework in India is established through the Unlawful Activities (Prevention) Act, 1957,[19] along with the Citizenship Act, 1955[20] and the Passports Act, 1967[21] and the Indian Penal Code.

A. The Unlawful Activities (Prevention) Act, 1963

Section 39 of UAPA criminalizes any conduct which pertains to providing support to a terrorist organization and include acts such as inviting and procuring support for a terrorist organization, arranging meetings to further such organization's activities etc. This section is therefore the most efficacious provision to combat those individuals who draw support for terrorist organizations such as the IS using online means, the same of which is increasingly being resorted to not only to spread radicalism but also to lure individuals outside their domestic territory to travel and subsequently commit crimes in Iraq and Syria.[22]

Section 15 defines what would constitute a terrorist act and includes acts which would threaten the unity, integrity, security or sovereignty of India[23] and necessarily imputes a physical act such as the use or making of bombs[24] while Section 2(1)(o) lays down the definition of unlawful activity and encompasses even those acts which are not covered under the purview of Section 15 such as acts of speaking or writing words. Therefore, these sections would catch within their ambit those acts committed by individuals with a view to spread fear and attack the sovereignty of India in furtherance of the IS's bidding. These provisions are imperative in repelling those attacks committed by fighters returning from Iraq and Syria who carry out attacks in their domestic countries due to their affiliation with the IS.[25]

Additionally, by virtue of Section 20, those individuals who are members of the IS would be liable for imprisonment, which may extend to imprisonment to life, due to Section 20 proscribing membership to terrorist gangs and organizations. This is supplemented by a notification released by the Central Government[26] through which the IS as well as all its

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[19] Unlawful Activities (Prevention) Act, 1967 § 15 [Hereinafter 'UAPA'].
[20] Citizenship Act, 1955 § 10.
[21] Passports Act, 1967 § 10(3).
[22] *Profile on Mehdi Masroor Biswas*, The Times of India (Dec. 13, 2014) http://timesofindia.indiatimes.com/india/Who-is-Mehdi-Masroor-Biswas/articleshow/45501624.cms.
[23] Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 S.C.C. 602.
[24] Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra, (2010) 5 S.C.C. 246.
[25] Prominent examples are those of Jewish Museum of Belgium shooting in Brussels resulting in the deaths of four people, the November 2015 Paris attacks in France resulting in 130 deaths and the 2015 Ankara bombings in Turkey resulting in 103 civilian deaths.
[26] Government of India, *Banned Organisations*, Ministry of Home Affairs (Nov. 19, 2015) http://www.mha.nic.in/BO.

manifestations have been recognized as terrorist organizations[27] for the purposes of UAPA. Those sympathizers of the IS who raise funds for the outlawed terrorist organization, regardless of whether such funds are used for the purpose of carrying out terrorist acts,[28] would be penalized under Section 17, with prosecutions already being carried out against IS agents under the provisions of the same.[29]

To conclude, the UAPA proscribes and criminalizes a range of conduct which would aid in disabling IS agents and sympathizers from mounting attacks from within the country and financially supporting such an outlawed organization. Attacks committed in pursuance to the IS's radicalism including the overt physical acts of making bombs etc. and acts which do not manifest to the former's level such as boosting support for the IS in the form of inflammatory speeches[30] would also attract the stringent provisions of UAPA, ensuring the protection of India's security, integrity and sovereignty from agents of the IS and returning fighters from mounting an offensive from within the country.

B. The Indian Penal Code, 1860

Section 125 of the Indian Penal Code illegalizes the act of waging war against the government of any Asiatic Power, with such government establishing an alliance with the Government of India or which is at peace with the Government of India and imposes a punishment of imprisonment for life or for a term which may extend to seven years. This provision recognizes the necessity of the Government of India to establish and safeguard its friendly relations with other Asiatic Powers and is based on the principle of international peaceful co-existence.[31] Prosecutions have already been initiated under this provision against those who maintain online social-media handles and post pro-IS material either for the purposes fear-mongering or for garnering support for their cause.[32]

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[27] Bharti Jain, *Centre bans ISIS as terrorist organization*, The Times of India (Feb. 26, 2015) http://timesofindia.indiatimes.com/india/Centre-bans-ISIS-as-terrorist-organization/articleshow/46385269.cms.
[28] *Malsawmkimi v. National Investigation Agency*, Criminal Appeal Nos. 172 of 2011 and 65 of 2012 (Gauhati High Court, 10/9/12).
[29] *ISIS operative arrested in Sikar*, The Indian Express (Nov. 16, 2016) http://indianexpress.com/article/india/india-news-india/rajasthan-isis-operative-arrested-in-sikar-4379307.
[30] *Incidents and Statements involving SIMI: 2015*, South Asia Terrorism Portal (2015) http://www.satp.org/satporgtp/countries/india/terroristoutfits/simi2015.htm.
[31] Gaur, *supra* note 8, at 235.
[32] *Centre's nod needed to chargesheet Mehdi Masroor Biswas*, Deccan Chronicle, available at http://www.deccanchronicle.com/150430/nation-current-affairs/article/centre%E2%80%99s-nod-needed-chargesheet-mehdi-masroor-biswas, last seen on 5/5/2017.

Similarly, Section 126 make depredation on the territory of any state which is either at peace with the Government of India or has established an alliance with the Government of India an offence punishable with a term of imprisonment extending to seven years.[33] The only distinction between the current provision and the former provision is that the current provision is applicable to any foreign country while the former is only applicable for Asiatic Powers.[34] The combination of these two provisions would therefore serve as a potent deterrent against Indian nationals travelling to Syria and Iraq committing crimes against governmental forces.

C. The Citizenship Act, 1955 and The Passports Act, 1967

Section 10 of the Citizenship Act empowers the government to terminate the citizenship of an Indian for disloyalty to the Constitution and in cases of communicating or providing assistance to an enemy, which is at war with India. The termination of citizenship has the consequence of preventing an Indian's unencumbered movement into the country. Supplementary to the above is the Passports Act, 1967, which allows the government to refuse to issue or revoke a passport or travel documents in the interest of the security, sovereignty, unity and integrity of India.[35]

Therefore, the provisions of the Citizenship Act and the Passports Act, which employed in cohesion with the penal provisions of the IPC and the UAPA are ample in deterring Indian citizens from travelling to Iraq and Syria and subsequently committing crimes upon such territories and also in quelling acts committed against India's sovereignty with a view of instilling fear within the nation.

III. EXERCISE OF JURISDICTION BY INDIAN COURTS FOR CRIMES COMMITTED EXTRATERRITORIALLY THROUGH THE PASSIVE PERSONALITY AND ACTIVE PERSONALITY PRINCIPLE

The roles played by both the active personality principle and the passive personality principle are crucial for deterring and subsequently putting an end to the crimes committed by the IS. The IS not only recruits members from Syria and Iraq, but also, due to the convoluted

[33] Gaur, *supra* note 8, at 236.
[34] *Supra* note 18.
[35] *Supra* note 21.

lifestyle it portrays on social media,[36] seeks support from those beyond the territory of affected states as well. To circumvent any radicalization and to prevent its citizens from travelling to the affected states and committing crimes on the IS's bidding, the active nationality principle plays an integral role. As the active personality principle pivots on the nationality of the offender, it enables the state (of which he is a citizen of) to assume jurisdiction over crimes committed by him, even if such crime was committed beyond the state.[37] Therefore, those individuals who flee from the territories of Syria and Iraq can be punished by a state through its municipal law for crimes which were not committed within the territorial confines of such state. Similarly, the passive personality principle enables a state to assume jurisdiction over crimes committed over its citizens abroad which would in turn have the effect of thwarting crimes against such citizens.

A. Jurisdiction Established Through the Active Personality Principle

The active personality principle is already well-developed and codified within the provisions of the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973. Section 4(1) of the IPC categorically and unequivocally lays down that the provisions of the IPC would extend to Indians wherever they may be outside India.[38] Section 3 further empowers the Indian courts to assume jurisdiction over Indians who have committed crimes outside the territory of India.[39] Therefore, the cumulative effect of Section 3 and Section 4 would be when any crime is committed by an Indian beyond the territory of India, the Indian courts can extend their jurisdiction over such crimes as if they were committed within the Indian territory.[40] Lastly, the procedure pertaining to the prosecution of Indians committing crimes abroad is laid down within Section 188 of the CrPC[41] and therefore the active personality principle is definitively contained within Section 3 and Section 4 of the IPC and Section 188 of the CrPC.[42]

To conclude, when any crime punishable by Indian law, is committed by an Indian in Iraq and Syria, the Indian courts can exercise jurisdiction over such crimes in pursuance of the active personality principle. This would have the effect of thwarting Indians from

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[36] Jessica Stern & J. M. Bergerlenka, ISIS: The State of Terror 212 (1st ed. 2015).
[37] K.D. Gaur, Commentary on the Indian Penal Code 57 (2d ed., Universal Law Publishing 2013).
[38] *Id.* at 59.
[39] Rao Bahadur Singh v. State of UP, A.I.R. 1953 S.C. 394; Central Bank of India Ltd v. Ram Narain, A.I.R. 1955 S.C. 36.
[40] *Pheroze v. State*, 1964 (2) Cr.L.J. 533.
[41] *Narayan v. Emperor*, A.I.R. 1935 Bom. 437.
[42] Gaur, *supra* note 8.

committing crimes in Iraq and Syria and subsequently fleeing to the territory of India to avoid domestic prosecution.

1. The Maher H. Case

Though no such prosecution has taken place under the Indian law, the *Maher H. case*[43] is an important development of the active personality principle, especially with regard to the armed hostilities ongoing in Iraq and Syria. In this case, a Dutch national was the perpetrator of certain terrorist acts in Syria, who, whereupon the cessation of hostilities returned to the Netherlands. Furthermore, in his defence, he claimed that the Dutch criminal law pertaining to terrorism was inapplicable as an international armed conflict was taking place, and as he was an active participant of the same, he would be afforded with the protections as extended by the Geneva Conventions,[44] the end effect being that he could only be prosecuted for alleged war crimes and not for terrorism.

The defendant was exploiting the principle of 'combatant immunity,' a key feature present within innumerable International Humanitarian Law instruments.[45] Combatant immunity affords protection to lawful combatants from punishment under domestic law for committing lawful acts of war, and is available only for acts committed during an international armed conflict and not for a non-international armed conflict ("NIAC").[46]

However, the Dutch district court rejected this argument and did not afford such immunity to the accused as not only did a NIAC exist in Syria, but also found that participants in armed hostilities belonging to an organized armed group as opposed to members of armed forces were not permitted to resort to use of force in the context of an NIAC. Lastly, while concluding, the district court held that civilians who directly engage in any armed hostilities in the context of a NIAC would not be afforded with any combatant immunity and consequentially can be prosecuted for crimes committed in pursuance of their armed hostilities[47] and therefore the court could exercise jurisdiction over the crimes

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[43] *Supra* note 12.
[44] Geneva Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field, 75 U.N.T.S. 31 (12/8/1949), Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 (12/8/1949), Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (12/8/1949), Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (12/8/1949).
[45] Marten Zwaneburg, Foreign Terrorist Fighters in Syria: Challenges of the "sending" state, Int'l L. Stud. 204, 210 (2016).
[46] Sandesh Sivakumaran, The Law Of Non-International Armed Conflict 514 (1st ed., OUP 2012).
[47] Zwaneburg, *supra* 45, at 211.

committed in Syria. The court convicted the accused and sentenced him to be imprisoned for a term of three years.[48]

2. The Sharia4Belgium Case

Other prominent cases are those of the *Sharia4Belgium* case[49] and the *Context* case,[50] wherein 46 individuals were accused of terrorist-related crimes in Syria, of which 36 were tried *in absentia,* making it one of the largest prosecutions in Europe of foreign terrorist fighters. Convictions were also sustained against some of the accused on the basis of evidence ranging from testimonies of those terrorists who returned from Syria, tapped phone calls to evidence collected from social media.

The *Context* Case

The *Context* case[51] involved 9 accused who were indicted for crimes pertaining to participating in terrorist training camps in Syria and conspiracy to commit murder or manslaughter with a terrorist motive in Syria. These accused were charged for the conspiracy to commit these crimes rather than the crimes itself, due to the relatively lower evidentiary burden of proving the same.

B. Jurisdiction Established Through the Passive Personality Principle

The passive personality principle permits a state to extend its jurisdiction over crimes which are committed against its nationals, regardless of where these crimes take place.[52] This principle is based upon the doctrine that the state is burdened by the duty to protect its nationals abroad.[53] Therefore, under this principle, the sovereign is concerned with the crime's effect rather than where it occurs.[54] A limitation to this seemingly universal acceptance is that this principle has not received support for its application to ordinary crimes and torts, however there is a greater readiness to apply this principle to cases involving

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[48] Bibi van Ginkel, Prosecuting foreign terrorist fighters: What role for the military? 8 (1st ed., Netherlands Institute of International Relations 2016).
[49] Prosecution of Fouad Belkacem, Case No. FD35.98.47-12 - AN35.F1.1809-12 (Court of First Instance in Antwerp, 11/5/2015).
[50] Context Prosecution, Case No. ECLI:NL:RBDHA:2015:14365 (District Court of The Hague, 8/6/2016).
[51] *Id*.
[52] Dickinson, *supra* note 7.
[53] United States v. Yunis, 681 F. Supp. 896, 901 (Columbia Circuit Court of Appeals, 1988); The Lotus Case (France v. Turkey), P.C.I.J. (ser. A) No. 10, at 55 (1923).
[54] United States v. Aluminium Corporation of America, 377 U.S. 271 (Supreme Court of the United States, 1964).

terrorism and hostage-taking[55] and this readiness is attributable to the severity associated with such crimes.[56]

Though the early development and application of this principle had been mired with controversy, in recent times it has garnered greater support. During its nascent stage, this principle was not the recipient of any international sanction,[57] however gradually, it has accumulated considerable support.[58] This has crystallized in a greater acceptance, resulting in more countries incorporating this principle in their municipal legal framework. However, no discernible efforts have been adopted by the Indian legislature to incorporate this principle, even though the existence of such a principle is need of the hour in relation to terrorist and hostage-taking cases.

1. Passive Personality Principle in the US

Though India has made no inroads in incorporation of the passive personality principle, the efforts of the US would be in stark contrast to the same, cementing their jurisprudence to be in the forefront in relation to this principle. The relevant pieces of legislation of the US to prosecute crimes committed by members of the IS against US citizens are the Omnibus Diplomatic Security and Antiterrorism Act of 1986[59] and the Hostage-taking Act, 1984.[60] Though the US has not adopted any special legislation with regard to deterring its citizens from travelling and committing crimes in Iraq and Syria (similar to the Indian position), the existing framework is sufficient, especially in light of the relevant legislations incorporating the passive personality principle within them. The extension of jurisdiction of the US courts through the application of the passive personality jurisdiction is in accordance with the US' obligations under the 1979 International Convention for the Taking of Hostages.[61]

The relevant provisions of the abovementioned legislations which have codified the passive personality principle are Subsection (b) of the Hostage-taking Act and Section 1202 of the Antiterrorism Act. Subsection (b) of the Hostage-taking Act extends the court's

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[55] Gerald Waltman III, *Prosecuting ISIS*, 85 Miss. L. J. 23 (2015).
[56] John G. McCarthy, The Passive Personality Principle and Its Use in Combatting International Terrorism, 13 Fordham Int'l L. J. 298, 302 (1989).
[57] W.E. Beckett, *The Exercise of Criminal Jurisdiction Over Foreigners*, 6 Brit. Y.B. of Int'l L. 44, 58 (1925).
[58] McCarthy, *supra* note 56, at 304.
[59] *Supra* note 10.
[60] *Supra* note 11.
[61] *Supra* note 14.

jurisdiction over the crime of hostage-taking occurring outside the US, if the offender or the person seized or detained is a national of the US. Similarly, Section 1202 of the Antiterrorism Act permits the court to establish an extraterritorial jurisdiction over terrorist conduct abroad against US nationals.

2. Prosecutions Involving the Passive Personality Principle in the US

Two notable prosecutions, namely the *Yunis* case[62] and the *Rezaq* case,[63] under the Hostage-taking Act have further solidified the application of the passive personality principle in the US for specific crimes committed abroad. In *Yunis*, the accused had allegedly hijacked a flight in Beirut, including two Americans, which enabled the US courts to exercise jurisdiction over the crimes. It is imperative to note that the only link enabling the US court to exercise jurisdiction was that the crime was committed against the hostages of which two were Americans. The accused claimed that the court would not have jurisdiction over such crime as it lacked the subject-matter and personal jurisdiction however this contention was rejected by the trial and subsequently by the appellate court.[64]

The court explicitly held that the passive personality principle and the universal principle (as scholars unanimously agreed that the crimes of hostage-taking and aircraft piracy would fit within the category of heinous crimes for the purpose of asserting universal jurisdiction)[65] would allow the court to exercise jurisdiction over the crimes of the accused and therefore both these principles provided an appropriate basis for jurisdiction in the case.[66] The court also ruled that it is not necessary that a crime which is committed, was committed because of the victim's nationality, rather, the effect being that an offender does not have to intend to seize an American because of his nationality to be accountable under the Hostage-taking Act.[67]

The *Rezaq case* involves similar facts as the *Yunis case*, wherein the accused hijacked an Air Egypt aircraft which was travelling from Athens to Malta. After the accused gained control of the plane, he started killing Israeli and American hostages due to the non-fulfilment of his demands while releasing the Egyptian and Filipino hostages. The accused

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[62] United States v. Yunis, 681 F. Supp. 896, 901 (Columbia Circuit Court of Appeals, 1988).
[63] United States v. Rezaq, 134 F.3d 1121, 1133 (Columbia Circuit Court of Appeals, 1998).
[64] Lynda M. Clarizio, *United States v. Yunis. 681 F.Supp. 896*, 83 The Am. J. of Int'l L. 94, 95-97 (1989).
[65] M. Cherif Bassiouni, International Criminal Law: Crimes 31-32 (1st ed., Transnational Publishers 1986).
[66] Clarizio, *supra* note 64, at 97.
[67] Abraham Abramovsky, Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in United States v. Yunis, 15 Yale J. Int'l L. 121, 135 (1990).

was apprehended soon after, and the Court of Appeals found that the United States could exercise jurisdiction over Rezaq through the application of the passive personality principle. The court further held that the American hostages were targeted and victimized due to their American citizenship due to which assuming such jurisdiction over Rezaq's crime would be proper.

Even though both the cases elucidate the same point of law pertaining to the assumption of extraterritorial jurisdiction through the passive personality principle, a divergence with regards to its application is established. The *Yunis case* unequivocally shows that the application of the passive personality principle is proper in those cases in which American citizens are taken as hostages regardless of whether the terrorist possessed any motivation to target any victim due to his American citizenship. In stark contrast, the *Rezaq case*, requires that the passive personality principle to be applied only in those cases in which a victim is targeted due to their nationality i.e. the hostage's nationality is the very reason the terrorists chose that particular hostage.[68] Despite these opposing viewpoints, it is largely accepted that the terrorist acts are predominantly committed on the basis of a victim's nationality.[69] Hence, the principle should apply only to those cases involving acts of international terrorism that are directed against at individuals due to their nationality.[70]

However, apart from the crimes proscribed by the Hostage-taking Act, 1984 and the Antiterrorism Act, 1986, the US courts have been cautious in extending its jurisdiction over other crimes committed on foreign soil against US citizens and apart from the aforementioned cases, have not had much occasion to further develop this principle.[71]

IV. INTERNATIONAL LAW OBLIGATIONS OF INDIA TO INCORPORATE THE PASSIVE PERSONALITY PRINCIPLE: POTENTIAL TO EXTEND PROTECTION TO INDIANS ABROAD

The preceding sections established that though no special legislations have been adopted in India with regards to the ongoing conflict in Syria and Iraq, the extant laws themselves represent a robust mechanism which empower courts to not only prosecute Indian nationals from committing crimes in those war-ravaged areas through the codified provisions

[68] Waltman, *supra* 55, at 28.
[69] D.H. Bell, *Comment: The Origins of Modern Terrorism*, 9 TERRORISM 307, 307-09 (1987).
[70] McCarthy, *supra* note 56.
[71] Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L. J. 1, 11 (1993).

of the active nationality principle, but also protect India's sovereignty, security and unity by making affiliations, and criminal acts committed in pursuance to such affiliation illegal.

However, notwithstanding what has been said in the foregoing paragraph, the existing Indian laws are ineffectual and inadequate in protecting those Indian nationals who are currently on the Iraqi and Syrian territory and have not partaken in the armed conflict i.e. those Indians who have travelled to Iraq and Syria, but have done so not in support of the IS but rather to provide humanitarian assistance, covering the war due to a journalism assignment etc.

This position can be rectified by mimicking the efforts of the US in protecting their citizens in foreign territories which had been adopted in furtherance of their obligations imposed by the Terrorist Bombings Convention, Hostage-taking Convention and Convention against Torture. As India has ratified the Terrorist Bombings Convention,[72] has acceded to the Hostage-taking Convention[73] and is a signatory to the Convention against Torture,[74] potential exists to incorporate such obligations within the domestic legal framework as the US has done.

India would be legally bound by the terms of the Terrorist Bombings Convention and the Hostage-taking Convention by virtue of its respective ratification and accession to these instruments, though the same has not been effected in municipal laws. The only stumbling-block would be with regards to the obligations under the Convention against Torture is that India is a mere signatory to the same.

A. Hostage-Taking Convention

The Hostage-taking Convention was formulated in light of a succession of incidents involving hostage-taking during the 1970's, especially against foreigners resulting in the international community being shaken to its core, with the preamble reaffirming this crime being a grave concern to the same.[75] Article 1 defines the crime of hostage-taking as one involving the seizing or detention of an individual for the purposes of compelling a third

[72] International Convention for the Suppression of Terrorist Bombings, 1998, 2149 *U.N.T.S.* 284 (9/1/1998).
[73] International Convention against the Taking of Hostages, 1979, 1316 U.N.T.S. 205 (26/9/1978).
[74] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 U.N.T.S. 85 (10/12/1984).
[75] Ben Saul, *International Convention against the Taking of Hostages*, Sydney Law School Research Paper No. 14/105, p. 5 (2014).

party to do or to abstain from doing a particular act, with Article 2 requiring the aforementioned provision to be made punishable in the domestic criminal law.

Article 5 lays down that that the member-states may establish jurisdiction over the crime of hostage-taking when such crime is committed against a national of such state, i.e. the hostage so taken is a national of such state, so as to compel a state to do or from abstaining to do an act.[76] Assimilating such measures within the Indian legal framework would be fruitful in deterring instances of Indians being taken by hostages, especially in Iraq and Syria. The instance of four Indians being beheaded publicly after being taken hostage for attempting to flee a warzone,[77] would lie squarely within the purview of this convention, showing the adoption of such provisions being need of the hour.

B. Terrorist Bombings Convention

The Terrorist Bombings Convention does not define the term "terrorism," rather proscribes the intentional and unlawful placing and detonation of explosives in a place of public use, an infrastructural facility or a governmental facility with the intention of either causing death or bodily injury or causing destruction to the targeted area.[78] Article 6 allows states to exercise jurisdiction over the outlawed conduct when the offence is committed against a national of such state thus paving way for member-states to adopt a passive personality jurisdiction over such crime.

Therefore, India can meet its obligations under this convention by not only criminalizing the conduct proscribed by Article 2 but can also adopt a passive personality jurisdiction as prescribed within Article 6, over such crimes by incorporating such provisions within the domestic framework. Another example wherein Indian courts could have exercised passive personality jurisdiction over crimes committed by IS agents was the suicide attack mounted upon a Canadian embassy resulting in the death of two Indian nationals.[79]

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[76] United States v. Salad, 907 F.Supp.2d 743 (East District of Virginia, 2012).
[77] *4 Indians killed by ISIS in Syria*, India Today (Feb. 1, 2016) http://indiatoday.intoday.in/story/4-indians-killed-by-isis-in-syria/1/585100.html.
[78] International Convention for the Suppression of Terrorist Bombings, 1998, 2149 *U.N.T.S.* 284 (9/1/1998), art. 2.
[79] *Two Indians among 24 killed in Afghanistan, ISIS claim strike*, NDTV (Jun. 21, 2016) http://www.ndtv.com/indians-abroad/two-indians-among-24-killed-in-afghanistan-isis-taliban-claim-stake-1421424.

C. UN Convention against Torture

By becoming a signatory to this convention, India has established a provisional status for such treaty.[80] This status imposes an obligation upon the signatory to not to defeat the object and or the purpose of the treaty.[81] Therefore, even though no legally binding obligation is formed for incorporating the provisions of this convention into the domestic framework, India has signalled its intention to accede to this convention later on by becoming a signatory. Through such a move, there exists a possibility for India to conform to the requirements laid down within this convention.

Through Article 2 of this convention, the crime of torture is illegalized, with an extensive definition of torture being established through Article 1. Article 5(1)(c) provides states with the power to take measures in order to establish jurisdiction over the crime of torture when the victim of such crime is a national of that state, hence establishing a passive personality jurisdiction for the crime of torture.[82]

The ghastly kidnapping of an Indian Catholic priest in Yemen by the IS, who was subsequently tortured and crucified,[83] would be covered under the provisions of this convention, demonstrating a need for the expeditious adoption of the passive personality jurisdiction in relation to this crime.

D. Aut Dedere Aut Judicare: The Obligation to Prosecute or Extradite

A commonality found within all three of the aforementioned conventions is the existence of the principle of *aut dedere aut judicare*.[84] This principle obliges states to either extradite or prosecute an individual accused of a crime,[85] who is found on the territory of such states, and encompasses within itself the principles permitting the exercise of

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[80] Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. Rep. 15 (May 28, 1951).
[81] Megalidis v. Turkey (Turkish - Greek Mixed Arab Tribe), 4 Annual Digest of Public International Law cases 395 (1928).
[82] Bruce Zagaris, *International White Collar Crime: Cases and Materials*, 237 (1st ed. Cambridge University Press 2010).
[83] Sarah Malm, *ISIS 'crucifies Catholic priest on Good Friday' after kidnapping him from old people's home where four nuns were shot dead*, DailyMail (Mar. 28, 2016) http://www.dailymail.co.uk/news/article-3512288/ISIS-carries-Good-Friday-crucifixion-Indian-Catholic-priest-Yemen-kidnapped-three-weeks-ago.html.
[84] Hugo Grotius, The Rights of War and Peace (A.C. Campbell ed. 1901); "When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal".
[85] Monica P. Moyo, Final Report on the Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare), 54 Int'l Legal Materials 758, 761 (2015).

jurisdiction over crimes committed outside the territory of a state.[86] This principle is propounded in a catena of international conventions, with such conventions recognizing the critical role that such an obligation plays in preventing offenders from escaping justice and thereby establishing an international framework to fight impunity.[87]

Treaties which contain this principle can be classified into two types:[88] first, those conventions which require the states to extradite the accused, and only when such extradition is refused, the obligation to prosecute domestically arises. Second, those in which the conventions oblige the states to prosecute, with extradition becoming an obligation after such state's failure to prosecute, or with both extradition and prosecution of the accused constituting as available options. The purpose behind such an obligation is to prevent perpetrators of serious crimes from escaping prosecution by making it certain that they cannot find refuge in any State.[89]

The relevant provisions of the aforementioned conventions[90] clearly document the second principle by stating that when the state upon which the crime is committed refuses to extradite the accused, such state would be obliged (without any exception) to submit such case for prosecution in accordance with the laws of such state.

This obligation only arises after the coming into force of such convention (containing the obligation) for the state concerned. Therefore, after a state becomes a party to such a convention it would become entitled to request any other member-states to comply with the obligation to extradite or prosecute.[91] As India is a member-state of the Hostage-taking Convention and the Terrorist Bombings Convention, it has to adopt measures for the implementation of this obligation, and with its failure to do so, would remain in breach of its obligation.

The importance of this principle cannot be understated, as its provisions pertaining to the extradition of an accused, enable and facilitate states to exercise a passive personality

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[86] *Id*. at 762.
[87] *Id*. at 761.
[88] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, 422 (separate opinion of Judge Yusuf).
[89] *Id*.
[90] International Convention against the Taking of Hostages, 1979, 1316 U.N.T.S. 205 (26/9/1978), art. 8(1); International Convention for the Suppression of Terrorist Bombings, 1998, 2149 *U.N.T.S.* 284 (9/1/1998), art. 8(1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 U.N.T.S. 85 (10/12/1984), art. 7(1).
[91] *Id.* at 458.

jurisdiction, by seeking the extradition of an accused, for those crimes committed beyond their territory,[92] and even if a request for an extradition is unheeded, then the state to which the request is made would be obliged to carry out domestic prosecution, ensuring that serious crimes do not go unpunished.

V. CONCLUSION: THE CRITICAL ROLE PLAYED BY INDIAN COURTS IN PROSECUTING THE IS

The wave of terror spread by the IS is unprecedented, with states around the world reinforcing their domestic laws to not only thwart attacks from within, but to also protect their citizens abroad. Such desperate times inexorably call for desperate measures, with the prevailing circumstances justifying resort to jurisdiction established through the passive personality principle. This form of jurisdiction is controversial, with criticism often being directed towards it due to the inability of domestic law enforcement agencies being unable to obtain custody of an accused,[93] resulting in the failure of prosecution on the basis of this principle. Another scathing criticism has been that when a state receives competing requests to extradite a particular accused from different states seeking to exercise their jurisdiction over such accused on the basis of a range of principles (i.e. territorial, active personality, passive personality, universal principle and the protective principle) more often than naught, the state receiving such requests would give preference to states asserting their jurisdiction over the accused through the nationality principle or territorial principle as opposed to the passive personality principle.

Even though this principle in not free from condemnation, it represents the most efficacious method that India can exercise to protect its citizens who are on foreign lands. By taking recourse to such a principle for exercising jurisdiction over serious crimes committed against Indians upon the territories of Iraq and Syria, members of the IS would be deterred from committing atrocities against Indians, thus protecting Indians abroad. Additionally, the already existing anti-terrorism laws in India are sufficient to impede the increase of IS's terror domestically, with criminal acts such as financing, being members of the IS and providing support to the IS attracting stringent punishments.

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[92] Xavier Phillipe, The principles of universal jurisdiction and complementarity: How do the two principles intermesh?, 88 Int'l Rev. of the Red Cross 375, 379 (2006).
[93] Watson, *supra* note 71, at 26.

By mimicking the efforts adopted by the US to extend protection to citizens abroad, India can not only meet its obligations under the Hostage-taking Convention, Terrorist-bombing convention and the Convention against Torture, but would also ensure a cessation of the crimes committed against Indians upon foreign territories. These efforts would also be compounded through the codified active personality principle under Section 3 and 4 of the IPC, ensuring that Indians who commit crimes in Iraq and Syria, and escape such lands, cannot thereby flee prosecution in India.

Conclusively, by adopting the legal framework suggested in the foregoing paragraphs, Indian courts would not only play a role in curbing this epidemic of terror domestically, but would also make a make a mark globally, ensuring that Indian members of the IS and those members who commit crimes against Indians in Iraq and Syria do not escape prosecution by seeking refuge within Indian territory.