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EDITORIAL

It is with great pride and satisfaction that we present Volume XIV of the NALSAR Student Law Review ("NSLR"). We are delighted with the response received through an increased number of submissions from students, academicians, and professionals. Demonstrating our commitment to increasing the visibility of the NSLR, we have launched our new website where the archives can be viewed.

The purpose of the law is to offer predictability and impute responsibility to the actions of individuals. A consistent churning in the discipline of law is needed to reflect the aspirations of an ever-changing society. Since its beginnings in 2005, the NSLR has strived to serve as a platform to host articulated insights on diverse matters contemplated by the canvas of the law. We have strived to continue that tradition in the XIVth edition.

The premise behind the creation of 'special' criminal statutes is to effectively combat certain categories of crime. In the Article titled *"Designed for Abuse: Special Criminal Laws and Rights of the Accused"*, Kunal Ambasta makes a compelling case against such a rationale. Examining anti- terror and sexual harassment laws, the Article argues that the creation of such 'special' statutes lacks penological justification. It contends that the 'procedural innovations' found in such special statutes agitate against the established principles of criminal procedure and evidence. Through careful analysis of the language of such statutes and judicial decisions, the author makes the case that the *raison d'etre* of special criminal statutes, which is the expedition of justice, is far removed from the reality.

In an intriguing take on a riddled area of the law titled "*Uniformity in Diversity – Reflecting on the Essential Practices Doctrine and its Implications for Legal Pluralism*", Dr. Kalindi Kokal examines the 'essential practices doctrine' applied by various courts in deciding matters of religion. The Article explores the contradictory and inconsistent opinions of the courts in determining what is fundamental to a particular religion. It makes a case against the attempts of the court to homogenise religion by imposing notions of public morality as being essential to them. The author argues that this has been the product of the tendency of courts towards regulating or even banning practices that are not ubiquitous. The Article postulates that the resultant homogenisation has reformed the meaning of religion, often empowering the majoritarian

narratives in religious communities. The simultaneous result of this has been the reduced effectiveness of state laws (including case laws) in terms of their actual enforcement.

Wildlife conservation and forest management have emerged as issues urging our attention to rethink our ideas of inclusive growth. In their Article titled *"Whose Forest Is It After All?"*, Dr. Manjeri Subin Sundar Raj & Ujal Kumar Mookherjee critically analyse these issues in the aftermath of the recent Supreme Court judgment in *Wildlife First & Ors. vs. Ministry of Environment and Forests*. The authors trace the change in the policies related to forest management and laws granting rights to traditional forest dwellers since the colonial era. The Article surveys scholarship advocating traditional human inclusive models of conservation and the western model of conservation. The authors view the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 as endorsing the former model due to its inclusion of public participation. The Article contrasts this in light of the recent Supreme Court judgment and contends that the ordered eviction of tribals has diluted the statute.

In the following Article titled *"Protection of Harmed Investors- The Missing Link in the Disgorgement Orders of the SEBI"*, Dr. S.N. Ghosh studies the issues in the disgorgement of ill-gotten gains within the Indian securities market. The author contends that presently, the Securities & Exchange Board of India accumulates ill-gotten funds, but fails to utilise them for the investors' education or protection. Such retention of funds amounts to undue enrichment, which runs contrary to the legislative mandate of the regulatory body and principles of contract law. To remedy this issue, the author refers to the regulatory framework in the United States of America for possible reforms to the disgorgement mechanism to identify and protect harmed investors in India.

Pursuant to the amendment to section 30(2)(b) of the Insolvency & Bankruptcy Code, 2016 and its consequent validation by the Supreme Court in the matter of *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta and others*, operational creditors occupy an unfavourable position in an insolvency resolution process. In their Article titled *"Operational Creditors in Insolvency: A Tale of Disenfranchisement"*, Misha Chandna, Pooja Singhania and Sudip Mahapatra lay bare this reality and argue that the initial successes of the IBC mask the disadvantage that operational creditors face. The Article reasons that by permitting the

distinction between financial creditors and operational creditors while attempting to 'take into account' the interest of operational creditors, the Supreme Court's approach has potentially opened the floodgate for litigation. The authors view this development as one without offering much protection to the operational creditors. Their suggestions for a 'fairer' IBC: permit representation for operational creditors on the Committee of Creditors and put in place a mechanism of proportionate recovery for operational creditors.

Along with covering academic issues in commercial law, the present edition has endeavoured to cover the practical challenges arising in commercial law practice. In the Essay titled *"Rights Issues – Untying the Knots"*, Sayantan Dutta, examines the regulatory & practical challenges faced in executing rights issues in India, considered to be an equitable route of raising capital. The author notes that there exist challenges in the renunciation of rights entitlements as well as in the service of documents to foreign investors. Additionally, since rights issues are freely priced, underwriting agreements may be exploited to allow for back-door entry of pre-identified non-shareholder investors at prices lower than other forms of issuances. If left unaddressed, the mechanism of rights issue may be exploited by investors and issuers, and consequently, the author proposes solutions to preserve its intended equitable nature.

In the Essay titled *"Ethical Hackers under the Information Technology Act: The Cyber Terrorism Conundrum and Unprotected 'Protected' Systems"*, Vivek Krishnani critiques the over-broad language of sections 66F and 70 of the Information Technology Act, 2000. The Essay argues that the penal framework against hacking laid down by this statute is worded in vague terms that potentially make an act punishable irrespective of the *mens rea* of the actor. To avoid the prospect of abuse by the authorities, the author suggests rephrasing the relevant sections of the statute to provide a clear and narrow definition by including *mens rea* as an integral element of the offence.

In a comprehensive review of Rahul Matthan's book titled *"Privacy 3.0: Unlocking our data driven future"*, Amlan Mishra critiques the context-specific account of privacy propounded by Matthan. Building on Daniel Solove's conception of privacy, the review highlights that though privacy problems ought to be understood and articulated in their specific contexts, the laws devised to deal with the same should necessarily incorporate normative standards. The review, while concurring with Matthan's recommendation of transcending the 'consent' standard

informing the notion of privacy, makes a key distinction. It underscores that developing normative standards of privacy would better serve to curb the tendencies of the government as well as the digital companies to normalise privacy invasions.

The Editorial Board is grateful to the authors for their contributions and patience. We are indebted to our peer reviewers whose time and effort have been instrumental in shaping the quality of the journal. The board would like to record our profound gratitude to the encouragement from the university. Our special thanks to Benjamin Vanlalvena who patiently designed our website, submissions portal and put together the final volume along with the updated cover. We are proud to announce our collaboration with Eastern Book Company as our publishing partner and are thankful to Mr. Sumeet Mallik for the opportunity. We are grateful to Prof. (Dr.) Faizan Mustafa for his continuing encouragement and Prof. (Dr.) Balakista Reddy, Registrar whose constant support paved the way for this collaboration.

We hope you enjoy this issue and look forward to your continued patronage.

Board of Editors, 2019-20

DESIGNED FOR ABUSE:
SPECIAL CRIMINAL LAWS AND RIGHTS OF THE ACCUSED

Kunal Ambasta[*]

The aim of this Article is to interrogate the necessity and efficacy of special criminal laws in the context of the Indian criminal justice system. It further argues that special criminal statutes have the inevitable effect of curtailing the rights of the accused in several crucial respects extending prior, during, and after trial. Special statutes creating distinct legal offences are sought to be justified on the basis of the distinctness of the crimes that they pertain to.

However, this Article argues that there exists little legal or penological justification in not treating those offences under the general criminal scheme. Finally, this Article demonstrates that procedural innovations applied under the guise of special statutes, result in further erosion of the rights of the accused persons, and the systemic effects of such laws work to the detriment of the criminal justice system.

The Article examines the various features of special criminal laws in broadly four parts. Part I of this Article looks at the theoretical justification of creating special laws. Part II will examine the procedural innovations developed by special legislations. Part III analyses the role of special legislations in engendering a system of informal plea bargaining. Part IV sheds light on the direct impact that reverse onus clauses in special legislations have on the right of the accused.

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CONTENTS

INTRODUCTION

In terms of criminal law, the Indian Penal Code, 1860 (hereinafter "IPC"), and the Code of Criminal Procedure, 1973 (hereinafter "CrPC"), can be said to be the general laws, which deal with the entire gamut of the legal implications of crime. By this, what is meant is that substantively, the terms of various criminal offences are defined and their punishment is laid out in the IPC. It also lays down the conditions for liability, such as general defences, exceptions, and so on. Procedurally, the CrPC exists as the default and exhaustive procedure by which the criminal justice system moves forward.

Why the CrPC may be considered to be general is easily understood from a look at its provisions. The CrPC provides for what is to legally take place at all steps of the criminal process, beginning from a complaint or a first information report to the stages of investigation, inquiry, and trial. It further provides for appeals, the carrying out of sentences, and so on. One could say that if the CrPC were to be looked at, parties to a criminal trial can find provisions pertaining to their rights and duties at any stage of the criminal justice process.

The IPC and the CrPC are supplemented by the Indian Evidence Act, 1872 (hereinafter "IEA"), which pertains to the relevance of facts, admissibility of evidence, and

means of proof. This Act also exists as a general statute, which applies to both civil as well as criminal trials, and is framed in general terms as to the kind of offence under trial.

For the purposes of this Article, special criminal laws refer to those laws, which create a distinct class of offences for certain acts.[1] These could be premised on a justification based on a distinct victim group, such as child sexual abuse, or the motive of the crime, such as terror. This Article has considered only those laws, which tweak the application of the procedural aspects of the criminal justice system. These could be alterations to entitlements to interim relief, such as bail,[2] to changes in the operation of evidence law, such as the alteration of standards of proof, and reverse onus clauses.

Over a period of time, the Indian legal system has adopted several criminal statutes that may be termed as 'special criminal laws'. The laws typically define these offences and proceed to stipulate certain ways in which they may be investigated and punished.[3] They do not replace the application of the IPC, which means that if the offences are additionally made out under the IPC as well as the special statute, both would be attracted. However, they do replace certain parts of the CrPC and the IEA. This is done usually through the application of non-obstante clauses within the special statute. With respect to the stages of procedure on which the special law is silent, the general procedural law still applies. Therefore, these special laws complement and attach to general statutes, creating a situation, where the rights of the accused are dealt with under the special laws, and the stringency of substantial provisions is either left unchanged or heightened as a permanent system.[4]

There are far too many special criminal statutes in the Indian legal system to all be studied in a single Article. The present Article looks primarily at anti-terrorism laws such as the Unlawful Activities (Prevention) Act, 1967 (hereinafter "UAPA")[5], and the Protection of Children from

[1] I write of the generality and special law distinction in terms of the application of principles of criminal law through statutes. For philosophical distinctions on generality *see* Peter Cane, *The General/Special Distinction in Criminal Law, Tort Law and Legal Theory*, 26(5) LAW AND PHILOSOPHY 4 65 (2007).
[2] The practice of limiting or extinguishing the right to bail is common in special criminal statutes. *See* Vikramjit Reen, *Proof of Innocence before Bail: Amendments Required*, 37(2) JILI, 256 (1995).
[3] Certain statutes such as the NIA Act, 2008, create an entirely separate investigative agency for the offences under special statutes, such as the Unlawful Activities Prevention Act, 1967.
[4] Ujjwal Kumar Singh, *State and Emerging Interlocking Legal Systems: 'Permanence of the Temporary*, 39(2) ECON. & POL. WKLY. 149 (2004).
[5] The Unlawful Activities Prevention Act, 1967, No. 37, Acts of Parliament, 1967.

Sexual Offences Act, 2012 (hereinafter "POCSO Act").[6] Part I of this Article traces the theoretical justification of creating special laws. Part II will examine the procedural innovations developed by special legislations. Part III analyses the role of special legislations in engendering a system of informal plea bargaining. Part IV sheds light on the direct impact that reverse onus clauses in special legislations have on the right of the accused.

I. MOUNTAINS OF MOLEHILLS: ARE SPECIAL OFFENCES REALLY THAT SPECIAL?

The generality of laws is a recognised feature of a system that purports to have the rule of law.[7] Jurists such as Professor Lon Fuller have famously defended the need for laws to be general in terms of their enactment and enforcement as necessary elements of an *"inner morality"* to the law.[8] Generality is considered to be important because it ensures applicability throughout the system and to all accused, and not just a special class of offences. Fuller also insisted on congruence between the law as designed and its actual implementation, to ensure fairness.

To take the Modern Natural Law theory perspective, generality is one of the features that ensures basic fairness in the legal system as a whole and curtails the power of the government to bring about 'evil' results, or abuse, through the law. It is believed that if the general procedural law relating to offences and their punishment is complied with, a basic amount of fairness is guaranteed.[9] However, the same basic principles of criminal law can be side-stepped, if classes of special criminal laws are created to apply only in specific situations and where the general procedural requirements of the law are held to be inapplicable. However, this does not mean, that the generality of laws ensures fairness in all cases. Indeed, it can be validly argued that general laws can also be misused. Hart famously argued that principles such as generality, which may ensure a logical coherence to the law, might also be amenable to the accomplishment of 'evil' aims.[10] However, the argument here is that the lack of generality allows for special laws to derogate from well-founded procedural safeguards as a

[6] The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012.
[7] Lord Bingham, *The Rule of Law*, 66(1) CAMBRIDGE L. J., 67 (2007).
[8] Brian H. Bix, *Natural Law: The Modern Tradition* in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 61 (Oxford, OUP, 2002).
[9] Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71(4) HARV. L. REV. 637 (1958).
[10] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71(4) HARV. L. REV. 593 (1958).

stated aim. Statutes that extinguish the right to bail for under-trial prisoners need not be misused to achieve the aim of prolonged incarceration *sans* guilt. But they can lead to arbitrary detentions as a valid and wholly legal result of following the law. Similarly, the stated policy objective of ensuring a high conviction rate manifests itself in mechanisms such as reverse onus clauses, without any consideration of the fairness of such results.

In terms of the psychological justification of these laws, the first argument often used to defend these laws is to view the class of offences they deal with to be special. This is the justification that is taken most often in the case of anti-terror laws. The understanding is that for terrorism as a class of criminal offences to be dealt with, requires special laws, and the general criminal law is incapable and inadequate to do the same.[11] This line of thinking proceeds from the transnational character of certain terror groups, to the distinct challenge they present to national security.[12] What is notable is the logic of national security and sovereignty being invoked to justify the enactment of anti-terror legislations, where terror offences are often singled out to be the greatest challenge facing the country. However, in terms of criminal law, this distinction between terror offences and general criminal offences is not clear. A terror offence would be an offence that is fully within the scope of a general criminal offence in terms of the requirements of liability. One can even go a step further and state that a terror offence is fully covered by the IPC in the Indian context, in terms of waging war against the state, a conspiracy to wage war against the state, or in cases where the loss of life occurs, murder.[13] Indeed, it is very common that in a terror charge, these provisions of the IPC will be mentioned against the accused, along with the special laws. What is theoretically distinct for a case of terror from an IPC offence remains unclear. Factors such as the threat level that an act presents to the safety of the country are not very relevant for criminal law distinctions.

Similarly, if the offence of child sexual abuse is considered, the nature of the crime remains the same in terms of the aspects of criminal law and is covered under the IPC. The

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[11] *Infra*, notes 20, 21. *See also* N. Manoharan, *Trojan Horses: Counter-terror Laws and Security in India*, 44(46), ECON. & POL. WKLY., 20 (2009).

[12] Sudha Pai, *TADA and Indian Democracy*, 30(50) ECON & POL. WKLY. 3203-3205 (1995). *See* Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20(1) COLUM. J. ASIAN L 93 (2006); *see also* MANISHA SETHI, KAFKALAND: PREJUDICE, LAW AND COUNTERTERRORISM IN INDIA 3-8 (Gurgaon; Three Essays Collective, 2014).

[13] These offences are fully defined in the Indian Penal Code, 1860, and are punishable by the maximum sentence of death or imprisonment for life.

challenges that the collection of evidence from the minor may present are fully capable of being handled by suitable changes to the Criminal Rules of Practice that courts are mandated to follow. However, the creation of a special law dealing with sexual offences against children was considered by many to be a unique necessity that could not be addressed adequately by prevalent legislation. In terms of several procedural aspects as well as the method of trial, the law makes certain changes to the ordinary nature of criminal law. In terms of already being covered by the scope of criminal law, the IPC does provide for offences of a sexual nature against children. However, certain modifications, such as recognising non-penetrative sexual abuse of children of any gender were needed.[14] However, in terms of criminal law requirements at a theoretical level, the same general principles were to be applied.

It is interesting to note the legislative history of the enactment of the Protection of Children from Sexual Offences Act, 2012. All constituencies involved in the matter, starting from the Parliamentary Standing Committee, to the actual debate in the Rajya Sabha, seem to have fully accepted the need for a special law without looking at the reasons as to why the same could not be achieved through amendments to the existent law to incorporate newer offences. Reasons seem to range from low rates of conviction, high incidence of crime against children, to the cumbersome process involved in amending the IPC.[15] What becomes clear from the Standing Committee Report is that scant regard is paid to the penological justification for creating new legislation, but that focus is only directed towards the ostensible policy justification for it. This is also true for the debate that occurred in the Rajya Sabha on the Bill, where the necessity of this law was taken as accepted.[16] This view of the criminal law may subscribe closely to what has been called the view of law as an external constraint.[17] Here, the promise of greater efficiency of a new law and the certainty of having a law specifically to deal with sexual offences against children are seen as paramount goals of society. Taken in this

[14] Penetrative sexual assault of males would be covered under § 377, IND. PEN. CODE.

[15] DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HUMAN RES. DEV., TWO HUNDRED AND FORTIETH REPORT 21st December, 2011, https://prsindia.org/sites/default/files/bill_files/SCR_Protection_of_Children_from_Sexual_Offences_Bill_2011.pdf (last visited May 17, 2020).

[16] Debate in the Rajya Sabha, 10th May, 2012, https://rsdebate.nic.in/bitstream/123456789/603084/1/ID_225_10052012_p361_p391_29.pdf (last visited May 17, 2020).

[17] David L. Bazelon, *Foreword- The Morality of the Criminal Law: Rights of the Accused*, 72(4) J. CRIM. L. & CRIMINOLOGY 1143 (1981).

view, having a special law is always considered better than not having one. The efficacy of more laws over fewer is presumed.

A similar story emerges when one looks at the enactment of the Prevention of Terrorism Act, 2002 (hereinafter "POTA").[18] The 173rd Report of the Law Commission of India contained a draft Prevention of Terrorism Bill for consideration.[19] The Law Commission foresaw the possibility of the legislation being tabled in a subsequent session of the Parliament. An interesting development prior to the Bill being introduced in the Parliament was the unanimous opinion expressed on the matter by the National Human Rights Commission (hereinafter "NHRC"). Invoking its jurisdiction under Section 12 of the Protection of Human Rights Act, 1993, the NHRC expressed its unanimous opinion that a special legislation on the subject of terror was not required, and the general criminal laws, with amendments if needed and better investigation and enforcement, would be sufficient to deal with the problem of terrorism. In a detailed opinion, the NHRC was of the view that the then existent set of criminal laws covered terror offences. They opined that the proposed provisions in the special anti-terror law were against the settled principles of criminal law and eroded the constitutionally guaranteed rights.[20] The Prevention of Terrorism Bill was passed by the Lok Sabha and rejected by the Rajya Sabha, leading to a joint session of the Parliament being convened for its discussion on the 26 March 2002.

In a day-long and extensive debate, several factors dealing with the desirability of a special anti-terror law were discussed. The usual aspects of the debate centered on the need of raising conviction rates in terror cases and on the nature of state sponsored terror against India. Arguments highlighting the potential of the law's misuse were also made. The opinion expressed by the NHRC was raised by members of the opposition parties. What is instructive is that there was no reply on the subject matter of the NHRC's objection to the Bill. Once again, it appears that the efficacy of the new law was presumed by the central government, and the foundational question of why general criminal laws are insufficient was never addressed.

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[18] The Prevention of Terrorism Act, 2002, No. 15, Acts of Parliament, 2002 (repealed).

[19] LAW COMMISSION OF INDIA, ONE HUNDRED AND SEVENTY THIRD REPORT, 13th April 2000. For comments on the Report and recommendations of the LCI *see* K. Balagopal, *Law Commission's View on Terrorism*, 35(25) ECON. & POL. WKLY. 2114 (2000).

[20] NATIONAL HUMAN RIGHTS COMMISSION, PREVENTION OF TERRORISM BILL, 2000: NHRC'S OPINION, https://nhrc.nic.in/press-release/prevention-terrorism-bill-2000-nhrc's-opinion (last visited May 17, 2020).

In the case of the POTA, it is especially instructive since the contrary point had been made and highlighted but was still not considered.[21]

II. THE DEVIL IN THE DETAIL: PROCEDURAL VIOLATIONS WRIT IN THE LAW

The aspects of special legislation that will be looked into, in this part, deal with the procedural changes these laws introduce into the law, which would have otherwise applied. These procedural aspects apply to both interim reliefs that the accused would be otherwise entitled to, such as bail, to changes that have a bearing on the adjudication of the cases itself, such as the operation of certain kinds of reverse onus clauses, or the admissibility of confessional statements made to the police.

The present anti-terror law in the country is preceded by the now non-applicable, Terrorism and Disruptive Activities (Prevention) Act, 1989 (hereinafter "TADA Act"), and POTA, both of which, allowed confessions to be made to police officers admissible in evidence.[22] This is a deviation from the provisions of the IEA, which make any confession made by an accused person to a police officer or in police custody, inadmissible in evidence.[23] The protection offered by the IEA extends to the extent that the accused person does not have to prove duress or torture during confessing to a police officer in order to make it inadmissible. It extends as a blanket provision covering all such confessions.[24] The purpose of the provision is to ensure that the police are not incentivised in any manner to induce or threaten the accused to confess, especially in the context of recording false and fabricated confessions. Confessions under the CrPC may be recorded only under Section 164 by a Judicial Magistrate and of an accused in judicial custody, and only after compliance of the requirements laid down in the provision.[25]

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[21] Debate in the Joint Session of Parliament, 26th March, 2002, http://loksabhaph.nic.in/Debates/Result13.aspx?dbsl=3795 (last visited May 17, 2020).

[22] Trials continue under the Terrorism and Disruptive Activities (Prevention) Act and POTA across courts where the allegations pertain to the times during which these laws were in force.

[23] §§ 25-26, Indian Evidence Act, 1872; These sections protect a person even when he is not formally accused at the time of the making of a confession, and are, in that sense, broader than the right against self-incrimination under Article 20(3) of the Constitution. *See* Aghnoo Nagesia v. State of Bihar*,* AIR 1966 SC 119.

[24] §§ 25-26, IEA do not require the accused to prove any extraneous factor leading to the making of the confession.

[25] § 164, CRIM PROC. CODE; The provision requires, *inter alia,* that the confession of an accused only be recorded when he has been warned by the Judicial Magistrate of the consequences of making such a confession, and the

However, the provisions of anti-terror laws such as the POTA and the TADA Act allowed for confessions to be made to police officers under police custody to be proved.[26] This was achieved by making the relevant provisions of the IEA inapplicable to cases under these laws.[27] As a substitute, certain safeguards were added in the law, such as the requirement of the confession to be recorded before a particular rank of police officer and certain post confessional measures to ensure that the confession was voluntarily made.[28] These provisions undercut and deviated from some of the most fundamental aspects of criminal law, such as the right against self-incrimination. It would be very difficult for any person, who was in the custody of the police and whose safety and security depended on the police itself, to ever prove that he was tortured by the police and compelled to make a confession. Barring clear medical evidence, there would be little that he would have in his favour to ever show the same.

The TADA Act was challenged on, *inter alia,* a violation of Article 20(3) in the Supreme Court. In its decision upholding the constitutionality of the provisions of the TADA Act in *Kartar Singh v. State of Punjab* (hereinafter "*Kartar Singh*"),[29] the Court completely bought into the argument of the necessity of such special laws to deal with the scourge of terrorism and the protection of national security. It is interesting to note how much this dichotomy affects the minds of the judges, who adjudicated this case, with them noting but yet disregarding instances of custodial brutality and torture of the accused.[30] What predicates the judicial decision-making in the case is the fact that the legislation in question deals with terror offences, which threaten the security of the nation. Therefore, terror offences stand on a different footing from regular criminal offences.

This 'exceptionalism' in the nature of the offence, which as Part I showed, is not very different from regular criminal offences and justifies in the eyes of the Court a looser application of the rights in the Constitution. Therefore, even while recognising the fact that

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Magistrate as satisfied himself by such questioning, that the confession is being made voluntarily. It further requires that the Magistrate only record the confession of an accused who has not been produced from police custody but only from judicial custody.

[26] § 15, TADA, 1987; § 32, POTA, 2002.

[27] *Id.*

[28] *Id.*

[29] Kartar Singh v. State of Punjab, (1994) 3 SCC 569. *See also* Shylashri Shankar, *Judicial Restraint in an Era of Terrorism: Prevention of Terrorism Cases and Minorities in India*, 11(1) SOC. L. REV. 103 (2015).

[30] *Id.*

the law has full potential for misuse, which would directly affect the fundamental rights of persons, the Court does not strike down the law. It instead provides additional safeguards to the application of the law.[31]

The constitutional challenge to the POTA was decided by the Supreme Court in *PUCL v. Union of India* (hereinafter "*PUCL*").[32] The Court accepted the Union of India's argument that terrorism was a problem that was distinct from ordinary crimes and law and order problems. Thereby, the central government had the competence to legislate upon the subject, which would have otherwise been within the purview of the states by virtue of falling under the first entry to List II of the Seventh Schedule.[33] The logic of the Court is circular and completely accepts the argument that since terrorism is a special offence, it cannot be dealt with, by ordinary criminal laws, and therefore, requires special laws such as the POTA. There is no critical discussion of the penological difference between terrorism and ordinary crimes, or why general criminal laws cannot deal with the problem. As regards the admissibility of confessions made to police officers, Section 32 of the POTA was considered to be an improvement upon the corresponding Section 15 of the TADA Act, insofar as it mandated a subsequent production before a Magistrate. Therefore, following *Kartar Singh,* and with meagre analysis on why such a provision should exist at all, the Court upheld it.

In both *Kartar Singh* as well as the *PUCL* judgment, what comes forth is the reluctance of the Supreme Court to apply any standard of constitutional scrutiny to the impugned provisions of the statutes under challenge.[34] The cursory justification of the provisions made by the central government was mostly premised on the special nature of terrorism and the need to effectively curtail fundamental rights. In both these cases, we see the Court wholly accepting this logic of necessity and assurance of non-abuse by the State. It is possible that the Court would have upheld these egregious provisions of law only if it had internalised the very logic that justifies these laws. The logic that justified the unique necessity of such laws is that such laws deal with offences distinct from those under general criminal laws and that they,

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[31] *Id.*
[32] Peoples' Union for Civil Liberties v. Union of India*,* AIR 2004 SC 456.
[33] List II, Schedule VII, IND. CONST., ("Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power)").
[34] K. Balagopal, *In Defence of India- Supreme Court and Terrorism*, 29(32) ECON. & POL. WKLY. 2054 (1994).

therefore, need not be made to satisfy the safeguards that other laws have to. Any honest scrutiny of special laws on constitutional principles would have led to different results.[35]

The abuse of the provisions allowing confessional statements to police officers to be proved during the trial has been well documented.[36] It became routine practice in terror cases to have extra-judicial confessions recorded from the accused and proved in court using these provisions. Upon trial, the accused would attempt to retract the confession relying on the argument that the same had not been made voluntarily. However, the accused would be required to show that the confession had been extracted involuntarily and not merely that he is retracting it as an afterthought. A retracted confession can otherwise be relied on by the Court to convict an accused, provided the Court is of the opinion that the confession was voluntarily made at the time it was recorded and upon corroboration.[37] Therefore, the effects that an extra-judicial confession can have on the rights of the accused may go to the ultimate conclusion and adjudication of the trial itself.

The result of the provisions allowing police recorded confessions to become admissible is to place the accused effectively at the mercy of the police. This is exacerbated by the fact that pre-charge sheet custody under such laws is extendable to one hundred and eighty days, as compared to ninety days for the most serious IPC offences. If one believes that the right against self-incrimination is a fundamental principle of criminal law and that no accused may be denied it, the provisions as well as the application of these erstwhile terror laws is clearly problematic. However, because these laws were portrayed as specific and justified on the basis of policy, they withstood constitutional challenges, which perhaps a general amendment to the IEA could not have. In the process, they also dispensed with some vital safeguards for the accused persons. As previously discussed, there exists no theoretical justification to not treat terror offences under the general substantive criminal law. The only real goal that is therefore achieved by the use of these special terror laws, seems to be a

[35] The Supreme Court upheld the validity of § 49 of the POTA in PUCL, *supra*, note 31; A similar provision in the Prevention of Money Laundering Act, 2006, namely § 45, was struck down as being manifestly arbitrary in Nikesh Tarachand Shah v. Union of India, AIR 2017 SC 5500; Comparison between the Supreme Court's lack of scrutiny of provisions in anti-terror legislation and general Fundamental Rights adjudication has highlighted this inconsistency on the part of the Court *see* Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-related Adjudication*, 21(1) NLSIR 51 (2009).

[36] *Black Law and White Lies- A Report on TADA 1985-1995*, 30(18-19), ECON. & POL. WKLY. 977 (1995).

[37] Subramania Gounden v. State of Madras, AIR 1958 SC 66.

successful circumvention of the procedural safeguards and the fundamental rights of the accused.

III. DAMNED IF YOU DO, DAMNED IF YOU DON'T: AN INFORMAL PLEA BARGAINING SYSTEM

Anti-terror legislation is notorious for the extinguishment of the right to bail of the accused pending investigation or trial. These legislations usually place restrictions on the powers of the Court to grant bail, which has added to the great taboo surrounding allegations of this nature in the first place. Often, mere allegations of indulging in terrorist activities are sufficient for Courts to deny bail, which results in long periods of incarceration pending trial, sometimes extending to many years.[38] There have been numerous cases, where the accused have finally been acquitted of the terror charges against them, but after having served more than ten years in prison as under-trials, merely because the right to bail was restricted. Further, Courts are generally averse to granting bail in such offences, to begin with.[39] To reiterate the point, this is a direct result of considering these offences to be special and not general, and on a connected note, of making the provisions of general laws such as the CrPC inapplicable to them. This results in a gross miscarriage of justice and the violation of the rights of the accused.

The denial of bail to under-trials for long periods of custody is a direct violation of the right to life and liberty. It has also helped create a unique method of further exploitation of these under-trials. This is the system of informal plea bargaining or a change of plea during the trial. This system has been informally referred to in Hindi as "*Katti*". Variations of this practice are now found across the country, in terror trials. An accused or a group of accused in a terror trial, who have typically undergone several years of custody as the proceedings drag on, will usually make an application before the Court under Section 265A of the CrPC, which pertains to plea bargaining. Since the provisions of plea bargaining under the CrPC only

[38] JAMIA TEACHERS' SOLIDARITY ASSOCIATION, FRAMED, DAMNED, ACQUITTED: DOSSIERS OF A VERY SPECIAL CELL, (New Delhi; Pharos, 2011); Indulekha Aravind, *Wrong arm of the law: 12 years in jail for terror crimes not committed*, THE ECONOMIC TIMES, 27th August, 2017, https://economictimes.indiatimes.com/news/politics-and-nation/wrong-arm-of-the-law-12-years-in-jail-for-terror-crimes-not-committed/articleshow/60237787.cms?from=mdr (last visited May 17, 2020).

[39] § 43D(5), UAPA, *supra* note 5.

extend to offences, which are punishable with a maximum of seven years of imprisonment, and most terror offences are punishable with much higher sentences, this application would inevitably be rejected. Thereafter, the accused usually changes his plea from 'not guilty' claimed at the start of the trial to one of 'guilty'. In many cases, this leads to the trial being concluded at this stage, and the punishment is typically awarded as being the time already served as an under-trial, or a reduced sentence, which can range to several years.[40]

In recent years, there have been several cases that have reached verdicts through the method described above, and it remains an understudied and underreported phenomenon. Even when it does get coverage, the narrative does not count for the actual machinations that have been employed to achieve the result.[41] It is possible that such a change of plea during trial is only made when facilitated by the prosecution agency on the promise that it would not seek a greater sentence for the accused than what they have already undergone. A rationally-thinking accused person would choose to plead guilty when they see the prospect of being confined in prison for the foreseeable future while the trial drags on for years and the remotest possibility of a sentence of life imprisonment at the end of it. This practice also allows the investigative agencies to secure a conviction regardless of the quality of evidence in the given case.

Some inferences can be drawn from the practice of changing pleas in terror trials. At least one causative factor is the lack of bail that is granted to the accused during proceedings. An average trial from the stage of arrest to judgment may take several years and can be delayed easily by the tardiness of the prosecution in bringing forth its witnesses to Court. An accused typically spends many years in custody waiting for the trial to conclude, and agrees to the prospect of conviction with release as a better one than contesting the matter for several more years while being incarcerated. If an accused were to be granted bail, it is unlikely that such an incentive to plead guilty would exist.

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[40] Court sends ISIS men to jail for seven years in terror case, THE ECONOMIC TIMES, 13th July, 2018, https://economictimes.indiatimes.com/news/defence/court-sends-isis-men-to-jail-for-7-years-in-terror-case/articleshow/58295971.cms?from=mdr. (last visited May 17, 2020).

[41] *Four accused in Chinnaswamy blast case to confess*, THE HINDU, 4th July, 2018, https://www.thehindu.com/news/national/karnataka/four-accused-in-chinnaswamy-stadium-blast-case-to-confess/article24325262.ece. (last visited May 17, 2020).

Furthermore, under the CrPC, a change of plea does not necessarily mean that the Court may, in all cases, conclude the trial. The Court has to satisfy itself as to the clarity and specificity of the plea of guilt and has the discretion to insist on the completion of the recording of evidence and reach a verdict on the merits of the same.[42] However, it appears that both the prosecution and the defence reach some semblance of an agreement and certainty as to the likely outcome of this change of plea, and act accordingly. It would be irrational for an accused to take the risk of changing their plea to that of guilty unless they have been assured that they will not suffer additional imprisonment, which in most cases will be a life term, because of it. They would also need to have been assured that the trial would be concluded with their plea of guilt and not drag on with their plea also recorded. This raises questions as to what kind of arrangement is entered into informally between the parties prior to the change of plea.

The practice of change of plea midway during a terror trial is the cumulative effect of the unfairness of the procedure that is built into terror statutes. By denying bail to under-trials, these laws subvert an essential safeguard of the criminal justice system, which is to not punish unless a person has been proved guilty. Long incarcerations during trial effectively ensure that these accused persons are punished without convictions. Needless to say, the law gives statutory force to this mechanism and pushes an accused to bargain his right to a fair and full trial with that of a speedy conviction. At the level of the trial courts, where this practice occurs, this translates to a denial of rights.

Ironically, one of the arguments used to justify the creation of special courts by special criminal laws has always been the need to conduct a speedy adjudication of guilt or innocence. This has been routinely invoked and accepted by the Supreme Court in constitutional challenges to these laws, such as in *Kartar Singh*. However, the narrative that emerges from this practice of informal plea bargaining is starkly different. It appears that not only are terror trials delayed to periods of several years but also that this delay, coupled with the lack of interim relief to the accused, leads to the success of the prosecution case in these cases. The machinations of these laws in trial courts are leading to a perhaps not foreseen but absolutely preventable destruction of the rights of the accused in such cases. This is over and above the

[42] §§ 229, 241, 252, 254, CRIM. PROC. CODE; *see* State of Maharashtra v. Sukhdeo Singh, AIR 1992 SC 2100.

extinguishment of the right to bail, which in itself is a violation of the fundamental rights. This phenomenon needs to be studied in greater detail, perhaps empirically, which is outside the scope of the present Article.

IV. REVERSE BURDENS OF GUILT

The last of the special features that shall be discussed in this Article, which have a direct bearing on the rights of the accused, is the use of reverse onus clauses. The general principle of criminal law is that an accused is presumed innocent until proven guilty.[43] This principle is universally recognised and incorporates within it the idea that the prosecution bears the burden of proof in a criminal trial to the standard of 'beyond reasonable doubt'. The development of this doctrine has been historical and is not discussed in this Article.

Reverse onus clauses, in the context of criminal law, are provisions of law, which, for certain specific facts, reverse the burden of proof onto the accused. Some examples may be taken from the IEA as well, which allows for certain facts to be proved by the accused. If the prosecution proves that a particular fact is specially within the knowledge of the accused, then the accused is under a burden to explain those facts, which he has special knowledge of.[44] Such a reverse onus clause requires the prosecution to first prove that a certain fact lies within the special knowledge of the accused and only then is the accused required to explain them. Therefore, there exists an initial burden on the prosecution to make the reverse onus clause applicable. It follows, therefore, that even when reverse onus clauses generally apply, they do not take away the entire burden from the prosecution and place it on the accused.

However, certain special legislations have made extensive use of reverse onus clauses to, in fact, reverse the entire burden of proof onto the accused and relieving the prosecution of any duty whatsoever. These provisions allow the Court to presume the guilt of the accused itself, imposing the burden on the accused to disprove guilt or prove innocence. Another novel application of the reverse onus clause is its use to reverse the burden of proof of 'facts in issue'.[45]

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[43] Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 10, INT'L. J. EVIDENCE & PROOF, 241 (2006).
[44] § 106, IEA.
[45] The term 'facts in issue' is used here as it is defined in § 3 of the IEA, 1872.

Seemingly benign legislation such as the POCSO Act incorporates such a provision in the statute. Section 29 of the law allows for the guilt of the accused to be presumed for certain offences if the accused is prosecuted for the same. This provision is in the teeth of all tenets of civilised criminal jurisprudence and the rights of the accused.[46] It merely requires that the accused be prosecuted for an offence, and his guilt would be presumed for the same. To deprive any accused of the rights of liberty following such a procedure would be unfair and would not amount to due process, which is concomitant of the guarantee under Article 21 of the Constitution of India.[47]

The Calcutta High Court has interpreted the provision to mean that the prosecution must establish the ingredients of the offence to a 'preponderance of probabilities' standard, as opposed to 'beyond reasonable doubt'. Part of the reasoning of the Court seems to be that absolving the prosecution from all burden would render the provision "*constitutionally suspect*".[48] One can, therefore say, that the provision, as it stands today, does cast some burden on the prosecution. However, the question of the standard of proof must also be confronted here. Unlike the provisions in the IEA, the reverse onus clause here attaches to the question of the commission of the offence itself, which is the ultimate fact in issue in a trial. It is a settled position of law that the burden on the prosecution to establish guilt in a criminal trial can never shift to the accused, and that burden must be satisfied to the standard of beyond reasonable doubt to sustain a conviction.[49] Even considering the Calcutta High Court's interpretation of the provision, the provision lowers the burden of proof on the prosecution in an unacceptable manner in two ways, namely, by allowing a reverse onus clause on the question of commission and by lowering the standard of proof on the question of guilt.

Prior to the POCSO Act, another special criminal legislation, which allowed for the drawing of presumptions as to facts in issue during trial, was the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter "NDPS Act"). Specifically, Sections 35 and 54 of the Act allow for the Court to presume a culpable mental state of the accused and also to presume the commission of an offence under the Act, where possession has been proved

[46] DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HUMAN RES. DEV., *supra* note 15, considers this provision to be similar to provisions in the IEA such as S.113A. As has been discussed, the presumptions under the IEA do not stand on the same footing, as they do not remove the entire prosecutorial burden in a case.
[47] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[48] Subrata Biswas v. State, 2019 SCC Online Cal 1815.
[49] Dahyabhai Chhaganbhai Thakker v. State of Gujarat, AIR 1964 SC 1563.

respectively. The constitutionality of these reverse onus clauses was challenged in the case of *Noor Aga* v. *State of Punjab* (hereinafter "*Noor Aga*").[50] The Supreme Court upheld the constitutionality of these Sections while altering the standards of proof required to prove foundational facts to trigger the presumption. Therefore, the fact of physical possession would have to be proved by the prosecution beyond reasonable doubt, whereas the accused need not disprove it to such a standard. However, the burden on the defence was also held to be a persuasive one, and therefore, one may conclude that the presumed fact would have to be disputed to a preponderance standard.

Noor Aga's case is instructive to us on the kind of analysis that the Court entered into on the question of the constitutionality of reverse onus clauses. In essence, the Court's evaluation is based on proportionality, with it trying to balance the rights of the accused with the aim of the special legislation. Though fully accepting the status of the presumption of innocence as a human right and fairness as a cardinal virtue of the criminal process, the Court did conclude that such rights were subject to statutory exceptions. It has to be observed here that this trend of balancing the rights of an accused *vis-à-vis* the interests of the society as statutorily formulated, is often, if not always, tilted towards the curtailment of the accused's rights. This is so because this analysis is an acceptance of the argument that actuates special criminal legislation, namely that distinct social or national interests require their enactment and mandate their special provisions. The result is that to constitutional courts, these restrictions or curtailments of rights by legislation seem proportionate and reasonable, and are consequently upheld.

However, the NDPS Act would still stand on a different footing from the POCSO Act as regards the application of reverse onus clauses. This is because the presumptions under the former legislation would still require a foundational fact to be proved prior to the triggering of the presumption. Further, after *Noor Aga*, the standard of proof for the foundational fact is also the highest. No such safeguards exist under Section 29 of the POCSO Act, as has been explained earlier. Special legislations other than the POCSO Act also make use of reverse onus clauses although none of them as extensively and widely as the former legislation.

[50] Noor Aga v. State of Punjab, (2008) 9 SCALE 681.

Section 43E of the UAPA allows the Court to presume the commission of an offence by the accused, if his fingerprints are found at the scene of the crime or on articles associated with the crime, or if similar arms or explosives that were used in an offence are recovered from the accused. Under ordinary criminal law, fingerprints of an accused at the scene of the crime would be a relevant fact that would indicate the presence of the accused at the spot. It would, however, be open to multiple interpretations. Mere presence at the scene of the crime does not by itself, following any rule of logic, prove the commission of the offence.

However, the UAPA allows for this leap of logic to take place under the guise of national security. Further, Section 43E(a) incentivises the investigation agency to ensure that recoveries and seizures of the explosives are made from the accused. Incidents of planting of fake evidence against the accused by the investigating agencies are not unknown. The recovery of explosives similar to those that were used in a criminal act would be an incriminating circumstance against the accused. However, it cannot, by itself, give rise to the presumption that the accused had, in fact, committed the said act. Such a presumption seriously affects the rights of the accused in the context of a criminal trial, which may have serious consequences for him.

The more fundamental question that needs to be asked in the context of the Indian criminal justice system is whether reverse onus clauses should be allowed to operate as to facts in issue in a criminal case. Should any criminal legislation give the courts the power to presume as opposed to inferring from the evidence, guilt? In such a context, reverse onus clauses need to be reassessed for their fairness.[51] It is not in doubt that special legislation is usually enacted to respond to what is perceived as great social challenges or to incidents that are considered to be extremely disruptive. However, the challenge of great threats to security or safety cannot be to respond by curtailing the very guarantees of liberty that are promised by the Constitution and truncating the rights of those, who may be the most affected by such laws. To allow the State to discharge its burden by the mere act of an allegation or by the mere collection of some wholly inadequate evidence is to ensure that all citizens are rendered more vulnerable to misuse of such power.

[51] In the context of U.S. constitutional law and statutory presumptions *see* Note, *Constitutionality of Rebuttable Presumptions*, 55(4) COLUM. L. REV. 527 (1955); *See also* Peter D. Bewley, *The Unconstitutionality of Statutory Criminal Presumptions* 22(2) STAN. L. REV. 341 (1970).

CONCLUSION

This Article has endeavoured to highlight some of the challenges presented to the rights of the accused by special criminal legislations. The points raised here are not exhaustive and even those that are raised may be dwelt upon in much greater detail. However, the twin points that are made in this Article are that the theoretical justification for treating certain crimes as distinct and thus requiring special procedure or substantive laws is unfounded. Second, it has also endeavoured that the reader will find that in both the application as well as the statutory design of these special laws, the otherwise basic and inalienable rights of the accused are deliberately lost sight of, and are suppressed. Often, the justification for this subversion of the rights of the accused is the serious nature of the offences involved, which by itself is both inadequate as well as disingenuous. It can also be seen that this disregard of rights in the statutory design, leads to further violations in practice.

One may argue that any law need not address the situations of its misuse and that the points made in this Article only point to the misuse of these special laws, and therefore, my criticism of the statutes *per se* is unjustified. However, it can be pointed out here, that the laws that have been analysed are not merely those, which are prone to misuse but are designed for the particular kinds of misuse to be perpetrated.

A law which disregards the general prohibition on the recording of police confessions, and at the same time, also ignores the alternate provisions of the recording of confessions given to judicial officers, is not merely facilitating investigation but ensuring that confessions are only recorded before police officers, who have a direct interest in ensuring that a confession does come to be recorded. A law, which extinguishes the right of bail when the Court may feel that there is some evidence against an accused, has unjustified detention and incarceration built into its provisions – which is not the byproduct of any abuse but a well-designed mechanism. To such an extent, any defence of these laws, which is premised on this misuse argument, is misconceived.

UNIFORMITY IN DIVERSITY?: REFLECTING ON THE ESSENTIAL PRACTICES DOCTRINE AND ITS IMPLICATIONS FOR LEGAL PLURALISM

Dr. Kalindi Kokal[*]

This Article posits that the Indian courts' usage of the 'essential practices' doctrine has created a uniform understanding of religion and what is fundamental to it. This has been done by imposing an interpretation of public morality rooted in a human rights discourse. By reading into religion only those practices that reinforce the values of human rights as essential, courts have problematised the perceived clash between human rights and religious practices in a simplistic manner.

Part I presents an overview of the Indian jurisprudence concerning the essential practices doctrine. Building on such an understanding, Part II spells out the two components that courts have relied upon to determine what is fundamental to each religion. Thereafter, Part III underlines the problem with courts depending on spiritual scriptures to establish the core facets of religion. Part IV demonstrates the manner in which the human rights discourse flowing from the Constitution influences the pronouncements on essentiality and the underlying consistency that governs it. Finally, Part V reflects on the effectiveness of state laws regulating religious practices and the meaning that such regulations hold for the relationship between law and religion.

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CONTENTS

INTRODUCTION

Over the last few years, Indian courts have engaged extensively in defining what is 'essential' to the practice of different religions in India in several cases. Be it the bursting of crackers on Diwali,[1] the reading of *namaz* in a mosque,[2] the refusal of entry by places of worship to certain sections of society,[3] or the legitimacy of ritualistic practices around marriage and divorce,[4] higher courts in India have recurrently used the *essential practices* doctrine to distinguish between religious and secular practices and then to further determine whether a certain practice is necessary to the pursuit of a particular form of belief.

[1] Arjun Gopal v. Union of India, (2018) SCC OnLine SC 2118.
[2] Mohd. Siddiqui (D) Thr Lrs. v. Mahant Suresh Das, (2019) SCC OnLine SC 1440.
[3] Indian Young Lawyers Association v. State of Kerala, (2018) SCC OnLine SC 1690; Dr. Noorjehan Safia Niaz v. State of Maharashtra, (2016) SCC OnLine Bom 5394.
[4] Shayara Bano v. Union of India, (2017) SCC OnLine SC 963.

There has been a lot of development albeit fraught with debate, in the discourse around whether Indian courts ought to decide the essential practices of a particular religion.[5] There has also been a discussion about how the different interpretations of what constitutes *essential practice* have led to the Indian judiciary contradicting itself over and over again.[6] Resultantly, there has been an inconsistency of opinions on the subject, and thus, an unsteady and unpredictable relationship of the Indian state with religious practices generally.

While this might indeed be a deliberate move on the part of the Indian state,[7] what this Article seeks to highlight is how Indian courts, by using the *essential practices* doctrine, are in fact, creating a uniform understanding of religion and what is fundamental to it. I argue that this is being done by imposing an understanding of public morality – one of the exceptions to the exercise of the freedom of religion – that is rooted in a human rights discourse. I further contend that by reading into religion only those practices that reinforce the values of human rights as 'essential', courts have problematised the perceived simplistic conflict between human rights and religious practices.

I. DEFINING ESSENTIALITY

The need for Indian courts to determine what an 'essential' religious practice is, has arisen from the distinction made in Clause 2(a) of Article 25 of the Constitution between religious practice and economic, financial, political or other secular activities which are associated with religious practice. While the state can regulate the latter form of practices

[5] Ronojoy Sen, *The Indian Supreme Court and the Quest for a 'Rational' Hinduism*, 1(1) South Asian History and Culture 86–104 (2009); Tarunabh Khaitan, *Guest Post: The Essential Practices Test and Freedom of Religion – Notes on Sabarimala*, INDIAN CONST. L. PHIL. BLOG (July 29, 2018), https://indconlawphil.wordpress.com/2018/07/29/guest-post-the-essential-practices-test-and-freedom-of-religion-notes-on-sabarimala/(last visited May 17, 2020); Rajeev Dhawan, *Why the Supreme Court's Judgment on Mosques Is Fatally Flawed*, THE WIRE (Oct. 1, 2018), https://thewire.in/law/why-the-supreme-courts-judgment-on-mosques-is-fatally-flawed (last visited May 17, 2020).

[6] Valentina Rita Scotti, *The 'Essential Practice of Religion' Doctrine in India and its Application in Pakistan and Malaysia*, STATO, CHIESE E PLURALISMO CONFESSIONALE (Feb. 8, 2016), https://riviste.unimi.it/index.php/statoechiese/article/view/6783 (last visited May 17, 2020).

[7] The judiciary, being an institution of the state, is not free from social and political dynamics that are part of the working of the state machinery. The author, therefore, holds the position that judicial decisions are necessarily impacted by political dialogues that constitute and are constituted by the government in power and as well as those ingrained in the routine working of bureaucratic institutions. For an understanding of the concept of 'state', *see* Hansen and Stepputat (2001, 8).

despite them being religious, the former, on account of being 'essential' are protected under the freedom of religion guaranteed to individuals and religious denominations.

Over the years, the Supreme Court has developed a series of tests against which it decides what practices are 'essential' to various religions. These tests have developed through several case laws and in varied religious, political, historical, and social contexts. I summarise the primary indicators of the *essential practices* doctrine hereunder, drawing on their recurrence in various case laws that have depended upon them to determine essentiality.

1. Ascertaining the essentiality of practices with reference to the doctrine and tenets of the religion in question;[8]
2. Testing if the acts have been done in pursuance of religion;[9]
3. Ascertaining the essentiality of practices with reference to community practice and historical background, in addition to the former list of doctrine and tenets;[10]
4. Asking whether the practice is part of the core upon which the religion is founded. This would include determining:
    a. Whether the said practice(s) changed with the efflux of time;[11] and
    b. Whether they are peripheral, merely superstition or a matter of tradition and custom;[12]
5. Testing whether banning, regulating, amending or prohibiting the said practice would fundamentally alter or change the nature of the religion in question;[13] and
6. Evaluating the essentiality of the practice in light of the context within which such a question has arisen and in view of the factual, historic and legislative evidence provided to prove this essentiality.[14]

Along the way, the Indian courts' stance towards the manner in which essentiality of religious practices would be ascertained changed from prioritising the opinion of the

[8] The Commissioner Hindu Religious Endowments, Madras vs. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt, (1954) SCR 1005 (known as the 'Shirur Mutt case').
[9] *Id.*
[10] Commissioner of Police v. Acharya Jagadishwarananda Avadhuta, (2004) 12 SCC 770 (known as the 'second Ananda Margis case').
[11] *Id.*
[12] Durgah Committee, Ajmer v. Syed Hussain Ali, (1961) AIR SC 1402.
[13] *Id.*
[14] A.S. Narayana Deekshitulu v. State of Andhra Pradesh, (1996) 9 SCC 548.

community to assuming a central role for the Court in determining what is and what is not essential to a religious belief. In the following section, this Article will use some practices – the essentiality of which were debated in the higher courts in India in the last five years – to elaborate how these tests developed the discourse on *essential practices* to create uniformity in the understanding and therefore, regulation of religions. These practices in the cases examined concern the entry of women into places of worship, triple *talaq* (a form of divorce), and fasting unto death.

A. Entry into Places of Worship

The entry of women into places of worship was debated in two cases, once in the context of the Haji Ali Dargah in Mumbai and the other in the context of the Sabarimala temple in Kerala. In the case of *Dr. Noorjehan Safia Niaz v. State of Maharashtra*[15] (hereinafter "*Haji Ali Dargah case*"), the arguments revolved around the issue of whether denying women entry into the sanctum sanctorum of the *dargah* was an essential practice. In *Indian Young Lawyers Association v. State of Kerala*[16] (hereinafter "*the Sabarimala temple case*"), the practice in question was the exclusion of women between the age group of 10 and 50 years from entry into the Sabarimala temple. In both cases, the denial of women by religious groups into their respective places of worship was prefaced primarily on the fact of menstruation-related pollution.

In the *Haji Ali Dargah case*, the Bombay High Court declared the practice of restricting the entry of women into the sanctum sanctorum as not essential to the practice of Islam on the ground that this practice had been changed. As the arguments and evidence revealed, women were, in fact, allowed entry into the debated space until 2011, after which the practice was altered with a change in the composition of the Haji Ali Dargah Trust in the same year. This was, thus, a new restriction – one that did not satisfy the constitutional test which required essential practices to be unalterable.

In the *Sabarimala temple case*, the process to determine essentiality was two-fold. The Court first established that the followers of Lord Ayappa did not comprise a separate

[15] Dr. Noorjehan Safia Niaz v. State of Maharashtra, (2016) SCC OnLine Bom 5394.
[16] Indian Young Lawyers Association v. State of Kerala, (2018) SCC OnLine SC 1690.

denominational sect and were followers of the Hindu religion. It then went on to declare that such exclusion of women was a non-essential practice based on the following grounds:

(a) for want of textual and scriptural evidence in support of such a contention;
(b) that this exclusion of women was an altered practice that had changed with time;
(c) that the practice violated the fundamental right of all women to practice religion; and
(d) that it was against the basic constitutional values of dignity, liberty, and equality.

In the Sabarimala case, the Court drew a parallel between the restriction on entry into temples on the basis of menstruation-related pollution and the practices of untouchability. Chandrachud J., in his judgment, grounded the dismissal of this practice as essential based on the fact that practices of untouchability were specifically abolished under Article 17 of the Constitution.[17]

B. Regulating Matrimonial Practices

In *Shayara Bano v. Union of India*,[18] the Supreme Court of India was tasked with deciding whether *talaq-e-biddat*, the method of divorce by way of pronouncement of triple *talaq,* was essential to the Islamic faith. Here, the Court declared that *talaq-e-biddat* was not an essential practice in Islam and therefore could not be protected under Article 25 (1) of the Constitution.[19] One of the primary grounds based on which the Court arrived at this conclusion of non-essentiality was that the abolition of this practice would not change the fundamental nature of Islam "*as seen through a Sunni's eyes*" and that its essentiality could not be established in the context of Quranic principles. Three out of five judges deciding this case concluded that *talaq-e-biddat* was in fact "*perceived as sinful by the very Hanafi school that tolerates it*".[20]

C. Fasting Practices

In *Nikhil Soni v. Union of India*,[21] the Rajasthan High Court decided whether *Sallekhana* or *Santhara*, the practice of fasting unto death, was essential to Jainism. The non-essentiality of *Sallekhana* to the practice of Jainism was one of the reasons used by the Rajasthan High Court

[17] Indian Young Lawyers Association, *supra* note 17.
[18] *Supra* note 4.
[19] *Id.*
[20] *Id.* at 331 (Nariman, J.).
[21] Nikhil Soni v. Union of India, (2015) Cri LJ 4951.

to justify its order to put a stop to this practice. Here, the Court remained unconvinced about the essentiality of *Sallekhana* to the pursuit of Jainism because *Sallekhana* was not "*practiced frequently*" by members of the Jain community. Additionally, the Court did not read taking one's own life as part of the Right to Life under Article 21 of the Constitution, and therefore, the practice was deemed to be in violation of it.

While this Article has relied on only four case studies to elucidate the manner in which courts apply and develop tests determining *essential practices*, the pattern of leaning towards analysing the 'popularity' of a practice within a religious community and examining its immutable nature through codification in texts or scriptures has been reflected in almost all the judgments referring to this doctrine. Therefore, in assuming their central role in determining the essential practices of religions, courts seemed to be more inclined towards abolishing, banning, or regulating practices that are not ubiquitous. However, by doing so, courts nevertheless end up homogenising what religions mean; often empowering the majority narratives in religious communities and reducing the effectiveness of state laws (including case laws) in terms of their actual enforcement.

II. SET IN STONE- THE SEARCH FOR POPULAR AND IMMUTABLE PRACTICES

One of the consequences of these tests of the *essential practices* doctrine is that in granting legitimacy to some practices and not to others, the state (through its courts) as one authority of power, homogenises Hinduism, Islam, and Jainism. It sets a standard of what is core to these religions in the eyes of the Indian state. However, in order to do so in the abovementioned four cases, the judiciary (as an organ of the state) relied on *(a)* prevalence of the practice, and *(b)* interpretations of the scriptures from these religions, where available. For practices to be identified as core to the pursuit of religions, they had to be established as unalterable and popular. Interestingly, the pattern of judgments reveals that both these requirements were interconnected, in that, the determination of essentiality required both conditions to be fulfilled, even though the courts have not spelt this out as such. Therefore, with regard to the restriction on the entry of women into places of worship, even though the practice was widespread and popular, it was dismissed as unessential since it had been altered.

However, in the Triple *Talaq* case, the practice in question, despite finding its mention in Islamic texts and having been established as unalterable (in terms of being finite), was not deemed to be in popular practice because it was not commonly practiced by all Muslims who had different notions of divorce and was therefore declared as non-essential. Such a pattern of discernment, however, seeks to declare only those practices as essential that are homogenous i.e. those practices practiced by the entire religious community and that have not been altered. A mention of these practices in religious texts or scriptures is supposed by the courts an as indicator of their possible unalterability. In a country as diverse as India, where religious hybridity is synonymous with the practice of religion, the search for practices that are standardised across religious groups is paradoxical, to say the least.

III. SCRIPTURE, TENETS AND DOCTRINES: FINDING AN APPROPRIATE CONTEXT FOR RELIGIOUS PRACTICE

To take off from the preceding section, the trend of courts examining the essentiality of practices in the context of doctrines and scriptures also presents an anomaly because this usually means scrutinising the normative texts of religions. This, apart from satisfying the "*bent of minds of an elite milieu*" in any religious community, also tends to lend a rigid perspective to the practice of any religion.[22]

Religious practice in its very essence is bound to evolve within everyday contexts of the believers, including their socio-economic conditioning and geographical location, amongst other things.[23] In all the four cases referred to above, the courts have evaluated the veracity of the practices against the texts, scriptures, and doctrines of their respective religions. The unavailability of a text, as in the case of prohibiting women from entry into the Sabarimala temple (which involved members of the Hindu religious community) or the practice of *Sallekhana* (which concerned the Jain community), certainly presented an obstacle. What the

[22] Gilles Tarabout, *Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism*, 17 SOUTH ASIA MULTIDISCIPLINARY ACAD. J., (Mar. 2018), http://journals.openedition.org/samaj/4451 (last visited May 17, 2020).

[23] Yüksel Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India*, CAMBRIDGE STUDIES IN LAW AND SOCIETY (Cambridge Univ. Press., 2013); Alefiya Tundawala, *Multiple Representations of Muslimhood in West Bengal: Identity Construction Through Literature*, 32(2) SOUTH ASIA RESEARCH 139–63 (2012); Kalindi Kokal, *Decoding Diversity: Experiences with Personal Law in the Lower Courts of Maharashtra* in RELIGION AS EMPOWERMENT: GLOBAL LEGAL PERSPECTIVES 78–105 (Kyriaki Topidi & Lauren Fielder eds., Routledge 2016).

courts, therefore, proceeded to do was to verify whether the regulation or abolition of the practice in question would alter the 'fundamental character' of the religion itself. By involving itself in deciphering concepts like the 'fundamental' character of religions, a closer reading of these judgments reveals that the Indian state was entangling itself in a web of complexities. These kinds of tasks require both vast intellectual expertise, interdisciplinary knowledge, and great lengths of time in order to be able to develop a sound discourse; neither of which the Indian judiciary presently has the scope for. Nevertheless, courts' engagement in such debates seems to have been strategic and capitalises on the agendas of the petitioners initiating such litigation.

As the next section shows, courts' engrossment with discovering the 'fundamental character' of religions unfolded a discourse on 'public morality' which is likely to be imbued with important political consequences as well as social implications for Indian society.

IV. THE ASPIRATIONS OF A TRANSFORMATIVE CONSTITUTION

The Indian judiciary's strategic interest in assuming the role of defining the *essential practice* of any religion has been significantly motivated by the Constitution's ideals as set out in the Preamble.[24] The ideas of justice, equality, liberty, dignity, protection of personal freedoms under Part III of the Constitution of India; and the protection of public order, morality and health (under Articles 25 (1) and 26 (1) of the Constitution) have guided a large portion of the court's decision-making in this regard. In determining *essential practices*, courts have asked time and again whether, by granting constitutional protection to the practice in question by declaring it 'essential' to the concerned religion, the Indian state's quest for a society based on principles of equality, liberty and fraternity would be compromised.

However, as Tarabout highlights, the result of this judicial practice is an "*idealistic characterization*" of religions.[25] To give an example, in the judgment on women's entry into Sabarimala, Justices Dipak Misra and A.M. Khanwilkar held:[26]

[24] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690, Chandrachud, J., Part A, ¶5 (Referring to the Constitution's preamble, Chandrachud, J., in the case on the Sabarimala temple explains: "These questions are central to understanding the purpose of the Constitution, as they are to defining the role which is ascribed to the Constitution in controlling the closed boundaries of organised religion.")
[25] Gilles Tarabout, *supra* note 22.

> "*In no scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple as devotees and followers of Hindu religion and offer their prayers to the deity.*"

Similarly, in the judgment on the validity of the triple *talaq*, which delved extensively into Quranic principles, speaking about the practice of triple *talaq*, Justice Kurien Joseph held:[27]

> "*What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well.*"

Thus, the analysis in the ruling held triple *talaq* to be inconsistent with Islamic scriptures.

Such idealising is often grounded in the Court's duty to protect public morality, which restricts the freedom of religion of both individuals,[28] and religious denominations.[29] But how does the court define a society's morality? Moreover, can there be a universal understanding of morality that does not come at the cost of discriminating against a certain section of society? As Chandrachud, J. highlights in his part of the judgment on the *Sabarimala temple case*, the concept of morality is bound to change as the society transforms. At the same time, he cautions that the concept of public morality should not be decided on the basis of popular notions of such morality.

Given this complex balancing act that courts must engage in,[30] it appears that the Court has, in the context of these more recent judgments, promoted a notion of morality based on human rights norms underscored by the need to protect individual dignity to determine the essentiality of practices and justify state regulation.[31] In cases concerning the

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[26] *Id.* at Para 122 (Misra & Khanwilkar JJ.).
[27] *Supra* note 4, at ¶26 (Joseph, J.).
[28] INDIA CONST. art. 25, cl. 1.
[29] INDIA CONST. art 26, cl. 1.
[30] Werner Menski, *Judicial Passivism in the Public Interest*, 10(1-2) BANGLADESH J. OF LAW 11–20 (2006); Deepa Das Acevedo, *Temples, Courts, and Dynamic Equilibrium in the Indian Constitution*, 64(3) AM. J. COMP. L. 555–582 (2016), https://doi.org/10.2307/26425464.
[31] *See* Sen (2009, 100) for his observation as to how "…*the essential practices doctrine can then be seen as the Court's attempt to discipline and cleanse religion or religious practices that are seen as unruly, irrational and backward*…".

restriction on women's entry into places of worship and the practice of unilateral divorce under Islamic law, courts relied on the promotion of gender equality couched in the principle of equality under the Constitution. Additionally, the Supreme Court held that the restriction on women's entry into places of worship fell within the ambit of an understanding of untouchability, already abolished under the Constitution. In the case of the Jain practice of *Sallekhana*, the courts depended on a restricted understanding of the principle of the right to life under the Constitution to legitimise state intervention. In doing so, courts have integrated human rights principles into what would constitute the 'core' or the 'fundamental nature' of a religion. Thus, courts have diffused the perceived binary between religion and human rights and their respective legal orders to construct a uniform kind of public morality for India.

A. Uniform Civil Code in Disguise

The nature of development in the jurisprudence on the *essential practices* doctrine as mentioned above, indicates an attempt by the Indian state to promote a set of principles that can be viewed as integral to all religions and thus seeks to set a common standard to measure the essentiality of various religious practices.

India does not have a separate legislation on human rights. The values of human rights have been imbibed into the constitutional legal order.[32] If these same values find successful integration into the discourses about the fundamental nature of religions which has been so crucial to the essential practices doctrine, human rights values as a standard of public morality may ultimately bridge the gap between the state legal order based on the Constitution and the various religious legal orders – thus, lending a homogeneity to the principles of their respective state-enforced governance.[33]

[32] Elsewhere, I have used Masaji Chiba's (1986) theory of postulational values to argue that human rights constitute postulational values that underscore not only state laws, but also certain types of religious laws and everyday practices; *see* KALINDI KOKAL, STATE LAW, DISPUTE PROCESSING AND LEGAL PLURALISM: UNSPOKEN DIALOGUES FROM RURAL INDIA (Routledge 2019).

[33] In such a context, would it be that the decision in State of Bombay v. Narasu Appa Mali (AIR 1952 Bom 84) does not remain deliberated at all, since the very reason for conflict between personal laws and the fundamental rights would stand obliterated?

V. RELIGION THROUGH THE LENS OF ESSENTIAL PRACTICES: EFFECTIVENESS OF STATE LAWS

Religion is essentially the belief in some cosmic form of power and order that is perceived to be beyond human control. This belief manifests itself in the form of practices, rituals, and specific forms of behaviour in an attempt to attach a sense of tangibility to this intangible macrocosmic universe. State laws seek to regulate the everyday life of people in the societies they govern. Regulating religious practice would, therefore, imply the regulation of everyday practices perceived to be related to the pursuit of different religions. However, finding religion in everyday life goes beyond the pursuit and interpretations of the tenets of religion and its orders. It means looking at wherever and however people invoke a sacred presence. This means looking for 'lived religion' that happens "*beyond the bounds and often without the approval of religious authorities*" on the boundaries of "*orthodox religion and innovative experiences*".[34] It is what manifests as the embodied and material aspects of religion in everyday life.

The very concept of determining the 'essential' in matters related to the practice of any religion, therefore, implies taking a partial and thus inevitably flawed perspective of the pursuit of religions and beliefs. Proceeding on the footing that law is a socially embedded process, the vigour of state laws including judicial decisions can, however, be examined only in the context of people's lived experiences. As these vary and cause conflicts and tensions, a variety of related cases continue to be brought to the Indian courts reflecting the pluri-legality of religion – the cause of much headache for Indian judges.

CONCLUSION

There has always been an aspiration that the Constitution and the values that underscore it would lead the way for societal transformation. In another paper, I have reflected upon whether a pattern could be deciphered with respect to Indian courts' decisions on whether to take the lead or to follow society with respect to regulation of societal practices

[34] Nancy T. Ammerman, *Finding Religion in Everyday Life*, 75(2) SOCIOLOGY OF RELIGION 189–207 (2014).

founded in religious beliefs.[35] However, to examine such patterns, it is important to distinguish, as the courts seem to be doing, between reform at an ideological level and reform in actual practice. A closer reading of the judgments in the last five years, which constitute the development of the discourse on the *essential practices* doctrine, reveals that Indian courts have decided to lead ideological transformations.[36] Sezgin explains that one of the forms in which post-colonial jurisdictions have engaged in the reform of their respective personal law regimes is substantive reform. Substantive reform primarily aims to change the "…*substance of personal laws without reducing institutional or normative plurality*".[37] Such reform is often in response to intrinsic and extrinsic pressures for a change in personal law status.[38] At an ideological level, such reforms ultimately compel the Indian courts to regulate practices that do not align with the reformative ideologies often pitched by activist litigants and reinforced by the Indian state.[39] But does a declaration of these practices as non-essential to religion itself reveal a different form of political dialogue?[40]

Ever since independence, governance of people by their religious laws under the personal law system has been perceived by the Indian state as an obstacle in the achievement of national unity where individuals would view themselves first as members of a composite nation.[41] However, by encouraging the development of a uniform understanding of public morality through the *essential practices* doctrine, Indian courts are reforming religion instead of doing away with it – as was previously envisioned – to achieve the ideological foundations of a uniform civil code, thus making a uniform civil code more complex to tackle and counter.

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[35] Kalindi Kokal, *To Lead or To Follow?*, 49(50) ECON. & POL. WKLY. 19–21 (2014).

[36] This means that the Indian courts have tried to tackle the issues before them at the level of the values that underlie them and the thought processes that legitimate them.

[37] Yüksel Sezgin, *How to Integrate Universal Human Rights in Customary and Religious Legal Systems?*, 60 J. L. PLURALISM & UNOFFICIAL LAW 5–40 (2010).

[38] The reason why courts can and do engage in the regulation of religious practices is because the Indian state legitimates the governance of people's lives by their religious laws in activities concerning birth, death, marriage, succession, divorce, and adoption through the system of personal laws.

[39] Activists, and particularly women's organisations in India, have popularly used legal mobilisation through filing public interest litigations to use courts to *"… challenge the legitimacy of patriarchal norms, raise awareness within the community, and lay the groundwork for long-term institutional changes from within using the threat of external judicial intervention*", *see* Sezgin, *supra* note 37.

[40] Non-essential religious practices have often been regarded as 'superstitions' and the branding of practices as superstitious has been examined to have a powerful political and reformist impact in the Indian context, *see* Bharati 1970; *see also* Tarabout, *supra* note 20.

[41] Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34(1) ISRAEL L. REV. 101–33 (2000).

WHOSE FOREST IS IT AFTER ALL?

Ujal Kumar Mookherjee and Dr. Manjeri Subin Sunder Raj***

The decision of the Supreme Court in early 2019 on forest rights has once again brought to the fore the model of forest management and wildlife conservation that should be followed in India. Ever since the British came to India, forests, which earlier used to be governed as commons, were closed to the local stakeholders including forest dwelling tribes whose subsistence was intricately connected with the conservation of these forests. Commercial exploitation of these forests was the main aim of the colonial rulers and hardly changed even after independence.

Although the profiteering motive was somewhat replaced by conservationist motives through the enactment of statutes such as the Wildlife Protection Act, 1972, the model of conservation that was followed may be regarded as flawed. This model of conservation has been criticised as being essentially 'Western'.

Though the Forest Rights Act, 2006 forwarded a new approach towards forest management in India, the recent Supreme Court decision has diluted it to a great extent, which has been argued to be "elitist". To this, we can also consider how nature may be regarded as a "complex adaptive system" and how the creation of wilderness islands is actually a "flawed model" based on "inaccurate assumptions". An analysis of the same forms the premise of this Article.

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CONTENTS

INTRODUCTION

Forests, until the concretisation of the imperial rule in this country, were viewed as open resources that could be accessed by the local population for satisfying their daily requirements.[1] It was with the advent of the British rulers and their profiteering motives that forests were closed to the commoners and were converted into state property.[2] However, even then, it was said that the object was to ensure public benefit.[3] To secure colonial objectives, the Forest Act of 1865 was enacted. Traditional forest dwellers were denied any footing under the statute as it did not have any provision that recognised or provided for their protection.

[1] For a detailed analysis of the history of forest law in India, *see* 2 FOREST RESEARCH INSTITUTE, ONE HUNDRED YEARS OF INDIAN FORESTRY (V.S. Rao et al eds., Forest Centenary Publications, 1961).

[2] This can partly be attributed to the fact that the British came to realise that the supply of wood, from the forests in India, for their Navy and the Empire, is limited. It was around this time that they started to develop a method of scientific forestry. *For more*, read about Connolly, Collector of Malabar at KERALA FOREST AND WILDLIFE DEPARTMENT, *About Us*, http://www.forest.kerala.gov.in/index.php/about-us/forest-dept-history (last visited May 17, 2019).

[3] *See* 9 MINISTRY OF AGRICULTURE AND IRRIGATION, REPORT OF THE NATIONAL COMMISSION ON AGRICULTURE (Delhi, 1976).

The Forest Act of 1927, yet again, had several other shortcomings and failed to recognise the earlier mentioned rights.

While these colonial legislations reeked of colonial objectives, independent India, for the first time, enacted its forest related legislation in 1980.[4] The central theme of this legislation was conservation. While this was a marked difference from the previous legislations, critics pointed out that the legislation retained colonial underpinnings in the model of conservation that it sought to promote.[5] The scheme of 'historical injustice' towards the traditional forest dwellers was still present. It was only when the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, of 2006 (hereinafter "FRA") came into force that a correction was brought about. The Act's objective stated thus:[6]

> "*An Act to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations.*"

This marked the first instance of the rights of traditional dwellers being accepted under forest law. Despite its criticisms, the statute marked progress towards a new direction which had, hitherto, been amiss from all the forest related legislations in the country.[7]

Public participation has emerged as one of the important elements forming the basis of the concept of good governance worldwide. Scholars like Ramachandra Guha and Madhav Gadgil have long been advocates of a more Indian-ised model of forest conservation in the country as opposed to the exclusionary 'Western' models of environmental conservation, which seeks to exclude human interventions and create wilderness islands to protect the environment.[8] This is quite evident from the fact that they criticised many an approach for not taking oriental philosophy into consideration. It can also be argued that the idea that humans

[4] The Forest (Conservation) Act, 1980, No. 69, Acts of Parliament, 1980.
[5] Nalin Ranjan Jena, *People, Wildlife and Wildlife Protection Act*, 29 ECON. & POL. WKLY. 2767, 2767 (Oct. 15, 1994).
[6] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2, Acts of Parliament, 2007.
[7] Lovleen Bhullar, *The Indian Forest Rights Act 2006: A Critical Appraisal*, 4 LAW, ENV'T. & DEV. J. 20, 34 (2008).
[8] *See* Andrew Brennan & Yeuk-Sze Lo, *Environmental Ethics*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2016) https://plato.stanford.edu/entries/ethics-environmental/ (last visited May 17, 2020), for Guha's take on the concept of Deep Ecology and it being predominantly western in conceptualisation.

must be excluded in order to protect wilderness is in itself a "*flawed model*" based on an "*inaccurate assumption*".[9]

A slew of petitions were filed by several organisations dedicated to the conservation of wildlife in the country like 'Wildlife First', before the Supreme Court. On February 13, 2019,[10] the Supreme Court ordered the eviction of thousands of tribals from the forests whose claims under the FRA, could not be established.[11] This judgment has faced staunch criticism from several quarters of society, stemming from an apprehension that this might lead to the dilution of the FRA. This necessitates a critique of the judgment in light of the long ranging debate surrounding forest management in the country.

Aimed at critically analysing the Supreme Court judgment in light of the aforementioned issues, this Article, in Part I describes how forests were managed in India. Thereafter, Part II throws light on various principles of forest management, and the final part tries to chart a course for better and efficient management of Indian forests.

I. DECIPHERING FOREST LAWS

In this part, the authors have tried to identify how the laws and policies relating to forest management have transformed over time. This enquiry may be classified as historical. The aim is to gain familiarity with the legislations and policies related to forest management at various points of time in the country and to also identify those factors which have influenced these laws and policies. Through this process, we aim to identify the common thread that connects them. For the sake of convenience, the authors have chosen to classify the forest management laws and policies in India under the following three heads: (a) colonial motives; (b) conservationist motives; and (c) The Forest Rights Act, 2006.

[9] Jan G. Laitos & Lauren Joseph Wolongevicz, *Why Environmental Laws Fail*, 39 WILLIAM & MARY ENVTL. L. & POL'Y REV. 1 (2014).
[10] Wildlife First v. Ministry of Environment and Forests, 2019 SCC OnLine SC 238.
[11] Manu Sebastian, *SC Orders Eviction Of Nearly 10 Lakh People Whose Claims As Forest Dwellers Were Rejected*, LIVE LAW (Feb. 21, 2019), https://www.livelaw.in/top-stories/sc-orders-eviction-forest-dwellers-tribes-whose-claims-under-forest-rights-act-stand-rejected-143060 (last visited May 17, 2020).

A. Colonial Motives

Before the advent of the British rule in India, forests were common property resources – open in the point of access.[12] Local communities were free to draw upon the forest produce for their household purposes. It was only during the British rule in India, to satisfy the colonial profiteering motives, that some sort of control was sought to be exercised.

The timber requirement in Britain led the colonial power to take interest in the forests of India. In 1805, the Court of Directors received a despatch enquiring into the extent that the British Navy could rely on timber to be supplied from the Malabar region.[13] In 1806, the teak plantation in the Malabar region was reserved. The First Conservator of Forest was appointed in 1806.[14] However, due to not achieving the desired results, the post was abolished in 1822. The colonial government had managed to assert its authority over most of the valuable forests in the country through issuing regulations and proclamations until 1850. But as colonial 'hunger' for wood intensified, soon there was a need to establish sovereignty over not only forests with value, but over forests as a whole.

Dietrich Brandeis, a German forest officer who had earlier managed teak forests of Pegu was invited to advise the government on forest matters in 1862 and was made the first Inspector General of Forests in 1864. The first Forest Department was formed and soon the first legislation related to forests in India, the Forest Act of 1865 came into being. The Act aimed to establish imperial control over the forests to supply timber for railways.[15] Under this, the Governor-General in Council was empowered to subject any land covered with trees, brushwood, or jungle to the provisions of the Act. The Rules framed under the Act could regulate the way in which timber could be, *inter alia*, felled, or converted. It must be noted that the Act made no concrete effort to define what was meant by a 'forest'.

The Act of 1865, albeit seeking to establish state control over the forests,[16] contained certain provisions which were unsuited to the fulfilment of the objective. A conference of

[12] FOREST RESEARCH INSTITUTE, *supra* note 1.
[13] E. P. STEBBING, THE FORESTS OF INDIA, 38, 62-63 (London, 1922).
[14] Captain Watson was appointed as the first Conservator of Forests on Nov. 10, 1806.
[15] Ramachandra Guha, *Forestry in British and Post-British India: A Historical Analysis*, 18 ECON. & POL. WKLY. 1940, 1940 no.45 (Nov 5 – 12, 1983).
[16] Dolly Arora, *From State Regulation to People's Participation: Case of Forest Management in India*, 29 ECON. & POL. WKLY. 691, 691 no.12 (Mar. 19, 2004).

forest officers considered the issues with the law and found most of its provisions defective.[17] The Act of 1865 was found wanting on many counts. Brandis, with the help of Baden Powell, the then Inspector-General of Forests, set out to draft a new legislation. The new legislation provided for the creation of "*reserved forests*", "*protected forests*" and "*village forests*" with the Act of 1865 providing grounds for complete control over valuable forests. The Act also contained a procedure for the settlement of rights in reserved forests, wherein after a hearing before a Forest Settlement Officer, all valid rights of the right-holders could be extinguished by paying compensation or by transferring their exercise of the right to another block of forest.[18]

The Forest Act of 1927 repealed all previous legislations. The Preamble to the Act provided that it aimed to "*consolidate the law relating to forests, the transit of forest produce and the duty leviable on timber and other forest produce.*"[19] Relying on the principle of *res nullis*, the British converted vast tracts of forest lands of the country into the property of the State.[20] Section 37(1) of the Act provided:[21]

> "*In any case under this Chapter in which the State Government considers that, in lieu of placing the forest or land under the control of a Forest-Officer, the same should be acquired for public purposes, the State Government may proceed to acquire it in the manner provided by the Land Acquisition Act, 1894.*"

One glaring omission of the Act was that the term 'forest' was not defined. Section 3 of the Act empowered the government to constitute any forest or waste land which was the property of the government or over which the government had a proprietary right, or the whole or any part of the forest produce to which the government was entitled, as a reserved forest.[22]

Any forest land or waste land which was not a 'reserved forest' but over which the government had proprietary rights or any part of the forest produce to which the government was entitled to could be constituted into a 'protected forest'. In such forests, any tree or

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[17] Guha, *supra* note 15.
[18] Guha, *supra* note 15.
[19] Rahul Banerjee, *Adivasis and Unjust Laws*, 42 ECON. & POL. WKLY. 4010, 4010 no.39 (Sep. 29 – Oct. 5, 2007).
[20] *Id.*
[21] The Indian Forest Act, No. 16 of 1927, INDIA CODE (1927), https://www.indiacode.nic.in/bitstream/123456789/2388 (last visited May 17, 2020).
[22] Banerjee, *supra* note 19.

classes of trees could be declared as reserved from a particular date. Such forests or part thereof could be closed down for thirty years during which the rights of the stakeholders would remain suspended.

The Act hardly constituted a departure from the previous legislations since the underlying motive of the Act continued to be profiteering and the commercial exploitation of the forests. Forest conservation was never on the agenda.

The first National Forest Policy of independent India was released in 1952. But it had hardly any impact on the prevailing legislation relating to forests in India which continued in force for years after independence. The Policy distinctly highlighted the dependence of the newly independent state on the forest resources for reconstruction schemes and development of industries and communications. It classified forests into four categories: (i) protection forests which were to be preserved or created based on physical and climatic conditions; (ii) national forests to serve the needs of the State; (iii) village forests to provide for manure, cow-dung, and other agricultural requirements; and (iv) tree lands which, though outside the scope of ordinary forest management, were essential for the amelioration of the physical condition of the country.

The policy spoke about the predominance of the national interest over the rights of the village communities in clear terms. An overall analysis of the policy reveals the reminiscent colonial undertone: commercial exploitation of forests to serve the needs of the nation. It also reveals the "*forest versus human*" mode of conservation. However, conservation of forests for its inherent value was never the consideration of the policy makers.[23]

B. Conservationist Motives

Guha points out that four distinct interest groups have played a major role in influencing forest management policies in the country.[24] In India, it was only from 1970s that intellectuals and activists took up long-standing grievances of the forest dwelling communities. From 1864 to 1972, forest management strategies in the country were heavily biased in favour

[23] George F. Taylor II, *The Forestry Agriculture Interface: Some Lessons Learned from Indian Forest Policy*, 60 THE COMMONWEALTH FORESTRY REV. 45, 48-49 no.1 (Mar. 1981).
[24] Guha, *supra* note 15, at 2192.

of commercial exploitation of forests.[25] However, with the enactment of the Wildlife (Protection) Act of 1972, a paradigmatic shift towards conservationism was noted.[26] This statute, along with amendments introduced in 1991, sought to create strictly protected parks and sanctuaries.

However, the model of conservation that was the basis of enacting the Act has been regarded by many as being flawed. As pointed out earlier, there is little scope for community-based conservation under the Act since the underlying assumption of the Act was that people and wildlife are antagonistic to each other.[27] Guha, emphasised the need for replacing "*Ecology versus People*" with "*Ecology with the People*".[28] The Act of 1972, however, fails to recognise the symbiotic relationship that has existed amongst the people, forests, and wildlife living therein.[29] In his critique of Radical American Environmentalism, Guha argues that the setting aside of wilderness areas has resulted in the transfer of resources from the poor to the rich.[30] The Act, like its predecessors which impacted forest management to some extent, failed to protect the rights of the tribal populations, who for centuries were residing in the forests. Instead, it provided for the acquisition of their rights through the Land Acquisition Act, 1894, which, till it was in force, provided little or no scope for factoring in the opinion of local stakeholders.[31]

The Forest (Conservation) Act of 1980 was hardly a departure from the above mentioned trend. Despite containing "*conservation*" in its title, very little justice has been done to the term. All that the Act did was to take away the power remaining in the hands of the state government and vested the same in the central government. The Act has made it much more difficult to convert forest lands for non-forest uses without the clearance of the central government. The effect, as Guha points out, has been the consolidation of the territorial control of the Forest Department.[32]

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[25] *Id.* at 2193.
[26] *Id.*
[27] Krishnayan Sen, *Wildlife Protection: Scope of Community Participation in New Act*, 39 ECON. & POL. WKLY. 623, 623 no.7 (Feb. 14 – 20, 2004).
[28] Guha, *supra* note 15.
[29] JENA, *supra* note 5, at 2767.
[30] Ramachandra Guha, *Radical American Environmentalism and Wilderness Preservation: A Third World Critique*, 11 ENV'TL. ETHICS 71, 72 no.1 (Spring 1989).
[31] JENA, *supra* note 5, at 2767-2768.
[32] Guha, *supra* note 30.

Though the dominant theme of the Acts of 1972 and 1980 was primarily conservation, in terms of denial of rights of the forest dwelling population, it did not differ from any of the previous legislations or governmental policies.[33]

C. The Forest Rights Act, 2006

It was the National Forest Policy Resolution of 1988 which emphasised the primacy of maintaining environmental stability and ecological balance over the derivation of economic benefits.[34] It sought to balance conservation and the commercial exploitation of resources without abandoning local stakeholders' rights. The National Environment Policy of 2006, prepared to spell out a comprehensive policy for the protection of the environment in the country highlighted the need for applying the principles of good governance to the environment and to build mutually beneficial multi-stakeholder partnerships. The policy recognised that the disempowerment of traditional communities over forests since the commencement of formal forest laws have led to its degradation.[35] It spoke for the restoration of these entitlements through the Panchayati structure and framework provided under Part IX of the Indian Constitution.[36]

Decisions of the Supreme Court of India have played a crucial role. The Supreme Court, in *Banwasi Seva Ashram* v. *State of UP*,[37] in the exercise of its epistolary jurisdiction registered a writ petition based on a letter written to it by Banwasi Seva Ashram. The main contention of the petition was that the state government declared parts of the jungle lands of Dudhi and Robertsganj tehsils of Uttar Pradesh as 'reserved forests'. For years, the Adivasis living in these areas had access to forest produces like fruits, vegetables, fodder, flowers, timber etc. As these jungle lands were declared as 'reserved forests', forest officials started interfering with such usage, and criminal cases were registered against the Adivasis, and attempts to obstruct their free movement were made. Since certain villages were also brought

[33] JENA, *supra* note 5, at 2768.
[34] MINISTRY OF ENV'T & FORESTS, NATIONAL FOREST POLICY RESOLUTION (1988), https://www.vasundharaodisha.org/pdf/law&policies/National_Forest_Policy_1988.pdf (last visited May 17, 2020).
[35] MINISTRY OF ENV'T & FORESTS, NATIONAL ENVIRONMENT POLICY 24 (2006), https://ibkp.dbtindia.gov.in/DBT_Content_Test/CMS/Guidelines/20190411103521431_National%20Environment%20Policy,%202006.pdf (last visited May 17, 2020).
[36] *Id.*
[37] Banwasi Seva Ashram v. State of Uttar Pradesh, AIR 1987 SC 374.

under the protected area, the lands in and around the villages which the tribals had been cultivating, also saw increased interference from the forest officials. The Court gave a detailed set of guidelines as to how those claims were to be dealt with**.**

In *Samatha* v. *State of AP* (hereinafter "*Samatha*"),[38] the main issue was whether the government lands, forest lands, and tribal lands in Scheduled Areas could be transferred to non-tribals or private businesses. Interpreting the term "*persons*" to include the government as well, the Court held that such a transfer was impermissible. It was held that the government could not lease out lands which were in Scheduled Areas to non-tribals, in contravention of the Fifth Schedule of the Indian Constitution. The Court further spoke about the need for a policy decision to bring an enactment consistent throughout the whole country with respect to tribal lands that had minerals. It further opined that the executive was duty bound to protect the social, economic, and educational interests of the tribals when the state leased out the land in Scheduled Areas to non-tribals.

Thus, in such cases, the decisions of the Supreme Court have translated to correlative duties and obligations being placed upon the parties involved.

In this background, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act was passed with its stated objective to correct "*historical injustice*" meted out to forest dwellers. The legislation seeks to redress this injustice by providing the forest dwellers an opportunity to claim the following rights:[39]

1. To hold and live in forest lands that have been under individual or common occupation prior to 13 December, 2005.
2. To claim titles to forest lands that have already been cultivated or occupied.
3. Management and protection of forests as well as traditional knowledge.
4. To receive facilities like health, education, communication, and power.

Some of the key features of this Act relating to the expansion of the classes of beneficiaries to include not only forest dwelling Scheduled Tribes, but also other traditional

[38] Samatha v. State of Andhra Pradesh, AIR 1997 SC 3297.
[39] Armin Rosencranz, *The Forest Rights Act 2006: High Aspirations, Low Realisation*, 50 J. OF INDIAN L. INST. 656, 656 no.4 (Oct., 2008).

forest dwellers.[40] It grants the rights of ownership, access to collect, use and dispose of minor forest produce even in protected areas, to access biodiversity and the community right to intellectual property and traditional knowledge related to forest biodiversity and cultural diversity and the right to rehabilitation *in situ*.[41] Most significantly, the Act represents strong gravitation towards decentralisation through the involvement of the Gram Sabhas in the decision-making process.

The recommendations of the Joint Parliamentary Committee had envisaged community control over the determination of the nature and extent of rights and vested the Gram Sabhas with the sole authority to settle forest rights within its jurisdictional limits. However, the recommendations have been diluted to some extent with the involvement of the Panchayati Raj officials and forest department officials in the process.[42] The prevailing process requires the Gram Sabha to make a recommendation of the claim, which is then sent to the Sub-Divisional level authority. The next step is to send the claim to the District level authority which verifies the claim made. The District level authority consists exclusively of forest officials, including the officials of the forest department.[43] This process is significant as the Act provides for the creation of Critical Wildlife Habitats which are inviolate areas to be determined on scientific and objective criteria so that any area critical for wildlife may be free from human interventions.

The Act has been criticised on many counts.[44] It has been alleged that many of the recommendations of the Joint Parliamentary Committee have been diluted under the final Act.[45] It has been argued that several provisions of the Act arose as a compromise between the tribal lobbyists and the wildlife protectionists which prevented the Act from achieving its stated objective.[46] Armin Rosencranz points out, that since the Act came into force, the governmental response has been between weak and outright denial.[47] Though the Act supersedes the previous legislations with regards to the recognition of rights, in other aspects,

[40] *Id.*
[41] Bhullar, *supra* note 7.
[42] *Id.*
[43] Editorial, *Who Is the Encroacher of Tribal Lands?*, 4 ECON. & POL. WKLY. 8, 9 no.1 (Mar. 2, 2019).
[44] Rosencranz, *supra* note 39.
[45] MINISTRY OF ENV'T & FORESTS, *supra* note 35.
[46] Rosencranz, *supra* note 39.
[47] MINISTRY OF ENV'T & FORESTS, *supra* note 35.

the previous legislations continue to hold the field. This inconsistency may be found by the conjoint reading of Sections 4 and 13 of the Act.[48]

Having said that, it cannot be denied that the Act provides a great thrust towards empowering the forest dwellers in this country. It is the reflection of an attempt to distribute powers with the local stakeholders being involved in the decision-making processes, thereby attempting to create a new democratic form of forest governance.[49] Despite the lacunae, the effective implementation of the Act can chalk a better way to deal with the issues that it seeks to address.

II. GOOD GOVERNANCE OF INDIAN FORESTS: THE NEED FOR INVOLVING LOCAL STAKEHOLDERS IN FOREST CONSERVATION

After tracing the motives behind the development of the laws and policies relating to forest management, the authors will examine the various perspectives germane to the present system of forest management. This part attempts to offer an insight into the multi-dimensional nature of the debate surrounding forest management in India. The issues have been classified under the following four heads: (a) the constitutional mandate; (b) the good governance aspect; (c) socio-economic peculiarities; and (d) the environment protection aspect.

A. The Constitutional Mandate

Article 244(1) of the Constitution of India states that the provisions of the Fifth Schedule shall apply to the administration of Scheduled Areas and Scheduled Tribes in states other than Meghalaya, Mizoram, and Tripura.[50] The objective of the Fifth Schedule is to preserve the tribal population's autonomy and culture, ensure economic empowerment, fulfil their aspirations of social, economic, and political justice and fo peace and good governance in those areas.[51] In the landmark decision rendered by the Supreme Court in *Samatha*,[52] the Court observed that the clauses of the schedule and regulations framed thereunder must be

[48] MINISTRY OF ENV'T & FORESTS, *supra* note 35.
[49] *Id.*
[50] IND. CONST. art. 244, cl. 1.
[51] Orissa Mining Corporation Ltd. v. Ministry of Environment and Forests, (2013) 6 SCC 476.
[52] Samatha, *supra* note 38.

interpreted harmoniously and as widely as necessary to elongate the constitutional objectives and the dignity of the person of the Scheduled Tribes. The Court stated thus: [53]

> "*Agriculture is the only source of livelihood for the Scheduled Tribes, apart from the collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and an imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of abode, work and living….the tribes too have a great emotional attachment to their lands.*"

Part IX of the Indian Constitution was added by the 73rd Amendment to the Constitution. Article 243B mandates the establishment of Panchayats at village, intermediate and district levels.[54] Article 243-M (4)(b) states that the Parliament may extend the application of Part IX to Scheduled Areas.[55]

The Panchayats (Extension to the Scheduled Areas) Act (hereinafter "PESA")[56] was enacted in 1996. It extended the application of Part IX to Scheduled Areas. Clause (d) of Section 4 states that every Gram Sabha shall be competent to safeguard and preserve the traditions, customs, cultural identity, and community resources of the people.[57]

Section 4(i) further stipulates that consultation with the Gram Sabha or the Panchayat at the appropriate level is mandatory before lands for developmental projects may be acquired.[58] Section 4(k) makes the recommendations of the Gram Sabha mandatory before the grant of license or mining lease for minor minerals in Scheduled Areas.[59] The FRA was enacted bearing all these in mind.[60]

In *Lafarge Umiam Pvt. Ltd. v. Union of India,*[61] the Supreme Court observed that public participation in the determination of forests is an important aspect since native and indigenous people are fully aware and have full knowledge regarding what constitutes conservation of

[53] *Id.* at ¶10.
[54] IND. CONST. art. 243(B).
[55] IND. CONST. art. 243-M, cl. 4(b).
[56] The Panchayats (Extension to the Scheduled Areas) Act, 1996, No. 40, Acts of Parliament, 1996.
[57] *Id*, § 4, cl. (d).
[58] *Id*, § 4, cl. (i).
[59] *Id*, § 4, cl. (k).
[60] Orissa Mining Corporation, *supra* note 51, at ¶48.
[61] Lafarge Umiam Pvt. Ltd. v. Union of India, AIR 2011 SC 2781.

forests and development.[62] The Court held that "*these natives and indigenous people know how to keep the balance between economic and environment sustainability.*"[63]

In *Orissa Mining Corporation Ltd. v. Ministry of Environment and Forests*,[64] the dispute pertained to the grant of final stage clearance for the establishment of the Alumina Refinery Project in Lanjigarh, Orissa. The Court held that what needs to be looked into is whether tribes like the Dongria Kondha, Kutia Kondha have any religious rights over the Niyam Giri (Niyam Raja) and that it has to be considered by the Gram Sabha. The Court issued a direction to the state of Orissa to place such matters before the Gram Sabha for their active consideration.

B. The Good Governance Aspect

Ever since the World Bank started publishing its reports on 'good governance',[65] the concept has assumed immense significance. Despite being criticised as philistine, subsequent developments in this field have almost standardised certain parameters which constitute the measuring rod for governance in a country.[66] Public participation in governance is one such parameter. It is often urged that the local community's role in the management of natural resources is one of the key aspects of natural resource governance.

Garett Hardin, in his influential paper "*Tragedy of the Commons*",[67] had highlighted that common property resources were inevitably destined for doom. He terms it a "*tragedy*" because the property that belongs to everyone belongs to no one and is treated as such. The centrality of his contention was that since common property resources were open in the point of access, every stakeholder would try to maximise the benefits out of the same, leading to a situation where the property itself was wasted. It was the same argument using which the traditional English commons were closed down years ago. The commons were treated as a black hole in the economy, until Elinor Ostrom, in her Nobel-prize winning work "*Governing*

[62] *Id.* at ¶11.
[63] *Id.* at ¶10.
[64] Orissa Mining Corporation, *supra* note 51.
[65] UNIVERSITY COLLEGE OF LONDON, GOOD GOVERNANCE AND THE WORLD BANK (Vivian Collingwood ed.), https://www.ucl.ac.uk/dpu-projects/drivers_urb_change/urb_economy/pdf_glob_SAP/BWP_Governance_World%20Bank.pdf (last visited May 17, 2020).
[66] Ved. P. Nanda, *The Good Governance Concept Revisited*, 603 ANNALS OF AM. ACAD. POL. & SOC. SCI. 269, 274 (Jan. 2006).
[67] Garett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243–48 no. 3859 (1968).

the Commons" was able to cast away the aspersions related to commons. Through her eight design principles, she was able to highlight how a common-pool of resources can be used to resolve problems related to overuse and overexploitation.[68]

Forest policy in India has been largely defined through distinct motives like deriving profits out of forests, serving national interests, conserving wildlife and environment, and protecting the interests of the forest dwellers. On careful analysis of the legislations since the inception of the colonial rule in the country, it can be seen that protecting the interests of the forest dwellers has always remained the agenda of least concern.

The FRA sought to address this issue. The Act however has received hostile reception ever since its inception. Many petitions have been filed in the Supreme Court challenging the validity of the Act. In particular, wildlife conservationists have challenged the Act on the ground that it endangers the wildlife in the country.

Armin Rosencranz, in this context, raises the fundamental question, "*what is the scientific basis for reaching the conclusion that co-existence between people and wildlife is not a possibility, thus making relocation necessary?*". [69] It may be argued that the forest dwelling tribes have hardly been the cause of degradation of the wildlife or the forests of the country. Bigger contributors have been the conversion of forests for agriculture, settlements, building infrastructure, commercial exploitation of trees (timber), extraction of fuelwood, and so on.[70]

The National Environment Policy of 2006 points out that earlier, community entitlements over forests were generally recognised and thus there were stronger reasons to use the forests sustainably. However, ever since the commencement of formal institutions and laws related to forests, these entitlements were done away with. This led to forests becoming open in terms of access, which led to a manifestation of a "*Tragedy of Commons*".[71] It may be argued that the assumption that the recognition of the rights of the forest dwelling tribes in forests is detrimental to the wildlife and the environment is a flawed assumption.

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[68] Robert. D. Tollison, *Elinor Ostrom and the Commons*, 143 PUBLIC CHOICE no. 3 (Jun., 2010).
[69] Rosencranz, *supra* note 39.
[70] MINISTRY OF ENV'T & FORESTS, *supra* note 35.
[71] *Id.*

Micheal Haller, in his influential paper, elaborated on the idea of anti-commons. A "*tragedy*" of commons occurs when too many individuals have the privilege of using a scarce resource. A tragedy of anti-commons occurs when too many individuals have rights of exclusion in a scarce resource.[72] Excessive power in the hands of the forest department in the country creates a situation, wherein the de facto methods of forest management break down. Where resources are controlled by a complex and fragmented system of *de jure* rights, a kind of stalemate of management decisions occurs. It encourages the exploitation of the forest resources in an uncontrolled and informal manner, leading to the ultimate depletion of the resource.[73] Excessive regulation over forests and deprivation of the local stakeholders from forest lands may encourage a *de facto* regime of exploitation that may ultimately lead to the depletion of the resource.

C. Socio-Economic Peculiarities

Ramachandra Guha has identified four actors in the debate regarding forest management in India: (i) wildlife conservationists; (ii) timber harvesters or industrialists; (iii) rural social activists; and (iv) scientific foresters.[74]

Regarding them as "*interest groups*", he points out that each of such groups has sought wider support from a sophisticated theory of resource use in which their specific interests have been presented as being in congruence with the societal interest.[75] The wildlife conservationists and social (or scientific) foresters, he says, advocate in favour of strict state control over forests while the industrialists are opportunistic in their advocacy. The rural activists, on the other hand, argue for a greater role to be given to the community for the management of forests.

Guha argues that the entire development of the forest management system in India has been based on the changing impact of the claims of each of the social groups. Guha credits these developments to the peculiar socio-economic circumstances of India.[76] India has

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[72] Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets* 111 HARV. L. REV. 621, 677 no.3 (1998).
[73] Marena Brinkhurst, *In the Shadow of the Anticommons: The Paradox of Overlapping Exclusion Rights and Open Access Resource Degradation in India's Wastelands*, 44 J. ECON. ISSUES 139, 140 no.1 (Mar., 2010).
[74] Guha, *supra* note 29.
[75] *Id.*
[76] *Id.*

a huge community of forest dwellers and Scheduled Tribes whose contributions have been critical to the maintenance of ecological balance. The forest dwelling tribes depend upon forests for their survival. Drawing from the arguments of Ostrom,[77] since conservation of forests is intricately related to the question of their sustenance, local stakeholders can contribute positively towards that end. In light of the commitment to securing social justice, an exclusionary model of forest conservation is an idea that does not fit into the socio-economic context of this country.

Guha emphasises the need for a more participatory model of forest management in which environmental protection can be harmonised with the ends of social justice. "*Ecology with people*", he argues, should replace the focus of "*Ecology versus the People*".[78] The setting aside of wilderness areas stems from the assumption of a dichotomy between the maintenance of biotic integrity and human needs. Guha argues that placing greater emphasis on the creation of wilderness areas is harmful when the Third World is concerned because of a long settled agrarian population that has played a critical role in maintaining a fine relation with nature.[79] The setting aside of wilderness areas deprives the forest dwelling populations of their livelihood, thereby pushing them into the vicious circle of poverty and results in the direct transfer of resources from the poor to the rich.[80]

D. The Environment Protection Aspect

The Indian model of forest conservation must involve local stakeholders since having witnessed both the gifts and wrath of nature, they are in a better position to appreciate the needs of nature and the need to protect it. Atavism and prettification do little to protect the environment. Laitos and Wolongevicz in their influential work titled "*Why Environmental Laws Fail*", argue that one of the reasons for the failure of the laws designed to protect the environment worldwide is the overreliance on an "*unrealistic model for nature*". As per such a model, nature is perceived simply as closely integrated, self- regulating and a complex system that functions best when it is left alone and human interventions are done away with. They

[77] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (New York, Cambridge Press, 1990).
[78] Guha, *supra* note 29.
[79] Sen, *supra* note 26.
[80] *Id.*

argue that nature is a "*complex adaptive system*".[81] Ecosystems do not exist in a state of equilibrium, rather, they are governed by various processes which, through their mutual interactions form subsystems within the larger ecosystem. Humans do play a role in the working of the ecosystem, and the creation of isolation islands in the name of conservation is a "*flawed model*" and operates on an "*inaccurate assumption of conservation*".[82]

III. THE SUPREME COURT'S DECISION: A CRITICAL ANALYSIS

Challenging the validity of the FRA, a slew of petitions were filed before the Supreme Court, mainly from the wildlife conservationist lobby. While hearing one such matter filed by Wildlife First and other organisations such as the Nature Conservation Society and Tiger Research and Conservation Trust, a three judge bench of the Supreme Court headed by Arun Kumar Mishra J., ordered the eviction of almost 2 million forest dwellers whose claims under the FRA were rejected.[83] The Court asked for affidavits from individual states seeking a response on the number of rejected claims under the FRA that had taken place in various states and if those, whose claims had been rejected, have been evicted. Upon perusing the affidavits, the Supreme Court ordered the eviction of those whose claims under the FRA had been rejected. It also asked the Forest Survey of India to conduct a satellite survey and to place on record the encroachment positions in these states before and after the evictions. The order of the Supreme Court saw a huge wave of protests throughout the country, mainly against the government. It was alleged that the Ministry of Tribal Affairs (hereinafter "MoTA") had made no concerted efforts to defend the Act or the rights of the dwellers before the Supreme Court.[84] Following the MoTA's review petition, the implementation of the order has currently been stayed.[85]

It is important in this regard to consider the process of determining the claims under the FRA. Before the FRA was enacted, the Bill was referred to a Joint Parliamentary

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[81] LAITOS & WOLONGEVICZ, *supra* note 9, at 1.
[82] *Id.*
[83] Wildlife First, *supra* note 10.
[84] V. Venkatesan, *In Fear of Eviction*, FRONTLINE (Mar. 29, 2019), https://frontline.thehindu.com/the-nation/article26509725.ece (last visited on May 17, 2019).
[85] Ishan Kukreti & Priya Ranjan Sahu, *Forest Rights Act: Who is the Encroacher and Who is Encroached Upon*, DOWN TO EARTH (Mar. 20, 2019), https://www.downtoearth.org.in/coverage/forests/forest-rights-act-who-is-the-encroacher-and-who-is-encroached-upon-63585 (last visited May 17, 2020).

Committee (hereinafter "JPC"). The recommendations of the JPC were passionately contested in both the Houses leading to its reference to a group of ministers to resolve the conflict. The FRA, 2006 came into force in this background. The Act was criticised for having failed to integrate livelihood and conservation concerns, and also for diluting the recommendations of the JPC.[86]

One such area was the process of the determination of the rights under the FRA. The recommendations of the JPC envisaged a form of community control by vesting the Gram Sabha with the sole authority for determination and settlement of forest rights. This would have been a reversal in the practice that had been followed in the country ever since the inception of the British Raj. The Forest Department, whom Guha regards as the "*fourth group in the forestry debate*", has managed to retain most of its powers amidst the tug-of-war between the wildlife conservationists, industrialists, rural social activists and the social foresters who were the major influences in how forest management law and policy in India was shaped.[87]

However, under the FRA, the process of determination of rights is a threefold phenomenon. The Gram Sabhas have been authorised to initiate the process by making recommendations,[88] but the real decision is made by the Sub-Divisional committees.[89] Any person aggrieved with any such determination of the Gram Sabha may prefer a petition to the Sub Divisional Level Committee. Curiously, the list of 'aggrieved persons' includes state agencies.[90]An appeal from the Sub-Divisional Committees may also be preferred to the District Level Committees whose decision shall be the final.[91] Importantly, the Sub-Divisional and the District Level Committees shall include forest and revenue officials beside members of the Panchayati Raj institutions. Hence, the forest department retains a fair share of control under the scheme of the Act.

The MoTA issued a guideline in 2012 regarding the implementation of the FRA to all the states and Union Territories. It recognised some of the problems with the implementation of the Act. Some of the issues were that the Gram Sabha meetings were all convened at the

[86] Bhullar, *supra* note 7.
[87] Guha, *supra* note 30.
[88] FRA, *supra* note 6, at §6(1).
[89] Bhullar, *supra* note 7.
[90] Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007, pt. II sec. 3, Rule 6(g) (Jan. 1, 2007).
[91] FRA, *supra* note 6, at §6(5).

Panchayat levels resulting in the exclusion of smaller habitations not formally part of any village. Furthermore, forest dwellers' unhindered rights over the minor forest produce were not being recognised; other community rights were not being recognised; harassment and the eviction of the forest dwellers took place without the settlement of their forest rights; claims were being rejected due to the insistence on certain types of evidence.

Rule 13 of the Scheduled Tribes and other Traditional Forest Dwellers Rules, 2007, contains a list of evidence for the determination of forest rights.[92] Rule 13(3) lays down that the Gram Sabha, the Sub-Divisional Level Committee and the District Level Committee shall consider more than one of the evidence mentioned in the process of the determination of forest rights.[93] In order to remedy these lacunae, the MoTA issued guidelines. It was specifically mentioned in the guidelines that the Sub-Divisional Level Committee or the District Level Committee should not reject any claim which has been recommended by the Gram Sabha.[94] It provided that no claim that is accompanied by two forms of evidence specified in Rule 13 should be rejected without giving any reasons in writing for the same.[95] Also, they should not insist upon the production of any particular form of evidence. It was clarified that fine receipts, encroachers lists, primary offence reports rooted in prior official exercises would not be the sole basis for rejection of the claim.[96] It was also clarified that the usage of technology can only be supplementary evidence and cannot replace other forms of evidence supplied by the claimant.[97] The guidelines further went on to clarify that Section 4(5) of the Act, which prevents the removal of any person from occupation until the claim recognition process is complete, is absolute.[98]

The country has seen many instances of the eviction of tribals in order to hand over the natural resources of the country to the land-hungry corporates, which has led to the degradation of the natural resources of the country for private benefits, quite contrary to the

[92] Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007, pt. II sec. 3 (Jan. 1, 2007).
[93] MINISTRY OF TRIBAL AFFAIRS, FOREST RIGHTS ACT, 2006: ACT, RULES AND GUIDELINES 38, https://tribal.nic.in/FRA/data/FRARulesBook.pdf (last visited May 17, 2020).
[94] *Id.* at 38, point (g).
[95] *Id.*
[96] *See* MINISTRY OF TRIBAL AFFAIRS, GUIDELINES ON THE IMPLEMENTATION OF THE SCHEDULED TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT, 2006, No. 23011/32/2010-FRA Vol. II, https://tribal.nic.in/FRA/data/Guidelines.pdf (last visited May 17, 2020).
[97] *Id.*
[98] *Id.*

constitutional scheme of the country.[99]As per data, ever since the law was enacted, 4.22 million applications for settlement rights have been filed and out of this 1.94 million have been rejected.[100]

In their petition seeking a stay of the order, the Centre's counsel highlighted that there was not a single speaking order for the rejection of the claims of the tribals, and hence none of the forest dwellers could avail the appellate facilities as they were completely unaware about the grounds of rejection.[101] The bench further asked the states to respond to the accusation of high rates of rejections, non-communication of such orders, lack of reasoning, and rejection on frivolous and extraneous grounds. Additionally, the data provided by the state governments were the cumulative data for rejection on all three levels, even where there was a right to appeal against the decisions. Even the Centre acknowledged that the rejection of claims in areas affected by left-wing extremism was made on frivolous grounds.[102]

Considering this, one can locate an undercurrent that shifts the blame of environmental degradation squarely on the shoulders of the forest dwelling populations. The rationale that forests can only be conserved by denying rights or by evicting the forest dwellers, is based on a false elitist notion, completely ignoring the fact that India's forest cover is healthy in areas where forest dwellers inhabit. It also ignores the livelihood concerns of these populations, who, if evicted, will have nothing to rely upon for their sustenance.

CONCLUSION

The dilution of the FRA poses a great danger to the country. For long, traditional dwellers have been treated as 'encroachers', despite the fact that they have been taking care of the forest and its produce. Profiteering motives and a faulty idea of conservation have for long been instrumental in denying them their rights. The FRA, with its objectives, for the first time brought the concerns of these communities to the centre-stage and sought to address the same. This revolutionary legislation, true to its aim – correcting a historical injustice, has been able to do wonders and provides the forest dwellers their rightful claims.

[99] ROSENCRANZ, *supra* note 39, at 656-677.
[100] Kukreti & Sahu, *supra* note 80.
[101] Venkatesan, *supra* note 79.
[102] *Id.*

However, this might be to no avail. As a result of the Supreme Court's decision, the argument for the creation of conservation islands is gaining traction. While there have been a lot of calls, around the globe, to create islands of conservation, the method is not foolproof. This model is unsuitable for countries like India where the role of the tribal population has been highly critical for the conservation of nature. Historical proximity to nature puts them in a better position to appreciate nature's needs. Their traditional knowledge must be used as a resource in the conservation of nature. As their sustenance depends upon the conservation of the resource, they must be involved in conservation processes rather than bureaucrats, who have long been detached from nature.

Depriving them of natural resources is also against the constitutional scheme that advocates the equitable use of the resources in favour of the least well-off. The faulty implementation of the Act has in itself imperilled the lives of these communities, and the eviction of such a huge number of forest dwelling population poses a greater threat for them. A lot depends on how the issue unfolds in the times to come.

The effect of the decision is the dilution of the FRA which is largely unwarranted given the socio-economic conditions of the country. It raises a poignant question for all of us to ponder – *Whose Forest Is It After All?*

PROTECTION OF HARMED INVESTORS: THE MISSING LINK IN THE DISGORGEMENT ORDERS OF THE SEBI

*Dr. S. N. Ghosh**

Disgorgement is a monetary equitable remedy that is designed to prevent wrongdoers from unjustly enriching themselves as a result of their illegal conduct. Prompted by the practice in the United States of America, the Securities and Exchange Board of India has been issuing disgorgement orders since 2003. Accordingly, the ill-gotten monies collected by the SEBI under disgorgement orders are credited to the SEBI Investor Protection and Education Fund.

This Article expounds the twin objectives of the monies retained in the SEBI Investor Protection and Education Fund – the protection of the interests of investors and the promotion of investor education in accordance with the specified regulations. The author argues that by such retention, the SEBI is violating the cardinal principles of undue enrichment under the Indian Contract Act, 1872. Though the Indian Contract Act provides for 'gain-based' remedies like disgorgement and restitution, the amended SEBI Act, 1992 falls short of restitution. However, in 2019, the Securities Appellate Tribunal in its decision in the matter of Ram Kishori Gupta & Anr. v. SEBI held that "disgorgement without restitution does not serve any purpose."

Thus, this Article argues that to better serve the mandate of the SEBI, a specific provision should be inserted in the SEBI (Investor Protection and Education Fund) Regulations, 2009, to the effect that the disgorged monies credited to the fund should be utilised for compensating harmed investors upon identification.

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CONTENTS

INTRODUCTION

Disgorgement is a deterrence measure. It amounts to the removal of any financial benefit directly derived from violating the law. The objective is to strip off the actual profits earned by the wrongdoer. In the famous case of *Huntington v. Attrill*, the Supreme Court of the United States of America (hereinafter "USA") stated that "*disgorgement is a pecuniary penalty imposed and enforced by the State, for a crime or offences against its laws.*"[1] It is imposed as a consequence for violating public laws, i.e. a violation committed against the State rather than an aggrieved individual. The deterrent effect of enforcement action by the securities regulatory bodies would be greatly undermined if the violators of securities law were not required to disgorge illicit profits.[2] At the same time, courts in the USA have also held that disgorgement is often not compensatory.

The Securities Exchange Act of 1934 (hereinafter "SEC Act") did not specifically provide for disgorgement powers to the Securities Exchange Commission (hereinafter

[1] Huntington v. Attrill, 146 U. S. 657, 667(1892).
[2] Kokesh v. SEC, 581 U. S. 3-8 (2017).

"SEC"). Before the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, the SEC had no express authority to collect and distribute funds to defrauded investors in either judicial or administrative proceedings. The ruling in *SEC v. Texas Gulf Sulphur Co.*[3] marked the first case in which an appellate court recognised disgorgement as a remedy. The genesis of the disgorgement provision can be traced to the enactment of the Sarbanes-Oxley Act of 2002 (hereinafter "SOX Act").[4] The enactment of the statute came in the aftermath of the Enron scam and explicitly authorised the SEC to collect funds to compensate the harmed investors for their losses under Section 308. It bestowed broad authority for "*any equitable relief that may be appropriate or necessary for investors.*"[5]

The Securities and Exchange Board of India Act of 1992 (hereinafter "SEBI Act"), analogous to the SEC Act, also did not contain any specific provision in relation to the disgorgement powers of the regulator. However, the power to take preventive or punitive measures was implicit in the SEBI Act.[6] Backed by the enactment of the SOX Act providing for disgorgement as an equitable remedy, the Securities and Exchange Board of India (hereinafter "SEBI") similarly began issuing disgorgement orders from 2003 as an equitable remedy. However, this soon became a contentious issue in Indian courts. The directions of the SEBI were reversed by the Securities Appellate Tribunal (hereinafter "SAT") on 3 November 2003, in the case of *Rakesh Agarwal v. SEBI*.[7] The SAT in its order held that:[8]

> *"…equitable powers can only be exercised by courts and not any quasi-judicial tribunals/ bodies. SEBI does not have the power to direct disgorgement of any alleged profits. The disgorgement of alleged profits is always directed as a measure of deterrence and not compensation. Any pecuniary burden sought to be imposed by the legislature upon citizens, must be expressly provided for in the concerned Act/Regulation. Directions of*

[3] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (1968).
[4] Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).
[5] Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 THE BUSINESS LAWYER, 317-346 (Feb., 2008).
[6] The Securities and Exchange Board of India Act, 1992, No. 15, Acts of Parliament, 1992.
[7] Rakesh Agarwal v. SEBI, (2004) 49 SCL 351 (SAT).
[8] *Id.* at ¶77 (Quoting SEC v. Maurice Rind, 991 F.2d 1486); *see* Videocon Intl. v. SEBI, (2015) 4 SCC 33.

> *disgorgement are therefore penal in nature, and accordingly cannot be passed pursuant to Section 11 B of the said Act, under which only remedial directions may be passed.*"[9]

In *Ritesh Agarwal v. SEBI,* the Supreme Court observed that:[10]

> "*Section 11B is more action oriented, in a sense, it is a functional tool in the hands of the Board. In effect, Section 11B is one of the executive measures available to the respondent (SEBI) to enforce its prime duty of investor protection...the section identifies the persons to whom and the purposes for which, directions can be issued.*"

Interestingly, in the case of *IPO irregularities - dealings by Ms. Roopalben N. Panchal*, the SEBI while citing the decisions of the SAT in a catena of cases, held that "*disgorgement is not a penalty, but a monetary equitable remedy*".[11] Following the decision of the SAT in *Dushyant Dalal v. SEBI*,[12] it was observed that "*there need be no specific provision in the* [SEBI] *Act in this regard and this power to order disgorgement is inherent in the Board.*"[13]

Due to confusion prevailing over the equitable powers of the SEBI, an 'explanation' to Section 11B in the SEBI Act was inserted by the Securities Laws (Amendment) Act of 2014 in line with global precedents of legislative empowerment to the regulator for issuing disgorgement orders.[14] It was clarified that the power to issue directions under Section 11B shall:[15]

> "*Include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.*"

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[9] SAT followed the earlier cases of SEC v. Maurice Rind, 991 F.2d 1486; SEC v. Manor Nursing Centers, 458 F.2d 1082 (1972); Sterlite Industries v. SEBI, SCC OnLine SAT 28; BPL v. SEBI, 2001 SCC OnLine SAT 40; Videocon Intl. v. SEBI, *Id.*

[10] Ritesh Agarwal v. SEBI, (2008) 8 SCC 205, at ¶27.

[11] In re Roopalben N. Panchal alias Rupalben N. Panchal, 2011 SCC OnLine SEBI 33, at ¶9d.

[12] Dushyant N. Dalal v. SEBI, (2017) 9 SCC 660.

[13] In re Roopalben N. Panchal alias Rupalben N. Panchal, *supra* note 11.

[14] The Securities and Exchange Board of India (Amendment) Act, 2014, No. 27, Acts of Parliament, 2014.

[15] *Id.*

It was made effective from 18 July 2013. Thus, the amendment would not fall foul of the cardinal principles crystallised against *ex facto law* and the violation of fundamental rights. Disgorgement of ill-gotten benefits is not a penalty; it is an equitable remedy. The jurisprudence on disgorgement has been reiterated by the SAT in a recent decision in the matter of *Mrs. Ram Kishori Gupta v. SEBI* (commonly known as the *Vital Communications case*),[16] wherein it has been held that "*disgorgement without restitution does not serve any purpose.*"[17]

This Article reviews the background engendering the evolution of the disgorgement of ill-gotten gains in the Indian securities market. The author, through examining various decisions, seeks to test the efficacy of the disgorgement orders issued by the SEBI. The aim is to explore whether the SEBI, by restricting its powers only up to passing disgorgement orders, is fulfilling its legislative mandate of investor protection. This is of utmost importance since large amounts have been collected by the regulator in the recent past. Now that the SAT has held that "*disgorgement without restitution*" does not serve the purpose of investor protection in the securities market, the author attempts to highlight the provisions of the SOX Act and the corresponding practices followed by the SEC in the USA to protect the interests of the harmed investors.

Arguably, the amount spent on investor education in India is minuscule and the interest on the unspent monies in the Investor Protection and Education Fund is also becoming an additional source of revenue generation for the SEBI. This being the case, the author argues that the extant process followed by the SEBI of collecting and retaining the disgorged monies of ill-gotten gain amounts to 'undue enrichment' of the SEBI. Hence, it is violative of the cardinal principles enshrined in the Indian Contract Act, 1872.

It is argued in this Article that equity demands that the disgorged monies should be returned or used to compensate the investors who lost their monies due to the nefarious designs of a few market participants. The SEBI cannot hold this money with itself, particularly when the monies remain unutilised. Taking a cue from the Rules of Practice and Rules on Fair Fund and Disgorgement Plans followed by the SEC, this Article endeavours to propose a mechanism to compensate, upon identification, the harmed investors in the domestic

[16] Ram Kishori Gupta & Anr. v. SEBI, 2019 SCC OnLine SAT 149.
[17] *Id.* at ¶6.

securities market. To meet this investor protection objective, the author proposes an amendment to the SEBI Act.

Part I of this Article narrates the journey of the enforcement regime in the SEBI Act. Part II deliberates on the jurisprudence developed, encompassing various perspectives of the disgorgement powers of the SEBI. Part III highlights the missing link in the investor protection process followed by the SEBI upon passing disgorgement orders. To assert this central issue, evidence will also be brought out. Taking a leaf out of the provision of Section 308 of the SOX Act (Fair Funds for investors), this Article endeavours to propose the insertion of an appropriate provision in the SEBI Act. The Indian Companies Act, 2013 also contains a similar mechanism with the intervention of the Court.

I. THE ENFORCEMENT REGIME IN THE SEBI ACT

The enforcement ecosystem in a jurisdiction is greatly influenced by its legal and extant regulatory landscape, eco-political framework, merits of the case, nature of the conduct to be deterred and, to cap it all, the social, cultural, and economic environment.[18] In India, the significance of a deterrent action against the perpetrators of economic offences by the SEBI has been underlined by the Supreme Court in *N. Narayanan v. Adjudicating Officer, SEBI*.[19] In the aforementioned case, the Court observed:[20]

> "*Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only country's economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India's securities market. Message should go that our country will not tolerate 'market abuse' and that we are governed by the 'Rule of Law'. Fraud, deceit, artificiality, SEBI should ensure, have no place in the securities market of this country and 'market security' is our motto.*"

[18] THE BOARD OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, PRINCIPLES FOR FINANCIAL BENCHMARKS (2013).
[19] N. Narayanan v. Adjudicating Officer, SEBI, (2013) 12 SCC 152.
[20] *Id.* at ¶170.

The evolution of the enforcement metrics and the penalty-setting regime in India has been gradual and has also been influenced by many externalities. The Indian securities laws have gone through a learning curve. The SEBI Act was crafted by law-makers having little market experience and without a forward-looking approach. The Act could not fully comprehend the designs and colours of market violations and hence, the imposition of penalties was not provided in the Act. In the article titled *"Historical Perspective of Securities Law,"* Sahoo states that "*in the light of experience gained with the working of the SEBI Act, 1992, it was considered desirable to expand the jurisdiction of SEBI, enhance its autonomy and empower it to take a variety of punitive actions in case of violations of the Act.*"[21] India was admitted as a member of the International Organization of Securities Commissions (hereinafter "IOSCO"). Principle 9 of the then 30 Principles of Securities Regulations prescribed a strong enforcement process in its membership and consequently, the effective implementation of the Principles was critical for the SEBI.[22] Accordingly, Chapter VI-A – Penalties and Adjudication – was inserted in the SEBI Act by the Securities Laws (Amendment) Act, 1995.[23] The Amendment Act provided the much-desired teeth of monetary penalties to the enforcement empowerment of the SEBI as an alternative mechanism to deal with capital market misuse as well as abuse.[24]

Regulatory haste coupled with the lack of experience again created a regulatory gap. Section 14(1)(aa) of the SEBI Act provided "*all sums realized by way of Penalties under this Act shall be credited to Securities and Exchange Board of India General Fund*"[25], whereas the penalty amounts were credited to the government treasury in other major jurisdictions. The SEBI (Amendment) Act, 2002 rectified this anomaly.[26] Consequent to the amendment, the penalties are deposited in the Consolidated Fund of India. Despite the amendment, it appeared that due compliance was not made by regulators in India including the SEBI (per the scope of this Article). The Comptroller and Auditor General of India for the fiscal year (hereinafter "FY")

[21] M.S. Sahoo, *Historical Perspective of Securities Laws.* CHARTERED SEC'Y (2000).
[22] INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (2003).
[23] The Securities and Exchange Board of India (Amendment) Act, 1995, No. 5, Acts of Parliament, 1995.
[24] Misuse will include delayed or non-disclosure of Price Sensitive Information; directly or indirectly using any manipulative or deceptive device; non-filing of event-based corporate information. Abuse will include non-adherence of the Code of Conduct; indulging in Insider Trading, using the funds of clients for trading in the proprietary account of the broker.
[25] §14(1)(aa), SEBI Act, 1992.
[26] The Securities and Exchange Board of India (Amendment) Act, 2002, No. 59, Acts of Parliament, 2002.

ended March 2010 pulled up the SEBI and other regulators for "*contravention of constitutional provision*" by keeping their surplus funds worth over INR 2,142 crores collected through fee and penalty outside the government accounts.[27] Incidentally, the Annual Accounts of the SEBI for the year ended March 2016 as well as March 2017 stated that the penalties were being deposited in the Consolidated Fund on India.[28]

Though the Indian Contract Act, 1872 provides for 'gain-based' remedies,[29] their wider application is comparatively a new class of remedy in the regulatory enforcement ecosystem (applied only in the IPO scam) of the Indian securities market. The objective of this remedy is to compensate for the loss suffered by the plaintiff, i.e. award of compensation to the extent possible, equivalent to the loss of monies by the investor(s). Gain-based remedies are generally classified as: (a) restitution; and (b) disgorgement. The law of restitution, which is an equitable remedy, is the law of gains-based recovery. It provides for restoring anything unjustly taken from another. It is not compensation. However, the money or property wrongfully in the possession of the defendant must be traceable, i.e. it can be tied to particular funds or properties. In such a case, restitution comes in the form of a constructive trust or an equitable lien.[30]

II. THE SCOPE AND OBJECTIVES OF THE DISGORGEMENT POWERS OF THE SEBI

The meaning and objectives of empowering the SEBI to issue disgorgement orders,[31] have been elaborated by the SAT in *Karvy Stock Broking Ltd. v. SEBI*:[32]

[27] ET Bureau, *CAG pulls up 5 watchdogs for keeping fee out of govt accounts,* THE ECONOMIC TIMES (Mar. 19, 2011, 12:49 AM),https://economictimes.indiatimes.com/news/economy/finance/cag-pulls-up-5-watchdogs-for-keeping-fee-out-of-govt-accounts/articleshow/7740032.cms (last visited May 18, 2020).

[28] The annual accounts are available in the public domain for these two financial years only. Hence, the observations of the Comptroller & General of Accounts could not be verified.

[29] Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872.

[30] ANNA PAYNE & MONIQUE LEAHY, RESTITUTION AND IMPLIED CONTRACTS, 66 AM. JUR. 2D §6 (Thomson Reuters, 2001).

[31] §15J, inserted by the 1995 amendment *inter alia* provides that while adjudging the quantum of the penalty, the adjudicating officer shall have due regard to the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default.

[32] Karvy Stock Broking Ltd. v. SEBI, (2008) SCC OnLine SAT 74, at ¶5.

> *"Disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not a punishment nor is it concerned with the damages sustained by the victims of the unlawful conduct. Disgorgement of ill-gotten gains may be ordered against one who has violated the securities laws/regulations but it is not every violator who could be asked to disgorge. Only such wrongdoers who have made gains as a result of their illegal act(s) could be asked to do so. Since the chief purpose of ordering disgorgement is to make sure that the wrongdoers do not profit from their wrongdoing, it would follow that the disgorgement amount should not exceed the total profits realized as the result of the unlawful activity. In a disgorgement action, the burden of showing that the amount sought to be disgorged reasonably approximates the amount of unjust enrichment is on the Board."*

Upholding that the principles of natural justice shall prevail even while the SEBI passes disgorgement orders, the SAT quashed the orders of the SEBI in the above matter and observed:[33]

> "*…the impugned order was passed without affording an opportunity of hearing to the appellant and other entities which have been ordered to disgorge a sum of Rs. 115.82 crores. The least that was required of the Board was to have called upon the appellant to show cause as to why it should not be ordered to disgorge the amount determined in the impugned order. Not having done so, the principles of natural justice have been flagrantly violated. The impugned order, therefore, deserves to be set aside on this ground alone.*"

The powers and objectives of enforcement of the SEBI were elaborated by the SAT in *Karvy Stock Broking Ltd. v. SEBI*:[34]

> "*Section 11 is the very heart and soul of the Act. This provision has been periodically amended and today it is substantially different from what it was at its inception in the year 1992. The scope of the power has been considerably widened. The introduction of Sub section (4) in Section 11 and various other provisions like Section 11B is indicative*

[33] Karvy Stock Broking Ltd. v. SEBI, *supra* note 32, at ¶7.
[34] Karvy Stock Broking Ltd. v. SEBI, 2007 SCC OnLine SAT 2, at ¶18.

> *of the legislative intent. These provisions are meant to arm the Board with authority so as to be able to effectively exercise power and achieve the declared objectives of the Act. It is clear that a common thread runs through the various provisions of the Act and that is to empower the Board to take preventive as well as punitive measures so as to protect the investor and to promote the securities market.*"

The SEBI has been directing the disgorgement of funds in various matters on the premise that "*the interest of the market and of the investors requires that such entities are not allowed to participate in the market and unjustly enrich themselves at the cost of investors. Such acts of serious irregularities threaten the market integrity and orderly development of the market and calls for regulatory intervention to protect the interest of investors.*"[35] In *Sumeet Industries v. SEBI*, it was held that the computation of unlawful gains should be per precise norms. In case, it is not so, it will be set aside and the SEBI may be directed to recompute the quantum of unlawful gains liable to be disgorged by the appellants.[36] Further, in the matter of *Palred Technologies,* the SEBI order held that where the impounded funds liable to be disgorged, *"are found to be insufficient to meet the figure of unlawful gains, then the securities lying in the demat account of these persons shall be frozen to the extent of the remaining value."*[37]

In the *NSE Co-location* matter, the regulatory body noted that "*the stock exchange, as a first level regulator, has a fiduciary duty to the entire ecosystem. Market participants' confidence in the trading system is based on the presumption that the rules of trading are completely uniform and transparent.*"[38] It further stated that "*an order for disgorgement of a portion of the profits derived from the TBT* [Tick by Tick][39] *data dissemination activity during the relevant period, for being transferred to the Investor Protection and Education Fund, created by SEBI under section 11 of the SEBI Act, would be an appropriate direction, commensurate with the violations.*"[40]

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[35] In re IPO Irregularities- Dealings by Mr. Deepak Kumar Shantilal Jain in the Initial Public Offering of Infrastructure Development Finance Company Limited, 2008 SCC OnLine SEBI 176, at ¶13.
[36] Sumeet Industries v. SEBI, (2016) SCC OnLine SAT 289.
[37] In the matter of Trading in the shares of Palred Technologies Limited, 2016 SCC OnLine SEBI 42, at ¶12.
[38] In the matter of National Stock Exchange (NSE) Ltd. and Ors., 2019 SCC OnLine SEBI 120, at ¶8.3.3.9.
[39] Tick-by-Tick data disseminated by Stock Exchanges is a near-real-time trade transaction information "where each 'tick' constitutes an information packet of any market event (new order, cancel order, modify order or trade) with a uniquely identified 'tick sequence number'. Every 'tick' of a scrip/instrument, i.e. any new order/modification/cancellation/trade will affect the order book of that scrip/instrument as multiple 'ticks' processed together form the state of the market book". *See* In the matter of OPG Securities Pvt. Ltd., 2019 SCC OnLine SEBI 116.
[40] In the matter of National Stock Exchange (NSE) Ltd. and Ors., *supra* note 38, at ¶10.2.

As an interim measure, the SEBI may also impound the unlawful gains in case there is a possibility of diversion of such monies. In the *Bank of Rajasthan Ltd.* matter, the SEBI directed: [41]

> "*With the initiation of investigation and quasi-judicial proceedings, it is possible that the notices may divert the unlawful gains (subject to the adjudication of the allegation on the merits in the final order), which may result in defeating the effective implementation of the direction of disgorgement, if any to be passed after adjudication on merits. Non-interference by the Regulator at this stage would therefore result in irreparable injury to interests of the securities market and the investors.*"

Further, interest on the disgorged monies may be awarded from the date on which the cause of action arose till the date of the commencement of the proceedings for the recovery of such interest in equity.[42] The interest may also be awarded to be paid till the date of actual payment. However, such directions must be specific. Notwithstanding this, in the absence of the words "*along with further interest till actual payment is made*" [43] in the order of SEBI, no future interest is payable.

In the case of *Ram Kishori Gupta and Anr. v. SEBI*, SAT, on 30 April 2013, held that restitution by the SEBI of the losses suffered by the complainants is outside the scope of the SEBI.[44] It further noted that:[45]

> "*This aspect needs to be looked into by a civil court of competent jurisdiction in a trial and not by SEBI under the SEBI Act for the simple reason that SEBI has neither the expertise nor infrastructure for this purpose. There is no mandate in law requiring SEBI to do so in case any investor suffers loss on account of trading in shares and so on. It must be emphasised that such jurisdiction is not envisaged anywhere in the entire scheme of the SEBI Act. In fact, the law of damages/compensation is a complex area and SEBI is not supposed to undertake the same for reasons stated hereinabove.*"

[41] In the matter of insider trading by suspected entities in the scrip of Bank of Rajasthan Ltd., 2016 SCC OnLine SEBI 19, at ¶24.
[42] Trojan and Co. v. Nagappa Chettiar, (1953) SCR 789.
[43] Dushyant N. Dalal v. SEBI, *supra* note 12.
[44] Ram Kishori Gupta and Anr. v. SEBI, (2013) SAT 52.
[45] *Id.* at ¶9.

Interestingly, before parting with its decision, the SAT directed "*SEBI to look into the part of the complaint of the Appellants which relates to the alleged misleading and fraudulent advertisements issued by Vital Communications Limited, along with the investigation, understandably, being carried on in respect of VCL or separately, as it may be advised and considered fit and proper in the circumstances of this case as per law.*"[46]

Occasionally, due to the complex nature of transactions and the fact that the investigation report does not dwell on the extent of the specific gains made by the clients or the brokers, it is difficult to exactly quantify the disproportionate gains of the unfair advantage enjoyed by an entity and the consequent losses suffered by the investors.[47] In case, the wrongful gains along with interest as directed are not paid within the specified time, then the SEBI has a right to initiate the recovery process under Section 28A of the SEBI Act.[48]

III. THE MISSING LINK OF INVESTOR PROTECTION BY THE SEBI IN ITS DISGORGEMENT ORDERS

Investor protection is crucial in the securities market. Wrongdoers, by their conduct, expropriate monies including ill-gotten gains. Such conduct undermines the functioning of the financial markets. Therefore, there must be a deterrent enforcement ecosystem in the securities market that "*holds individuals and entities accountable and deters misconduct, promote public confidence in financial services, create an environment in which fair and efficient markets can thrive* (sic)."[49]

Disgorgement of monies is in the larger public interest and has been upheld by the Supreme Court of the USA.[50] The SEBI has been enjoined with 'public interest' jurisdiction in the securities market. The Supreme Court of India explained the term in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi:*[51]

[46] *Id.* at ¶12.
[47] In re Jay Bharat Fabrics Mills Ltd., SEBI Order No. AS/AO-03/2014 (2014).
[48] In re Sumeet Industries Ltd., 2014 SCC OnLine SEBI 278.
[49] IOSCO, *supra* note 22.
[50] Kokesh v. SEC, *supra* note 2.
[51] Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi, (2012) 13 SCC 61, at ¶22.

> *"The expression 'public interest' has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs."*

The object of the SEBI Act is to protect the interests of the investors in securities and to promote the orderly, healthy development of the securities market through regulation and further investor confidence.[52] It is a well-accepted canon of statutory construction that the Court is duty bound to further the aim of the Parliament of providing a remedy for the mischief against which the enactment is directed. Accordingly, the Court should prefer a construction which advances this object rather than one that attempts to find some way of circumventing it.[53]

Extending the rationale of the judicial decisions mentioned above, it can be said that the crediting of the penalties by the SEBI to the Consolidated Fund of India is an expression of the legislative mandate of the SEBI Act that such monies are public monies which can be utilised as such by the government.[54] Extending this chain of reasoning to the disgorged monies, it is argued that as the monies are to be credited to the Investor Protection and Education Fund, the underlying intent of the legislation is loud and clear that this specific fund is exclusively for two purposes: investor protection and investor education in the securities market. However, as will be demonstrated, the SEBI is using the fund for investor education but not for investor protection. The IPO scams were the only exception to this. Hence, the current functioning creates a regulatory as well as an administrative gap.

A. Disgorgement and the Investor Protection Regime: Analysing the United States Regulatory Model vis-à-vis the Indian Regulatory Model

The phrase 'investor protection' is dynamic, fascinating, and yet complex in the financial market space. The SEC, in its mission statement, has given wide amplitude to the term 'investor protection'. It describes its mission in threefold terms: "*to protect investors;*

[52] N. Narayanan v. Adjudicating Officer*, supra* note 19.
[53] R.K. Agarwal v. SEBI, (2001) SAT 15.
[54] SEBI Act, *supra* note 26.

maintain fair, orderly, and efficient markets; and facilitate capital formation."[55] The SEC performs this function of protecting investors from fraud through the enforcement of the securities laws and the punishment of the violators.

The SOX Act has given a more progressive dimension to the investor protection regime.[56] The collection of damages for the injured investors was never considered an important function of the SEC. Section 308 (popularly called 'Fair Fund provision') of the SOX Act envisages a prominent role for the SEC in compensating the harmed investors. The SOX Act now empowers the SEC in certain circumstances to levy "*civil penalties (which) shall be added to and become part of the disgorgement fund for the benefit of the victims of such violation.*"[57] In other words, it means that the disgorgement monies of ill-gotten gains collected from the wrongdoers shall be utilised for the benefit of the victims of the violations.

Comparatively, two critical deviations are noted in the SOX Act from the provisions of the SEBI Act. *Firstly*, the civil penalties are to be collected by the SEC instead of depositing it with the government treasury. These monies become a constituent of the Fair Funds. *Secondly*, this aggregated fund is distributed to harmed investors. As Black notes:[58]

> *"Because of SOX's absence of legislative history, we do not know why…. Congress, chose to condition the distribution of a penalty to investors on obtaining disgorgement from the violator. Perhaps that decision stemmed from congressional focus on the specific facts of Enron one of the classic situations for disgorgement in which the employee-investors purchased securities while the corporate insiders personally profited from their fraud by selling their shares and receiving inflated performance-based compensation."*

The SEC has been earnestly using this process during recent years and compensating the harmed investors. It ordered various entities to pay a total of $2,506 million in FY 2018 ($2,957 million in FY 2017) in the disgorgement of ill-gotten gains.[59] The SEC also distributed

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[55] U.S. SECURITIES AND EXCHANGE COMMISSION, THE ROLE OF THE SEC, https://www.investor.gov/introduction-investing/investing-basics/role-sec (last visited May 18, 2020).
[56] SOX Act, *supra* note 4.
[57] *Id.* at § 308.
[58] Black, *supra* note 5.
[59] U.S. SECURITIES AND EXCHANGE COMMISSION, SEC ANNUAL REPORT 2018 (Nov. 1, 2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf (last visited May 18, 2020).

$794 million in FY 2018 ($1,073 million in FY 2017) to the harmed investors from the Fair Funds created under Section 308 of the SOX Act.[60] Total monetary relief ordered in FY 2018 increased by approximately 4% from FY 2017.[61]

Turning to the Indian context, the Union Finance Minister, while presenting the Budget for FY 2006-07, proposed the establishment of the Investor Protection and Education Fund. The Minister stated that the fund shall be utilised for the protection of the investors, and promotion of investor education and awareness under the SEBI (Investor Protection and Education Fund) Regulations, 2009.[62] The fund may also be utilised, as the Advisory Board, constituted under the above regulation, may specify.[63] Section 125 of the Companies Act, 2013 also provides for the establishment of a similar fund but titled 'Investor Education and Protection Fund'.[64] This fund is regulated by the Ministry of Corporate Affairs. Interestingly, amongst other purposes, this fund shall also be utilised for *"distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement."*[65]

It may be noted that the provisions for which the disgorgement orders may be passed under the Companies Act, 2013, are all market-related and fall within the jurisdiction of the SEBI. Section 38(3) of the Companies Act, 2013 provides that "*the Court may also order disgorgement of gain, if any, made by, and seizure and disposal of the securities in possession of, such person.*"[66] In other words, it is an additional remedy. An exception appears to have been carved out for the Serious Fraud Investigation Office, where, based on its investigation report, the Court may order disgorgement. Otherwise, forum shopping seems difficult given the architecture of securities market enforcement in the country.

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[60] *Id.*
[61] *Id.*
[62] P. Chidambaram, *Budget 2006-07: Speech of P. Chidambaram, Minister of Finance*, UNION BUDGET AND ECONOMIC SURVEY (Feb 28, 2006), indiabudget.gov.in/budget_archive/ub2006-07/bs/speecha.htm (last visited May 18, 2020).
[63] SEBI (Investor Protection and Education Fund) Regulations, 2009, Regulation 5(2)(h), https://www.sebi.gov.in/legal/regulations/apr-2017/sebi-investor-protection-and-education-fund-regulations-2009-last-amended-on-march-6-2017-_34705.html (last visited May 18, 2020).
[64] The Companies Act, 2013, No. 13, Acts of Parliament, 2014.
[65] *Id.* at §125(3).
[66] *Id.*

B. Reconciling the Inconsistency in the Indian Regulatory Model of Disgorgement and Investor Protection Regime

To resolve the ambiguity created by the statutes and the SEBI Act being a special act, the assistance of legal interpretation is warranted. The Supreme Court of India has previously held that "*the Court has to ascertain the object which the provision of law in question is to sub serve and its design and the context in which it is enacted. If the object of the law will be defeated by non-compliance with it, it has to be regarded as mandatory.*"[67] Further, "[T]*he principle as regards the nature of the statute must be determined having regard to the purpose and object the statute seeks to achieve.*"[68] In the SEBI (Investor Protection and Education Fund) Regulations, 2009, the scope for distribution of the disgorged amounts to eligible investors is ambiguous and is left to the discretion of the Advisory Board of SEBI.[69] However, the distribution of disgorged money is specifically authorised under the provision of the subsequently enacted Companies Act, 2013.[70]

In addition to the aforementioned, the SEBI Act is predominantly a socio-economic legislation for the welfare and protection of the interests of the retail investors. The argument of the author gains strength in the precedent of compensating the harmed investors out of the disgorged monies collected by the SEBI in the IPO scam. There is no denying that this action of the SEBI restored the confidence of the retail investors in the market. Thus, there is a convergence in the objectives of both the provisions under the separate laws. The author holds the view that it is a fit case for preferring a beneficial as well as a purposeful interpretation as to the scope of the utilisation of the disgorged amounts under the SEBI (Investor Protection and Education Fund) Regulations, 2009.

Though no explanation has been provided for the creation of the Investor Protection and Education Fund by the SEBI, the logic is similar to Section 308(a) of the SOX Act (Fair Fund provision) which authorises the "*SEC to inter alia, utilise the disgorgement funds for the benefit of victims of securities law violations.*"[71] The provisions in the Companies Act, 2013 are based on the limited recommendations of the Wadhwa Committee Report which was set up to ascertain

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[67] Sharif-ud-Din v. Abdul Gani Lone, (1980) 1 SCC 403, at ¶9.
[68] Chandrika Prasad Yadav v. State of Bihar, (2004) 6 SCC 331, at ¶31.
[69] SEBI (Investor Protection and Education Fund) Regulations, 2009, Regulation 5.
[70] §125(3)(c), Companies Act, 2013.
[71] U.S. SECURITIES AND EXCHANGE COMMISSION, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES OXLEY ACT OF 2002, https://www.sec.gov/news/studies/sox308creport.pdf (last visited May 18, 2020).

"*eligible and identifiable applicants who suffered losses in the IPO scam by the actions of some market participants.*"[72] As noted above, the Companies Act advocates for the intervention of the Court in compensating the losses instead of empowering its Tribunal. This is noteworthy to buttress the argument to carve out an exception for remedial action. That being said, the objectives of the provisions complement the procedural variations in meeting the objectives.

Further, as per the latest available Annual Accounts for the FY 2017, a meagre 10% of the amount of the Investor Protection and Education Fund has been expended and the balance of 90% of the amount is lying idle.[73] To put it differently, the SEBI is unduly getting enriched to the extent of retaining the unutilised disgorged monies and the interests accrued thereon. All the monies have been utilised for investor education exclusively,[74] except the monies reallocated and expenses related thereto for compensating the harmed investors of the IPO scam.

It is worth noting that the SAT in its recent decision in the matter of *Ram Kishori Gupta v. SEBI*,[75] which was pronounced on 2 August 2019 (recalling its earlier decision on 30 April 2013), observed that since it was conclusively established that Vital Communications Limited violated the securities laws, "*the impugned order should have contained provision for compensating the appellants*".[76] The SAT directed the SEBI to pay the said amount to the appellants either from the amount being disgorged from Vital Communications Limited and connected entities as given in the impugned order or from the SEBI Investor Protection and Education Fund.[77] The Tribunal further held that "*the basic idea behind disgorgement is restitution. As an investor protection measure, the Appellants need to be compensated, since disgorgement without restitution does not serve any purpose.*"[78]

An analysis of various disgorgement cases establishes that the SEBI, of late, is using disgorgement as a hammer in the cases it believes it can quantify 'ill-gotten' gain. In certain

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[72] WADHWA, J., ET AL., SEBI, REPORT ON REALLOCATION OF SHARES IN THE MATTER OF IPO IRREGULARITIES (2007), https://www.sebi.gov.in/sebi_data/attachdocs/1289366396898.pdf (last visited May 18, 2020).
[73] SECURITIES AND EXCHANGE BOARD OF INDIA, ANNUAL STATEMENT OF ACCOUNTS 2017-18 (2018), https://www.sebi.gov.in/reports/annual-accounts/jul-2019/sebi-annual-accounts-financial-year-2017-18_43728.html (last visited May 18, 2020).
[74] Not quantified in various Annual Reports of SEBI.
[75] Ram Kishori Gupta & Anr. v. SEBI, *supra* note 16.
[76] *Id.* at ¶6.
[77] *Id.*
[78] *Id.*

cases, the amount was not quantified due to the complex design of the trade transaction. Nonetheless, the amounts collected by the SEBI as disgorged amounts have exponentially increased in recent months, more particularly after the recent high-profile case popularly called the *NSE co-location* case.[79] That being the landscape, the circumstances warrant that a market-centric, purposeful interpretation would be in both public interest and investor interest in particular. In *Sahara Real Estate Corp. Ltd. and Anr. v. SEBI and Anr.*,[80] the Supreme Court upheld that the protection of investors is the legislative mandate of the SEBI and the mandate would be best served only when the harmed investors are compensated by SEBI.

Following the holding in the order by the SAT dated 2 August 2019, that "*disgorgement without restitution does not serve any purpose*",[81] the author argues that an enabling specific provision may be inserted in the SEBI (Investor Protection and Education Fund) Regulations, 2009, which would mandate that the disgorged monies lying credited in the SEBI Investor Protection and Education Fund be utilised for compensating the harmed investors.

Moving to the mechanism for identification of the harmed investors and the process for compensating them, the SEC in the USA has issued a comprehensive Rules of Practice and Rules on Fair Fund and Disgorgement Plans for this purpose.[82] Rule 1100, *inter alia*, provides that the enforcement order shall mandate that "*the amount of disgorgement be used to create a fund for the benefit of investors who were harmed by the violation*".[83] Further, the SEC shall:[84]

> "*Submit a plan for the administration and distribution of funds in a Fair Fund or disgorgement fund within 60 days. It will also contain detailed plan for administration and distribution of funds to the harmed investors. The plan will include 'categories of persons potentially eligible to receive proceeds; procedures for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund; procedures for making and approving claims, procedures for handling disputed claims, and a cut-off date for the making of claim; procedures for the administration of the*

[79] In the matter of National Stock Exchange (NSE) Ltd. and Ors., *supra* note 38; In the matter of NSE Ltd. and Ors., 2019 SCC OnLine SEBI 123.
[80] Sahara India Real Estate Corporation Ltd. and Anr. v. SEBI and Anr., (2012) 174 Comp Cas 154 (SC).
[81] Ram Kishori Gupta & Anr. v. SEBI, *supra* note 16, at ¶6.
[82] U.S. SECURITIES AND EXCHANGE COMMISSION, RULES OF PRACTICE, https://www.sec.gov/about/rules-of-practice-2018.pdf (last visited May 18, 2020).
[83] *Id.*
[84] *Id.* at § 1101.

> *fund, including selection, compensation; proposed date for the termination of the fund, including provision for the disposition of any funds not otherwise distributed and such other provisions as the Commission or the hearing officer may require.*"

Subsequently, the distribution plan is approved by the regulator. As a safety valve, there is also a provision for a potential challenge by the investors. The SEC has also dedicated an 'Information for Harmed Investors' portal.[85] In addition to the information regarding the Fair Funds Plans, the harmed investors are directed to a link wherein through the 'Investor Claim Form', the investor shall submit certain vital financial and other transaction details. The SEC also regularly publishes the 'Investor Bulletin' for disseminating such information. As noted above,[86] the distribution and the administration of the funds are monitored by the SEC. Research by the author has established that though other major jurisdictions provide for restitution, the mechanism provided in the SEC rules is comprehensive and investor friendly.[87]

Having observed the best global practice adopted by the SEC, it is argued that a similar enabling provision, on the lines of the 'Rules of Practice and Rules on Fair Fund and Disgorgement Plans' of the SEC may be appropriately incorporated in the SEBI (Investor Protection and Education Fund) Regulations, 2009. With due respect, the author submits that tracing and identifying harmed investor(s) in the present-day regulatory landscape of the Indian securities market may not be as challenging as the period during which the Justice Wadhwa Committee was constituted.[88]

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[85] U.S. SECURITIES AND EXCHANGE COMMISSION, INFORMATION FOR HARMED INVESTORS, https://www.sec.gov/divisions/enforce/claims.htm (last visited May 18, 2020).

[86] U.S. SECURITIES AND EXCHANGE COMMISSION, *supra* note 82.

[87] The mechanism of compensating the harmed investors as provided under §308 of the SOX Act is rule-based, transparent, and accountable. Every year the SEC publishes an Annual Report 'Division of Enforcement' wherein the monies returned to harmed investors are mentioned. This is also presented before the Senate each year. *See* U.S. SECURITIES AND EXCHANGE COMMISSION, DIVISION OF ENFORCEMENT: 2019 ANNUAL REPORT (Nov. 6, 2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf (last visited May 18, 2020). It has a dedicated web portal for the purpose also. Other jurisdictions do not seem to have such a robust investor-friendly mechanism.

[88] The IPO scams happened during the year 2005. SEBI did not have in-house Real-Time Information Gathering facilities. Further, Surveillance and Monitoring were generally manual. Due to such drawbacks, mapping of each transaction and generating real-time alerts was not possible. Now SEBI is reported to have "*a real-time surveillance mechanism, harnessing artificial intelligence to build a platform that will capture and analyse data and flag suspicious transactions during trading hours.*" *See* Pavan Burugula, *SEBI Plans Platform for Real-time Surveillance,* ECONOMIC TIMES (Mar. 5, 2020, 8:13 AM), https://economictimes.indiatimes.com/markets/stocks/news/sebi-plans-platform-for-real-time-surveillance/articleshow/74485211.cms (last visited May 18, 2020).

The SEBI has one of the best information and communication technology driven real-time surveillance and monitoring systems in place and this has been acknowledged by the International Monetary Fund and the World Bank in their 'Financial Sector Assistance Programme (India)'.[89] Further, all transactions now mandatorily have computer-footprints that leave an audit trail and facilitate the validation of the transactions. The SEBI has a database of tick-by-tick information of all the market transactions which are continually analysed by using sophisticated tools of data analysis.[90] Artificial intelligence, machine learning, and other tools are also utilised by the SEBI in its market surveillance ecosystem.[91] Only a handful of jurisdictions can assert such infrastructure and other capabilities as that of the SEBI.[92] Therefore, with such a market environment in the country, tracing, identifying, and validating the claims of the harmed investors would not be an insurmountable task. It will be a trust-building, transparent, and predictable mechanism for the investing community in the country, more particularly the retail individual investors, whose population is not commensurately growing.

However, there is a flip side too. The violators are always a step ahead of the regulators. Despite the alacrity of regulatory intervention, it occurs with a time lag. Market designs and manipulations in complex financial products are also gradually getting sophisticated. Hence, a product may require regulatory convergence. This is time-consuming

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[89] The Financial Sector Assessment Program (FSAP) is a comprehensive and in-depth analysis of a country's financial sector. FSAP assessments are the joint responsibility of the IMF and World Bank in developing economies and emerging markets and of the IMF alone in advanced economies. The FSAP includes two major components: a financial stability assessment, which is the responsibility of the IMF, and a financial development assessment, the responsibility of the World Bank. To date, more than three-quarters of the institutions' member countries have undergone assessments. *See* INTERNATIONAL MONETARY FUND, FINANCIAL SECTOR ASSESSMENT PROGRAM (2017), https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program (last visited May 18, 2020); SECURITIES AND EXCHANGE BOARD OF INDIA, FINANCIAL SECTOR ASSESSMENT PROGRAMME 2017, https://www.sebi.gov.in/media/press-releases/dec-2017/india-financial-sector-assessment-program-2017_37076.html (last visited May 18, 2020).

[90] *SEBI Strengthens Algo Trading Norms, Co-Location Facilities*, Mint (Apr. 9, 2018), https://www.livemint.com/Money/YYPk4cy7m1VzjpXFKka3EI/Sebi-strengthens-algo-trading-norms-colocation-facilities.html (last visited May 18, 2020); *SEBI Plans to Deploy Technology To Beef up Surveillance Activities*, The Economic Times (Aug. 26, 2018), https://economictimes.indiatimes.com/markets/stocks/news/sebi-plans-to-deploy-technology-to-beef-up-surveillance-activities/articleshow/65548984.cms (last visited May 18, 2020).

[91] *SEBI to Tap Artificial Intelligence, Big Data Analytics to Curb Market Manipulations: Ajay Tyagi*, Bloomberg Quint (Jan. 23, 2020), https://www.bloombergquint.com/business/sebi-to-tap-artificial-intelligence-big-data-analytics-to-curb-mkt-manipulations-tyagi (last visited May 18, 2020).

[92] *SEBI Plans to Spend Rs 500 Crore on IT Projects in 5 Years: Ajay Tyagi*, The Economic Times (Nov. 19, 2019), https://economictimes.indiatimes.com/markets/stocks/news/sebi-plans-to-spend-rs-500-crore-on-it-projects-in-5-years-ajay-tyagi/articleshow/72129549.cms?from=mdr (last visited May 18, 2020).

in India, which has a sectoral regulatory landscape. In short, it must be noted that compensation paid (or payable) to the harmed investors may be substantially lower than the claim amount. Alternatively, there may be such transactions wherein due to the complexity of the financial asset or market-design, a correct evaluation of the harmed investor may not be possible and therefore, it may not be practically possible to compensate the claimed loss.[93] That being the case, the SEBI portal on 'Information for Harmed Investors' should prominently display a 'disclaimer' to that limited extent. This practice is also followed by the SEC.[94]

CONCLUSION

This Article begins with tracing the evolution of the legislative empowerment provided to the market regulators to order disgorgement of ill-gotten funds from various market participants. As a deterrence measure in the securities market, disgorgement is a contemporary development. Before the Securities Enforcement Remedies and Penny Stock Reforms Act, 1990, the SEC had no express authority to issue disgorgement orders. The SOX Act, enacted after the Enron scam, provides explicit authority to the SEC to order the disgorgement of ill-gotten monies. It is deposited in the Fair Funds for investors. The SEBI Act enacted in 1992 that was analogous to the SEC Act, also did not authorise the SEBI to issue disgorgement orders.

However, under its equitable powers, the SEBI started issuing disgorgement orders in 2003. This was reversed by a SAT holding that the power to issue disgorgement orders must be expressly provided for in the Act/Regulation. Eventually, the Securities Laws (Amendment) Act, 2014 gave the much-needed empowerment to SEBI. The monies collected under the said orders are to be credited to the Investor Protection and Education Fund. The jurisprudence developed on the powers of the SEBI to issue the disgorgement of ill-gotten monies by various orders of courts and quasi-judicial authorities in India, discussed in Part II, further strengthen the arguments in this Article.

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[93] Also affirmed by SAT in Mrs. Ram Kishori Gupta & Anr. v. SEBI, *supra* note 16.

[94] U.S. SECURITIES AND EXCHANGE COMMISSION, INVESTOR BULLETIN: HOW VICTIMS OF SECURITIES LAW VIOLATIONS MAY RECOVER MONEY, https://www.sec.gov/oiea/investor-alerts-bulletins/ib_recovermoney.html (last visited May 18, 2020).

In Part III, the author has endeavoured to expose the doctrinal and administrative infirmities pursued by the SEBI in the implementation of its disgorgement powers. It is argued that the interests of the harmed investors must be protected in a manner similar to the Fair Funds provision for investors provided in the SOX Act. A similar provision has been provided in the Companies Act, 2013. Reference to Section 38(3) of the Companies Act, 2013 provides an insight into the intent of the disgorgement provision in the said Act – which is to compensate the harmed investors. The violations specified in that Act are market-related offences, which fall under the jurisdiction of the SEBI. That being the case, the intervention of the Court in the Companies Act, 2013 is a carve-out exception for petitions to the Court by the SFIO based on its investigation report. Compensating the harmed investors is the focus in this Article and the provisions of Companies Act, 2013 amplify that. Reallocation of monies to the harmed investors who lost amounts in the IPO scam further strengthens the contention of the author.

This Article, therefore, concludes that the SEBI has gained adequate expertise in exercising its quasi-judicial powers. The International Monetary Fund and the World Bank's 'Financial Sector Assessment Programme', in their latest report, have also commended the enforcement mechanism pursued by the SEBI.[95] The SEBI Act is pre-eminently a social welfare statute seeking to protect the interests of common men, who are small investors.[96] The investors would be protected only if there is a legal remedy that provides for the compensation of lost money. Consumer protectionism is also founded on the same principle. The Financial Sector Legislative Reforms Commission in their report has recommended a regulatory shift towards a consumer protection regime envisaging the burden of consumer protection for unsophisticated consumers upon the financial entities.[97]

Even otherwise, the retention of unspent disgorged monies and the income derived from interest accrued on such monies amounts to undue enrichment of the SEBI. The author argues that regular retention of disgorged monies by the SEBI contravenes the Indian Contract Act which specifically deals with the obligations of a person enjoying the benefit of a

[95] IMF, *supra* note 89.
[96] Umakanth Varottil, *Dissecting SEBI's Powers Under Section 11B of the SEBI Act, 1992: Part 2*, INDIACORPLAW (June 2, 2015), https://indiacorplaw.in/2015/06/dissecting-sebis-powers-under-section_3.html (last visited May 18, 2020).
[97] SRIKRISHNA, J., ET AL., MINISTRY OF FINANCE, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION (2013), https://dea.gov.in/sites/default/files/fslrc_report_vol1_1.pdf (last visited May 18, 2020).

non-gratuitous act. In *State of West Bengal v. B.K. Mondal*,[98] a litmus test was enunciated in the form of three conditions. *First,* a person should lawfully do something for another person or deliver something to him. *Second,* in doing the said thing or delivering the said thing, he must not intend to act gratuitously. *Third,* the other person, for whom something is done or to whom something is delivered, must enjoy the benefit thereof.

That being the case, disgorged amounts non-gratuitously collected and retained as unutilised by the SEBI has the trappings of undue enrichment. The law of restitution commands that "*a person who has obtained a benefit at the expense of another should be liable to restitute the other from whom he has gained.*"[99] In its recent decision on 2 August 2019 in the matter of *Ram Kishori Gupta*, the SAT has held that "*disgorgement without restitution does not serve any purpose.*"[100]

In conclusion, the author argues that since disgorgement has to be followed with restitution, specific provisions in the SEBI (Investor Protection and Education Fund) Regulations, 2009 should be provided wherein the disgorged monies credited to the fund should be utilised for compensating the harmed investors, upon identification. Based on the best global practice adopted by the SEC, the author has also proposed a mechanism to compensate the harmed investors. This will unquestionably boost the morale of the investors, particularly the retail investors who, for multifarious reasons, are shying away from the market. The growth of the Indian financial market hinges more on the regulatory ecosystem than the courts.

[98] State of West Bengal v. B.K. Mondal, AIR 1962 SC 779.
[99] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644.
[100] Ram Kishori Gupta & Anr. v. SEBI*, supra* note 16.

OPERATIONAL CREDITORS IN INSOLVENCY: A TALE OF DISENFRANCHISEMENT

*Sudip Mahapatra, Pooja Singhania and Misha Chandna**

The objective of this Article is to explain the unique predicament of operational creditors under the Insolvency and Bankruptcy Code, 2016 (IBC). It examines the various factors considered by the judiciary in recent pronouncements that have contributed to such a predicament and outline solutions that could be considered for a constructive resolution of the issues at hand. This Article is divided into four parts – the first part discusses certain issues considered by the Supreme Court in Committee of Creditors of Essar Steel India Limited v. *Satish Kumar Gupta and others, and its key findings in this regard.*

In the second part, the authors argue that the IBC and the ruling of the Supreme Court unfairly disadvantage operational creditors, and as a solution, suggest that such creditors be given representation in the Committee of Creditors in line with international practice.

In the third part, the authors point out a lacuna in the IBC regarding the treatment of the claims of creditors with 'disputed' claims in an insolvency resolution process and propose an alternate framework to determine such claims. The last part underscores the key takeaways from this Article and our concluding thoughts.

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CONTENTS

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (hereinafter "IBC")[1] was hailed as a major reform in the insolvency landscape in India. The IBC was enacted in the context of a mounting 'non-performing assets' crisis and the failure of debt recovery statutes such as the Sick Industrial Companies Act, 1985 and the Recovery of Debts due to Banks and Financial Institutions Act, 1993, which were plagued by inordinate delays that led to the resultant loss of the value of the assets. Accordingly, a key objective behind the enactment of the IBC was the insolvency resolution of corporate persons "*in a time bound manner for maximization of value of assets of such persons*".[2] Additionally, the IBC sought to bring about a paradigm shift from the debtor-in-control model to a creditor-driven process. The restriction on defaulting promoters from acquiring companies under the IBC pursuant to the introduction of Section 29A of the IBC was yet another key step towards this shift.

The IBC has made some progress in meeting its objectives. While numerous issues (both substantive and procedural) remain open, the Supreme Court of India has clarified a few key issues in its judgment dated November 15, 2019, in *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta and others* (hereinafter "*Essar Steel*").[3] Specifically, the Supreme Court has held that equal treatment need not be meted out to the operational creditors and financial creditors under a resolution plan. Further, the Court ruled that all the pre-insolvency

[1] The Insolvency and Bankruptcy Code, 2016, No. 37, Acts of Parliament, 2016.
[2] Insolvency and Bankruptcy Code, 2016, Preamble.
[3] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and others, (2020) 1 CompLJ 1 (Supreme Court).

liabilities of the corporate debtor would stand extinguished upon its successful resolution. The ruling of the Supreme Court seemingly brings much vital on issues critical for secured financial creditors and resolution applicants. At the same time, it is likely to result in certain inequitable consequences for operational creditors including creditors with disputed claims. For context, financial creditors have a purely financial arrangement with the corporate debtor while operational creditors include those creditors who are owed money by the corporate debtor for the provision of goods and services.

I. THE JUDGMENT IN ESSAR STEEL

A key concern in respect of the IBC since its inception has been the treatment of the different classes of creditors of the corporate debtor. As an insolvency resolution under the IBC is a creditor-driven process, most decisions in respect of the corporate debtor during its insolvency resolution period including the approval of a resolution plan, are taken by a 'committee of creditors' (hereinafter "CoC"). The CoC comprises all the financial creditors of the corporate debtor (except financial creditors related to the corporate debtor). Operational creditors are granted representation in the CoC only in the event that the corporate debtor does not have any financial creditors. The right to attend the meetings of the CoC is also limited to operational creditors having an aggregate debt of at least 10% of the total debt of the corporate debtor. Given that operational creditors are typically not granted representation in the CoC and do not have a say in the decision-making process, the protection of the interests of such creditors has been rather controversial.

Prior to August 16, 2019, Section 30(2)(b) of the IBC mandated that a resolution plan "*provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53*".[4] In effect, the minimum payment to operational creditors under a resolution plan could not be less than the liquidation value of such operational debt. However, as a practical matter, given the large outstanding debt of most corporate debtors, the liquidation value of such operational debt would, in almost all instances, be zero[5] –

[4] Insolvency and Bankruptcy Code, 2016, §30(2)(b).
[5] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and others, (2020) (Supreme Court), *supra* note 3 at ¶46.

thereby, not affording any meaningful protection to the operational creditors despite appearing to.

In the context of the preceding paragraphs, the decision in *Essar Steel* clarifies certain key aspects associated with the treatment of operational creditors under the IBC. To appreciate the full purport and effect of the judgment, it is necessary to examine certain findings recorded by the National Company Law Appellate Tribunal (hereinafter "NCLAT") in its order dated July 4, 2019. The order of the NCLAT approved the resolution plan submitted by ArcelorMittal India Private Limited (hereinafter "ArcelorMittal") for Essar Steel India Limited (hereinafter "Essar Steel").[6]

ArcelorMittal's resolution plan (as amended by the CoC) contemplated the payment of the entire dues of the operational creditors with an admitted claim of less than INR 1 crore and an additional INR 1,000 crore payment towards the dues of operational creditors with an admitted claim exceeding INR 1 crore, over and above the payment of INR 42,000 crore to the secured financial creditors. Under such a resolution plan, the manner of distribution of funds among the secured financial creditors was left to the discretion of the CoC. The CoC decided on a *pro rata* recovery for all secured financial creditors (except Standard Chartered Bank), according to which almost all such secured financial creditors would have recovered approximately 90% of their dues.

The NCLAT found the proposed distribution of funds under the resolution plan of ArcelorMittal to be discriminatory. In its finding, the NCLAT relied on the judgment of the Supreme Court in *Swiss Ribbons* v. *Union of India* (hereinafter "*Swiss Ribbons*").[7] According to the NCLAT, Section 53 of the IBC (priority of repayment in the event of liquidation)[8] was not relevant to determine the distribution of funds to the creditors under a corporate insolvency resolution process. The NCLAT modified the resolution plan of ArcelorMittal to ensure approximately 60.7% recovery to *all* creditors (secured financial creditors, unsecured financial creditors, and operational creditors). Appeals challenging the NCLAT's decision were filed, among others, by the CoC and ArcelorMittal.

[6] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and others (NCLAT order dated July 4, 2019 in Company Appeal (AT) (Ins.) No. 265 of 2019).
[7] Swiss Ribbons and others v. Union of India and others, (2019) 4 SCC 17.
[8] Insolvency and Bankruptcy Code, 2016, §53.

The order of the NCLAT resulted in a huge outcry among Indian banks, as it not only significantly reduced their recovery in the Essar Steel process but also sought to do away the distinction between secured and unsecured creditors entirely. To safeguard the interests of the Indian banks, the Parliament introduced the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (hereinafter the "IBC Amendment Act") with effect from August 16, 2019.[9]

The IBC Amendment Act, *inter alia*, amended Section 30(2)(b) of the IBC with retrospective effect. The amended provision requires that the operational creditors be paid the higher of the liquidation value of their debt under Section 53 of the IBC and the amount such creditors would be entitled to receive, if the amount proposed to be paid under a resolution plan was distributed in accordance with Section 53 of the IBC.[10] An explanation added to the amended provision expressly provides that a distribution in accordance with such sub-section would be considered "*fair and equitable*".[11] Writ petitions challenging the constitutionality were filed by various creditors before the Supreme Court.

Pursuant to its judgment in *Essar Steel*, the Supreme Court approved ArcelorMittal's resolution plan. The Supreme Court held that the principle of 'equality' could not be interpreted to mean that all creditors would be entitled to equal recovery under a resolution plan. The Supreme Court underscored that the IBC itself contemplated operational creditors as a separate class of creditors. Further, certain protections, such as the priority in repayment of dues and mandatory disclosure in a resolution plan regarding the treatment of operational creditors' interests, were built into the IBC to ensure fair and equitable dealing of the dues of the operational creditors. Accordingly, the Supreme Court in *Essar Steel* held that the CoC could approve resolution plans, which provided for differential payments to the financial and operational creditors.[12]

While the Supreme Court in *Essar Steel* set aside the principle of equal treatment of all creditors as adopted by the NCLAT, it recognised the contribution of the operational

[9] Rajya Sabha debate on the Insolvency and Bankruptcy Code (Amendment) Bill, 2019, July 29, 2019, 205-208.
[10] The Insolvency and Bankruptcy Code (Amendment) Act, 2019, §6(a).
[11] *Id.*
[12] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and others, (2020) (Supreme Court), *supra* note 3.

creditors[13] in keeping the corporate debtor running as a going concern. Thus, the Court recognised the need to protect their interests. The decision in *Essar Steel* maintains that the ultimate discretion of deciding the distribution of funds is with the CoC. However, such a decision should show adequate consideration of the objectives of the IBC which are: (i) the maximisation of the value of assets of the corporate debtor; and (ii) balancing the interests of all stakeholders.[14]

It is noteworthy that the resolution plan of ArcelorMittal as finally approved by the Supreme Court, resulted in a 20% recovery for the operational creditors with admitted claims, in comparison to the approximately 89% recovery for almost all the secured financial creditors. This was a marked departure from the ruling of the Supreme Court in *Swiss Ribbons*, which had relied on the dues of the operational creditors and financial creditors being given "*roughly the same*" treatment.[15] Whether such a significant difference in recovery could be considered 'equitable' for operational creditors appears to be questionable.

II. THE DISENFRANCHISEMENT OF OPERATIONAL CREDITORS

In *Essar Steel*, the Supreme Court rightly upheld the principle of equality among *"similarly placed creditors"* (and not 'all' creditors) and the constitutionality of the amended Section 30(2)(b) of the IBC. This expressly included the minimum payment of liquidation value to operational creditors.[16] However, the Supreme Court has failed to adequately consider the interests of the operational creditors and lay down attendant guidelines to ensure their equitable treatment in an insolvency resolution process under the IBC.

The Supreme Court has held that the decision of the CoC must reflect that it has "*taken into account*" the objectives of the IBC of the maximisation of the value of the assets of the corporate debtor and balancing the interests of all stakeholders[17] (including operational creditors). However, placing such an obligation on the CoC is vague at best. The Supreme

[13] This category often includes vendors and suppliers of critical goods and services availed by the corporate debtor and its employees.
[14] Insolvency and Bankruptcy Code, 2016, Preamble.
[15] Swiss Ribbons, *supra* note 7.
[16] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and others, (2020) (Supreme Court), *supra* note 3.
[17] *Id.*

Court further held that the "*limited*" jurisdiction of the Adjudicating Authority, i.e. the National Company Law Tribunal (hereinafter "NCLT"), includes a review of whether the CoC has taken into account such objectives and interests although such a power of review cannot be exercised to interfere with the "*commercial wisdom*" of the CoC.[18] Given the unrestricted scope of review of the NCLT and the potentially wide scope of the 'commercial wisdom' of the CoC,[19] the extent of protection afforded by such review is unclear. This will largely depend on how the NCLT and the NCLAT interpret it in future cases.

The issue regarding the treatment of the dues of operational creditors is particularly controversial due to the disenfranchisement of such operational creditors. Under the IBC, operational creditors are not allowed representation on the CoC and are accordingly unable to vote on any decision regarding the insolvency resolution process. This includes the approval of a resolution plan, which may alter the terms of their debt or extinguish it without any repayment. The ostensible safeguards under the IBC for operational creditors, i.e. the payment of at least the liquidation value and priority in repayment over financial creditors, are meaningless in practical terms. Given that the operational creditors are largely unsecured and companies are unable to repay their debts, if they have been admitted into insolvency, it is highly improbable that the liquidation value due to such operational creditors will be higher than zero in most cases. In any case, the hypothetical possibility of the liquidation value being higher than zero in certain instances cannot hide the reality that in a large majority of cases, operational creditors would not be entitled to any amounts. This effectively leaves the issue of their recovery to the generosity of the CoC and/or the resolution applicant.

In *Swiss Ribbons*, the Supreme Court specifically considered the issue of whether the lack of representation of the operational creditors on the CoC was violative of Article 14 of the Constitution (*protection from discrimination*).[20] The Supreme Court relied on the rationale for the exclusion of the operational creditors from the CoC based on the report of the Bankruptcy Law Reforms Committee (hereinafter "BLRC"),[21] which was the precursor to the IBC. The BLRC opined that financial creditors could evaluate the viability of a resolution plan, as they had trained employees for such purpose. On the other hand, operational

[18] *Id.*
[19] *See, for instance*, K. Sashidhar v. Indian Overseas Bank and others, (2019) 12 SCC 150, ¶55.
[20] Swiss Ribbons, *supra* note 7.
[21] 1 The Bankruptcy Law Reforms Committee, Report: Rationale and Design (November 2005).

creditors are involved only in recovering the amounts payable for their goods and services and are typically unable to assess the viability and feasibility of a business.[22] However, such a rationale seems tenuous. The BLRC assumes that merely because financial creditors may have the *ability* to analyse the viability and feasibility of a plan, they will indeed base their decision to approve or reject a plan primarily on the grounds of such viability and feasibility. However, the ultimate goal of any creditor, whether financial or operational, is to maximise recovery for itself. There is no incentive structure built into the IBC to facilitate a change in such a position and ensure that financial creditors do not act solely in their self-interest.

Another argument that may be advanced in support of the present framework under the IBC is that the resolution applicants being prospective acquirers of the corporate debtor, would require the cooperation of the operational creditors in running the business. Accordingly, it would be in the interests of such a resolution applicant to protect the interests of the operational creditors under the resolution plan. While on the face of it, this argument appears compelling, it would be applicable only in a limited number of cases, where the providers of the goods or services in question are not easily substitutable. Even in cases, where a certain operational creditor(s) may be particularly crucial to the business of the corporate debtor, it would be open to the resolution applicant to enter into appropriate agreements with such creditor(s) after the completion of the insolvency resolution process. Therefore, at the resolution plan stage, an applicant would be focused on making a compelling case, which would appeal to the financial creditors above all.

The distinction between secured and unsecured creditors has been maintained under the insolvency statutes in various jurisdictions such as the United States (hereinafter "US") and the United Kingdom (hereinafter "UK"). However, under both jurisdictions, the 'impaired' classes of creditors have the right to vote on (and ordinarily even reject) any restructuring proposal that purports to alter their rights.[23]

For instance, under Chapter 11 of the US Bankruptcy Code, a committee of unsecured creditors is formed during the insolvency resolution process comprising of the twenty largest

[22] 1 The Bankruptcy Law Reforms Committee, Report: Rationale and Design ¶4 (November 2005); Swiss Ribbons, *supra* note 7 at ¶75.
[23] *See,* 11 U.S.C. § 1126(c) read with 11 U.S.C. § 1129(8); (UK) Companies Act, 2006, § 899.

unsecured creditors of the debtor, who are willing to serve on the committee.[24] The purpose of such a committee is to ensure the representation of the interests of the unsecured creditors, who may be owed relatively small amounts and may not otherwise be given adequate consideration. The committee of unsecured creditors plays a vital and often determinative role in the restructuring process.[25] The committee has broad powers including participation in the formulation of a restructuring plan, requesting the appointment of a trustee or examiner, or if the committee determines that it is in the best interest of the creditor to have a trustee liquidate the business, seek the conversion of the case to Chapter 7.[26]

Further, the confirmation of a reorganisation plan by the bankruptcy court ordinarily requires acceptance of such a plan by the impaired classes of claims and interests, i.e. by creditors holding at least two-thirds in amount and more than one-half in the number of the allowed claims and holders of at least two-thirds in amount of the allowed interests.[27] The 'cram-down' on dissenting creditors is permitted subject to the fulfilment of certain conditions (such as the plan being non-discriminatory and fair and equitable).[28] However, the risks and delays involved in such a 'cram-down' deter creditors from resorting to such tools and encourage settlement among the creditors.[29] Similarly, in the UK, the schemes of arrangement proposed, when the company is in administration (comparable to insolvency resolution under the IBC), require the approval of at least 50% in number, representing 75% in value, of each *class* of creditors under the (UK) Companies Act, 2006.[30]

In view of the above, the exclusion from the CoC and palpable marginalisation of operational creditors in the decision-making process under the IBC is not only contrary to the position in other jurisdictions but also appears to be based on questionable grounds and reasoning. The right of a class of creditors to vote on any proposal seeking to restructure their debt, adds a crucial element of procedural fairness to any final decision to extinguish the whole or part of their debt under any such proposal. The Indian position which deprives an

[24] 11 U.S.C. § 1102.
[25] Peter C. Blain and Diane Harrison O'Gawa, *Creditors' Committees under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers and Duties*, 67 MARQ. L. REV 491 (1984).
[26] 11 U.S.C. § 1103; 11 U.S.C. § 1104. A chapter 11 bankruptcy process is primarily for the reorganisation of debt while Chapter 7 is for liquidation of the corporate debtor.
[27] *See,* 11 U.S.C. § 1126(c) read with 11 U.S.C. § 1129(8).
[28] 11 U.S.C. § 1129.
[29] Charles D. Booth, *The Cramdown on Secured Creditors: An Impetus Towards Settlement*, 60 AM. BANKR. L.J. 69 (1986).
[30] Companies Act, 2006, § 899 (UK).

entire class of creditors of such a right is patently unfair and lacks a sufficient basis. Accordingly, it is the view of the authors that the exclusion of operational creditors from the decision-making process under the IBC should be reconsidered and appropriate amendments should be introduced to allow for their participation in the CoC.

The authors' view also finds support in the Legislative Guide on Insolvency Laws issued by the United Nations Commission on International Trade Law (hereinafter "UNCITRAL"). It states that insolvency legislations should facilitate the active participation of the creditors in insolvency proceedings, such as through a creditors' committee, a special representative, or other mechanisms for representation.[31] The UNCITRAL also recognises that there may be a divergence of interests between different classes of creditors, including secured and unsecured creditors. Accordingly, it suggests the constitution of separate committees, where such interests are not adequately represented through the constitution of a single committee.[32]

Indeed, secured creditors would typically have priority over the claims of creditors including in the event of liquidation. This may justify the differential treatment of financial and operational creditors (who are typically unsecured). However, rather than leaving operational creditors bereft of any representation or recourse in respect of a process that purports to restructure their debt, a separate committee of operational creditors could be constituted. Any resolution plan could require the approval of such an operational creditors' committee albeit with a lower voting percentage than applicable in the case of financial creditors, for instance, 10% instead of the 66% required in the case of financial creditors.

The ability of the operational creditors as a class to block a resolution plan would provide critical leverage to such a class of creditors to ensure that their interests are taken into account by the resolution applicants as well as the financial creditors approving such a resolution plan. This is exemplified by the experience of the committee of unsecured creditors under the US Bankruptcy Code. Further, given that a resolution plan cannot discriminate

[31] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAWS ¶¶ 88-90 (2005).
[32] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAWS ¶¶ 101-103 (2005).

among similarly placed creditors,[33] the approval of even a small percentage of operational creditors to a resolution plan would ensure that any benefit offered to, and found acceptable by such creditors would be available to the entire class of operational creditors.

The self-proclaimed object of the IBC is the "*maximization of value of assets*" of the corporate debtor and to "*balance the interests of all the stakeholders*".[34] In this background, the utter disenfranchisement and disregard of the interests of the operational creditors appear to be unjustifiable. It is unfortunate that rather than considering solutions for the even-handed treatment of operational creditors, the Parliament has sought to further curtail the rights of such creditors. This has been done by including an explanation that distribution in accordance with Section 30(2)(b) of the IBC would be deemed to "*fair and equitable*".[35] Such a provision is evidently intended to preclude any challenge to the proposed treatment of the dues of operational creditors under a resolution plan. The haste of the Parliament in undoing the NCLAT order in *Essar Steel* and further disempowering operational creditors appears to be yet another instance of the Indian experience of knee-jerk reactions rather than formulating carefully reasoned positions.

III. TREATMENT OF DISPUTED CLAIMS: AN UNRESOLVED PARADOX

Another aspect under the IBC having adverse implications for operational creditors, which has largely been ignored, is the treatment of 'disputed' claims in an insolvency resolution. Upon the commencement of the insolvency resolution process of a corporate debtor, a moratorium on the liabilities of the corporate debtor (including any monetary claims) comes into effect pursuant to Section 14 of the IBC.[36] 'Claim' is broadly defined under the IBC to include a right to payment, whether or not such a right is reduced to judgment, fixed, disputed, or undisputed. Creditors of the debtor are required to file their 'claims' along with the proof of such a claim with the resolution professional (hereinafter "RP"). The RP may

[33] Swiss Ribbons, *supra* note 7 at ¶76.
[34] Insolvency and Bankruptcy Code, 2016, Preamble.
[35] *Supra* note 10.
[36] Insolvency and Bankruptcy Code, 2016, §14.

admit or reject such a claim, and the creditors have the right to challenge the non-admission of a part or whole of their claim before the NCLT.

The UK and US insolvency legislations contain a similarly broad definition of 'claims'. Courts in such jurisdictions have recognised the need to give the widest possible amplitude to such 'claims' provable in bankruptcy.[37] This is so that all the liabilities of the debtor may be comprehensively dealt with and discharged as a part of the insolvency resolution process. It also opens the doors for a debtor to get a fresh start, as non-provable debts would usually survive the insolvency resolution process.

In *Essar Steel*, the Supreme Court clarified that the role of the RP is limited to verifying and collating the claims of creditors. The RP cannot assume an *adjudicatory* function in respect of such claims. Considering the limited role of the RP, one issue that remains unaddressed is the treatment of 'disputed' claims, i.e. claims that were pending adjudication prior to the imposition of the moratorium under the IBC. The RP typically admits such disputed claims at a nominal value (say, INR 1) irrespective of the quantum of the claim to allow the participation of such creditors in the insolvency process. The admission of a claim by the RP is significant, as resolution plans ordinarily provide for the payment of only the admitted claims of creditors.

In this context, it is noteworthy that in *Essar Steel*, the NCLAT had assessed the 'disputed' claims of creditors on merits and admitted a large number of such claims. This increased the admitted liability of the corporate debtor by almost four times the original amount admitted by the RP.[38] This was intended to ensure that such disputed creditors could recover a proportionate share of the amounts proposed to be paid to other creditors of the same class under the resolution plan of ArcelorMittal. Creditors, whose claims could not be determined on merits by the NCLAT, were granted liberty to initiate (or continue) appropriate proceedings after the conclusion of the insolvency resolution process.[39] However, the

[37] Nortel Companies and Others, Re, [2013] 4 All ER 887, ¶ 93; T&N Ltd and Ors, Re Insolvency Act 1986, [2006] 3 All ER. 697, ¶¶ 35 and 46; Sanchez v. Northwest Airlines, Inc., 659 F.3d 671, 675 and 688; McSherry v. Trans World Airlines, Inc., 81 F.3d 739.
[38] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and others (NCLAT order dated July 4, 2019 in Company Appeal (AT) (Ins.) No. 265 of 2019), ¶ 196.
[39] *Id.* at ¶ 221.

Supreme Court set aside such admission of claims by the NCLAT. At the same time, the Supreme Court held that all disputed claims would stand extinguished and no proceedings for recovery of such claims could continue after the successful resolution of the corporate debtor.[40]

The ruling of the Supreme Court on extinguishment has brought much needed clarity to bidders, who may otherwise have been deterred from investing under the IBC on account of potentially crippling claims and litigation after they acquire the corporate debtor. However, this ruling has also gravely prejudiced the interests of creditors with disputed claims. The IBC does not contain any provision allowing the RP or the insolvency tribunals to estimate and thereby admit disputed claims. The ruling in *Essar Steel* does not provide any clarity on the substantive considerations to be taken into account by the RP or the Adjudicating Authority for the admission or rejection of disputed claims.

Despite such a lack of clarity, the ruling takes away the due process rights of such creditors to have their claims adjudicated by the courts ordinarily having jurisdiction. Accordingly, genuinely meritorious claims could stand discharged in insolvency without any payment or future recourse. In addition, frivolous disputes raised by the corporate debtor with regard to goods and services provided by the operational creditors could further destroy the already precarious standing of such creditors in the whole process.

Unlike the RP, the liquidator has been granted significantly broader powers to determine disputed claims under the IBC. The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 expressly provide that "*where the amount claimed by a claimant is not precise due to any contingency or any other reason, the liquidator shall make the best estimate of the amount of the claim based on the information available with him*".[41] Pertinently, the IBC requires that a liquidator be a qualified resolution professional.[42] Clearly, the credentials of the liquidator are not the basis of the differential powers provided to the liquidator and the RP.

[40] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and others, (2020) (Supreme Court), *supra* note 3 at ¶¶ 67 and 102.
[41] The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 25.
[42] Insolvency and Bankruptcy Code, 2016, §5(18).

Such differential treatment of the disputed claims in an insolvency resolution and liquidation was likely based on the theoretical difference between the two frameworks. In the former, the company survives while in the latter, the company would be obliterated, and therefore, all claims must necessarily be dealt with one way or another. However, the Supreme Court's ruling on the extinguishment of all claims in an insolvency resolution renders meaningless any such distinction. Paradoxically, the same creditors could recover more in liquidation than in an insolvency resolution. The impairment of the rights of the disputed creditors is all the more egregious given that such creditors are usually trade creditors. The general disenfranchisement of trade creditors under the IBC renders the extinguishment of their rights particularly inequitable.

The above issue may be resolved by an amendment to the IBC granting the RP the same power as a liquidator to 'estimate' disputed claims. The RP could take into account any Court orders passed in respect of such disputes (even if under appeal) to estimate such claims. The decision of the RP would be subject to review by the insolvency tribunals. A precedent for this may be found in the UK insolvency regime (the inspiration for the IBC), which grants the same powers to estimate claims with uncertain value to the office-holder. This power is concerning both the administration and the winding-up (comparable to an insolvency resolution and a liquidation process under the IBC respectively).[43] Alternatively, the insolvency tribunals could be granted first instance jurisdiction to estimate claims for their admission. Such a change would be similar to the jurisdiction of the US bankruptcy courts to estimate contingent or unliquidated claims to prevent undue delay to the case's administration.[44] Under either framework, a creditor's right to have a claim adjudicated would not disappear. It would merely be replaced by the right to have such a claim estimated and admitted by the RP or the insolvency tribunals.

The purpose of defining 'claims' broadly under the IBC[45] to include disputed claims is to enable their admission in insolvency. Moreover, one of the objectives of the IBC is to "*balance the interests of all stakeholders.*"[46] An amendment to the IBC to empower the RP or the

[43] The Insolvency (England and Wales) Rules 2016, Rule 14.14.
[44] 11 U.S.C. §502(c).
[45] Insolvency and Bankruptcy Code, 2016, §3(6).
[46] Insolvency and Bankruptcy Code, 2016, Preamble.

insolvency tribunals to estimate and accordingly admit disputed claims, will better serve the scheme of the IBC and its stated objective.

CONCLUSION

Despite being relatively nascent, the IBC has already succeeded in bringing about a substantial change in the existing culture of borrower impunity and lack of recourse for creditors plaguing the Indian banking sector. However, such success appears to be at the cost of the interests of other stakeholders, particularly operational creditors.

In *Essar Steel,* the Supreme Court upheld the constitutionality of the amendments to the IBC, which grant the CoC considerable powers to decide matters related to the distribution of funds among creditors under a resolution plan. In a marked shift from its previous position, the Supreme Court found a stark difference in recovery between the operational creditors and the financial creditors to be 'equitable'. The Supreme Court has attempted to afford some protection to operational creditors by requiring the CoC to 'take into account' the interests of such creditors when exercising its commercial wisdom. It has also empowered the NCLT to ensure such compliance.[47] However, the extent of such protection remains questionable given that the 'commercial wisdom' of the CoC continues to retain primacy.

The *Essar Steel* ruling strikes at the heart of the stated aim of the IBC to "*balance the interests of all stakeholders*".[48] A resolution process would necessarily entail a compromise on the part of the creditors in respect of their dues. This would obliterate all the rights and remedies in respect of the claims of the operational creditors (including disputed claims). Such an obliteration of rights without any due process would not serve either the stated objectives of the IBC or the larger public interest.

In the view of the authors, potential solutions to ensure more equitable treatment of operational creditors need to be considered by both the legislature as well as the insolvency

[47] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and others, (2020) (Supreme Court), *supra* note 3.
[48] Insolvency and Bankruptcy Code, 2016, Preamble.

tribunals and courts. The present framework, which leaves the manner of treatment of dues of operational creditors to the CoC comprising of financial creditors with an evident conflict of interest, is patently inadequate. One possible solution is to allow for the participation of operational creditors in the decision-making process including for the approval of a resolution plan in line with international practice. This would add an element of fairness to any haircut on their dues under a resolution plan and incentivise resolution applicants and financial creditors to ensure equitable treatment of their dues.

Lastly, the IBC and the Supreme Court disregard the interests of creditors with 'disputed' claims by failing to provide any mechanism to quantify and admit such claims in an insolvency resolution process. In the view of the authors, the RP should be given the same powers as a liquidator to 'estimate' disputed claims or the NCLT should be conferred with the first instance jurisdiction to assess such claims. Such provisions for the estimation and admission of disputed debt would also be more in accord with the scheme and objectives of the IBC and in keeping with the practice followed in other jurisdictions.

RIGHTS ISSUES – UNTYING THE KNOTS

*Sayantan Dutta**

This Essay unties the knots around the complicated discourse of rights issues in India and proposes some regulatory changes to streamline the process towards ensuring simplicity and equitability. It begins by articulating the concept of a rights issue and examines the practical challenges which arise with regard to renunciation. Apart from renunciation, rights issues also suffer from problems relating to the service of documents to 'Indian' addresses since a company may need to send the letter of offer to non-resident shareholders. Finally, the Essay examines the loopholes which emerge in underwriting a rights issue. The extant mechanism enables the procurement of third-party subscribers through pre-identification which may conflict with the equitable nature of rights issues.

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CONTENTS

INTRODUCTION

A rights issue of shares is perhaps the most equitable way of raising capital for any company. A rights issue operates as the quintessential mechanism of inviting existing shareholders of a company for more funds on a *pro rata* basis. This is a classic example of a company preserving the pre-emptive rights of the existing shareholders in case of a further issue of capital. The *pro rata* basis perhaps gives it an even more equitable flavor, where every shareholder is invited to invest based on her current shareholding in the company. In an ideal scenario, where every shareholder does subscribe to her entire rights entitlements, the shareholding pattern of the company remains unchanged.

The equitable nature of the rights issue is a probable reason for companies not being mandated to seek the approval of its shareholders in a general meeting. In undertaking a rights issue (the mere approval of the board of directors being adequate), the board of directors is permitted to decide freely on the pricing of the shares being offered in a rights issue (no specific pricing guidelines apply to the same rights issues). While listed companies undertake such a rights issue, the Securities and Exchange Board of India (hereinafter "SEBI") insists on rationalising disclosure requirements.

Rights issues appear to be a win-win situation for both the issuer company and the shareholders. But then like every twist in the tale, comes the complicated character of rights issues – renunciation of rights entitlements, additional subscription, and subscription of the unsubscribed portion in a rights issue. This is where a rights issue becomes a jurisprudential marvel, a transaction structuring tool, and sometimes a regulator's worst headache. In this Essay, the author will attempt to untie the knots around the complicated discourse of rights issues and propose the need for attention from the regulators to streamline the process and make the fundraising through rights issues simple and equitable. This Essay was written in November, 2019, and therefore, does not cover the changes in the rights issue process, which have been made subsequently by the Government of India; particularly, in the aftermath of the COVID-19 pandemic.

I. RIGHTS ISSUE: AS DEFINED UNDER APPLICABLE LAWS

In independent India, the mechanism of rights issue was introduced initially, in a codified way, under the Companies Act, 1956 through Section 81(1),[1] which has now been replaced by Section 62(1)(a) of the Companies Act, 2013. According to Section 62(1)(a) of the Companies Act, 2013,[2] a rights issue is an offer:

- "*made by notice specifying the number of shares offered and limiting a time not being less than fifteen days and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;*
- *Unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred above shall contain a statement of this right;*
- *After the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the board of directors may dispose of them in such manner which is not disadvantageous to the shareholders and the company.*"

[1] The Companies Act, 1956, No. 01, Acts of Parliament, 1956.
[2] The Companies Act, 2013, No. 18, Acts of Parliament, 2013.

Rights issues can be undertaken by both listed and unlisted companies, and some of the challenges are common to both. For the purpose of this Essay, the focus will be limited to rights issues by listed companies, where the stakes are higher, the strategies are sharper, and the regulations are stricter.

Rights issues by listed companies are primarily governed by the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018[3] (hereinafter "SEBI (ICDR) Regulations, 2018"), the comparatively newer regulations from the stable of the SEBI, replacing the old Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.[4] According to the SEBI (ICDR) Regulations, 2018, a rights issue is "*an offer of specified securities by a listed issuer to the shareholders of the issuer as on the record date fixed for the said purpose.*"[5]

II. RENUNCIATION: A STATUTORY RIGHT BUT A REGULATORY CHALLENGE

The Companies Act, 2013 provides for a right of renunciation to the shareholders of a company in a rights issue.[6] An existing shareholder can transfer her rights entitlement to another person, whether or not she is an existing shareholder of the company.

The *first* challenge concerning the right of renunciation involves non-resident investors. The Foreign Exchange Management Act Regulations (hereinafter "FEMA Regulations") govern the transfer of shares or securities between resident and non-resident investors.[7] However, there is no specific provision regulating the transfer of rights

[3] The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, SECURITIES AND EXCHANGE BOARD OF INDIA, https://www.sebi.gov.in/legal/regulations/sep-2018/securities-and-exchange-board-of-india-issue-of-capital-and-disclosure-requirements-regulations-2018-_40328.html (last visited October 18, 2019).
[4] The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, SECURITIES AND EXCHANGE BOARD OF INDIA, https://www.sebi.gov.in/acts/icdrreg09.pdf (last visited October 18, 2019).
[5] The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, Regulation 2(1)(xx), *supra* note 5.
[6] The Companies Act, 2013, §62(1)(a)(ii).
[7] The Foreign Exchange Management (Non-debt Instruments) Rules, 2019, THE GAZETTE OF INDIA (2019), http://egazette.nic.in/WriteReadData/2019/213332.pdf (last visited October 18, 2019).

entitlements between them. It should be noted that this is not a transfer of shares but a transfer of a right to subscribe to shares.

Historically, Indian companies used to seek prior approval from the Reserve Bank of India (hereinafter "RBI") for such a transfer of rights entitlements between resident and non-resident investors in a rights issue. A closer study of the rights issues undertaken by listed companies in India reveals that the RBI has granted such approval to companies from time to time. However, there has generally been a pre-condition included in such approval by the RBI to the renunciation between resident and non-resident investors.[8] Such a pre-condition allows renunciation only on the floor of stock exchanges and not through private arrangements.[9] Since there is no specific pricing guideline available for the transfer of rights entitlements (which is not a transfer of shares) between resident and non-resident investors, the RBI has intended to mark such transfer of rights entitlements to a market or trading price. This had been done to ensure there is no zero-consideration renunciation involving non-resident investors.

It is interesting to note that when the RBI introduced the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017[10] (hereinafter "FEMA 20"), it added the following explanation at the end of Regulation 6: "*The above conditions shall also be applicable in case a person resident outside India makes investment in capital instruments (other than share warrants) issued by an Indian company as a rights issue that are renounced by the person to whom it was offered.*"[11] Subsequently, the FEMA 20 was replaced by the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (hereinafter "FEMA (Non-Debt Instruments) Rules").[12] The new FEMA (Non-Debt Instruments) Rules carried the same explanation under Rule 7. Such an added explanation would ideally mean that the subscription of shares in a rights issue through renunciation involving non-resident investors are exempted from the pricing guidelines under the FEMA (Non-Debt Instruments) Rules.

[8] Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017, Regulation 6, https://www.rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=11161 (last visited October 18, 2019).
[9] Sayantan Dutta, *HR Khan Committee Report: Revamping the FPI Regime in India,* Bloomberg Quint (Jan. 23, 2020), https://www.bloombergquint.com/opinion/hr-khan-committee-report-revamping-the-fpi-regime-in-india (last visited May 18, 2020).
[10] *Supra* note 8.
[11] *Id.*, Regulation 6.
[12] The Foreign Exchange Management (Non-debt Instruments) Rules, 2019, *supra* note 7.

Hence, companies would no longer require such approval from the RBI for renunciation involving non-resident investors.

However, based on what has transpired, either the RBI has not taken note of the afore mentioned addition of the explanation to the FEMA 20, or it has intentionally ignored the FEMA (Non-Debt Instruments) Rules in recent rights issue transactions. For example, in the recently concluded rights issue by Vodafone Idea Limited in March 2019,[13] a prior clarification was obtained from the RBI, whereby renunciation involving non-resident investors was limited to renunciation on the floor of stock exchanges.[14] If the intention is to permit renunciation involving only non-resident investors on the floor of the stock exchanges, the RBI should bring an amendment to the FEMA (Non-Debt Instruments) Rules, and the explanation should be further 'explained' to provide for such regulatory intention. In the absence of such a detailed explanation and the presence of such intentional regulatory supervision, the issuer companies and the investors remain unsure about the mechanism to be followed for undertaking a rights issue.

Further, pursuant to its recent circular dated January 22, 2020, the SEBI has made a few changes in the rights issue process. One of the changes is a mandatory dematerialisation of the rights entitlements and the trading of such dematerialised rights entitlements on the stock exchanges with a T+2 rolling settlement timeline.[15] Both, the SEBI and RBI need to provide more coordinated guidance to the investors, issuers, and intermediaries regarding the renunciation mechanism through collectively making cohesive amendments. Additionally, by mandating the trading of rights entitlements on the floor of the stock exchanges and excluding renunciation through private arrangements by non-resident investors, the SEBI and RBI have ended up prohibiting investors of foreign direct investment (hereinafter "FDI") from renouncing their rights entitlements. This is otherwise available to them as a statutory right under the Companies Act, as FDI investors cannot trade on the stock exchanges at all.[16]

[13] Letter of Offer dated March 22, 2019 of Vodafone Idea Limited, shorturl.at/kOPQX (last visited October 18, 2019).
[14] Letter of Offer dated March 22, 2019 of Vodafone Idea Limited, pg. 844, shorturl.at/AEHU2 (last visited October 19, 2019).
[15] SEBI Circular (SEBI/HO/CFD/CMD/CIR/P/2020/12) dated January 22, 2020, https://www.sebi.gov.in/legal/circulars/jan-2020/streamlining-the-process-of-rights-issue_45753.html (last visited February 27, 2020).
[16] Only foreign portfolio investors can trade on the stock exchanges.

The *second* challenge relates to renunciation to non-shareholder investors. Renunciation under the Companies Act is not prohibitive, and a shareholder is entitled to renounce her rights entitlement to any person in full or in part. The renouncee need not be an existing shareholder of the company to accept the rights entitlement. While this is a convenient mechanism to both the shareholder, who does not want to subscribe to her rights entitlement as well as the issuer company, who is still able to raise capital by allotting the shares to the renouncee, this does extend the comforts and luxuries of the rights issue to a third-party investor, who is not a shareholder of the company as on the record date.

This also opens doors to potential exploitation of the rights issue route to allot shares to pre-identified third-party investors at a price which is not dictated by any pricing guideline, and without any prior approval of the shareholders of the company. The SEBI (ICDR) Regulations, 2018 provide for specific pricing guidelines for different kinds of issuances of securities. For example, initial public offerings (hereinafter "IPO") and follow-on public offerings follow a book-building mechanism to discover the final price,[17] whereas qualified institutional placements and preferential allotment mechanisms also have a weekly average pricing formula with specific periods for determining the minimum floor price.[18]

However, rights issues in comparison are freely priced – it can be priced above or below the trading price of the shares, as long as such pricing is not below the face value of the shares. It is not uncommon for companies to structure their fund-raising transactions through a rights issue to provide an entry to certain pre-identified third-party investors at a price of their choice. This issue was also discussed in the Report of the Companies Law Committee of February 2016.[19] However, no concrete solutions were proposed in the 2016 Companies Law Committee Report. One of the steps that can be considered to negate this exploitation of the pricing advantage by promoters or large investors, is to keep a cap on the size of renunciation to third-party investors. However, that can also be bypassed by a third-party investor by

[17] The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, Regulation 28(2) and Regulation 126(2), *supra* note 7.
[18] The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, Regulation 164 and Regulation 176, *supra* note 7.
[19] TAPAN RAY ET AL., REPORT OF THE COMPANIES LAW COMMITTEE, 2016, MINISTRY OF CORPORATE AFFAIRS, https://www.mca.gov.in/Ministry/pdf/Report_Companies_Law_Committee_01022016.pdf (last visited October 14, 2019).

purchasing a few shares prior to the record date and becoming a shareholder of the company at the time of renunciation.

Another interesting proposal was recently made by the SEBI constituted working committee under the chairmanship of HR Khan, retired deputy governor, RBI, in 2019. The Khan Committee was entrusted with the task of reviewing the erstwhile Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014, and paved the way for the new Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019.[20] The Khan Committee had recommended that the transfer of rights entitlements involving foreign portfolio investors in rights issues shall be at the ruling market price in case of a transfer on the floor of the stock exchange or at the fair market value in case of a transfer through private arrangement.[21]

Thankfully, this was not implemented, as this would have meant another implementation nightmare since valuations for rights entitlements (and not of shares) would be a very difficult task given the free pricing adopted for the final subscription of the shares being offered in a rights issue. A fair valuation method (primarily used for unlisted shares) or a market based average trading price (used for listed shares) would be difficult to apply in case of rights entitlements. This is because rights entitlements are neither 'securities' nor do they have a steady trading history because rights entitlements are traded only for those 15 days, during which a rights issue is open.

Accordingly, the proposal that can be mooted to remedy this loophole is a cap on the discount that a company can provide on the trading price of the shares while deciding the final price of the shares being offered in a rights issue by listed companies. If such a cap on the discount is not to be applied to the pricing of the shares in the rights issues, a restriction on the renunciation of rights entitlement may be applied to the promoter and promoter group shareholders of the company. These two options will be available on an either-or basis to the issuer companies. While the introduction of a pricing formula in a rights issue is perhaps a

[20] Securities and Exchange Board (Foreign Portfolio Investors) Regulations, 2019, THE GAZETTE OF INDIA (2019), https://www.sebi.gov.in/legal/regulations/dec-2019/securities-and-exchange-board-of-india-foreign-portfolio-investors-regulations-2019-last-amended-on-december-19-2019-_44436.html (last visited October 10, 2019).

[21] HARUN R. KHAN ET AL., REPORT OF THE WORKING GROUP ON FPI REGULATIONS (2019), https://www.sebi.gov.in/sebi_data/commondocs/may-2019/Annexure-A_p.pdf (last visited October 9, 2019).

conservative step, having only a one-way cap either on the discount or on the renunciation by the promoter and the promoter group shareholders may not be excessively restrictive. This is due to the presence of a similar restriction in the form of compulsory subscription of the entire rights entitlements by the promoters and the promoter group shareholders as a pre-condition for at least fast-track rights issues.

III. SERVICE OF DOCUMENTS TO 'INDIAN' ADDRESSES: THE MULTI-JURISDICTION ISSUES REGARDING SOLICITATION AND REGISTRATION

Under section 53(1) of the Companies Act, 1956, a company could serve a document to its shareholders to the Indian addresses provided by such shareholders.[22] However, this has since been done away within the Companies Act, 2013. The Companies Act, 2013 has omitted any such provision, which requires a company to serve any document only to the Indian addresses of its shareholders.[23] This creates difficulties for companies undertaking rights issues, where a company has non-resident shareholders.

Sending a letter of offer or similar documentation concerning a rights issue to jurisdictions outside India may violate the solicitation of investment rules of that jurisdiction. Consequently, this may trigger registration requirements along with other compliance and disclosure requirements under the securities laws of such overseas jurisdictions. It may impact the process of ensuring the participation of the shareholders in the rights issue of shares. Further, the act of not sending the letter of offer to any non-resident shareholder (who does not have an Indian address) may not be in complete compliance with the rights issue requirements under the Companies Act, 2013.

It is accordingly proposed that a suitable clarification be included preferably in Rule 35 of the Companies (Incorporation) Rules, 2014. Such clarification should hold that in case of non-resident shareholders, it would be adequate compliance if the company were to serve the

[22] The Companies Act, 1956, *supra* note 1.
[23] The Companies Act, 2013, *supra* note 2.

documents to the Indian address, if any, of such shareholder, in case of a rights issue, and also make the provision of Indian addresses mandatory for all shareholders.[24]

IV. UNDERWRITING A RIGHTS ISSUE

The SEBI (ICDR) Regulations, 2018 specify that the minimum subscription to be received in a rights issue has to be at least 90% of the offer made through the letter of offer.[25] In the event of a non-receipt of a minimum subscription of 90% of the total offer, the rights issue will fail and all the application monies will have to be refunded to the investors. This provision is similar to the minimum subscription provision applicable to an IPO.[26]

Historically, there have been two kinds of back-stopping or underwriting in rights issues: (i) promoters specifically undertaking to subscribe to the unsubscribed portion of a rights issue; and (ii) the SEBI registered underwriters underwriting the unsubscribed portion of a rights issue. Underwriting in rights issues in India has typically been in the nature of hard underwriting, where the underwriters undertake to subscribe to the unsubscribed portion even before the opening of the rights issue. This is in contrast to the soft underwriting approach taken in the IPOs, where the underwriting agreement is signed only after the closure of the issue and the risks of the underwriters are mitigated to a great extent.

Undertaking from the promoters to subscribe to the unsubscribed portions has been a popular method given the various advantages attached to it. Such an undertaking from the promoters boosts the morale of the investors. From the perspective of the promoters, this is a great opportunity to consolidate their shareholding in the company at a discounted price, if the promoters possess the means to subscribe to the unsubscribed portion. The erstwhile Securities and Exchange Board of India (Substantial Acquisitions of Shares and Takeover) Regulations, 1997 provided for a specific exemption from open offer requirements for such

[24] The Companies (Incorporation) Rules, 2014, Rule 35, https://www.mca.gov.in/Ministry/pdf/NCARules_Chapter2.pdf (last visited October 18, 2019).
[25] The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, Regulation 86(i), *supra* note 7.
[26] The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, Regulation 45(i), *supra* note 7.

an additional subscription by promoters (or persons in control).[27] However, the current Securities and Exchange Board of India (Substantial Acquisitions of Shares and Takeover) Regulations, 2011 exempt only persons holding at least 25% of the total share capital of the company from such open offer requirements while agreeing to subscribe to the unsubscribed portion in a rights issue.[28]

This was a welcome change as the mantle to back-stop in a rights issue should be limited to large shareholders of the company – preferably promoters or shareholders holding at least 25% of the total share capital of the company. This excludes back-stopping of a rights issue by third party investors without triggering an open offer if the creeping acquisition limits are breached due to their subscription of the unsubscribed portion because of their back-stopping obligations.

Rights issues can be underwritten by the SEBI registered underwriters as well by signing an underwriting agreement with the issuer company. However, underwriting in rights issues is not devoid of its share of legal complications. The SEBI has for a long time proposed a model underwriting agreement as an indicative arrangement between the issuer companies and the underwriters. While the underwriting agreements are heavily negotiated between the issuer company and the underwriters for representations, warranties, and indemnity clauses; the general underwriting mechanism is standard across all rights issue transactions and is not very far from the model underwriting agreement. It would be interesting to note the following paragraph from the SEBI Model Underwriting Agreement:

> "*We hereby record that we (hereinafter referred to as the underwriter) have agreed to underwrite/procure subscription to shares/debentures of Rs..... each for cash at par/premium aggregating to Rs..... (Rupees.... only) (hereinafter referred to as the underwriting obligation) for the*

[27] Securities and Exchange Board of India (Substantial Acquisitions of Shares and Takeover) Regulations, 1997, Proviso to Regulation 3(1)(b), https://dipam.gov.in/sites/default/files/act15a_0.pdf (last visited October 11, 2019).

[28] Securities and Exchange Board of India (Substantial Acquisitions of Shares and Takeover) Regulations, 2011, Proviso to Regulation 10(4), https://www.sebi.gov.in/legal/regulations/apr-2019/securities-and-exchange-board-of-india-substantial-acquisition-of-shares-and-takeovers-regulations-2011-last-amended-on-july-29-2019-_40714.html (last visited October 18, 2019).

captioned public issue by.... Ltd. (hereinafter referred to as "the Company" on the following terms and conditions."[29]

The SEBI Model Underwriting Agreement provides for the subscription of the unsubscribed shares by the underwriters or procurement of subscribers, who will subscribe to the unsubscribed shares by the underwriters.[30] This would mean that if the underwriter itself does not want to subscribe to the unsubscribed shares, it can procure a third-party subscriber to subscribe to the unsubscribed shares in the rights issue. If such procurement of subscribers is allowed in the case of rights issues, it can again defeat the purpose of the equitable nature of a rights issue.

This possibility arises as one can pre-identify a third party investor. Instead of allotting shares to such a third party investor through the preferential allotment mechanism (and adhering to the pricing guidelines of a preferential allotment), one may allot shares to such a third party investor as a procured subscriber by the underwriter through the underwriting mechanism prescribed in the underwriting agreement for a rights issue. Such a scenario may also extend the pricing advantage typical in a rights issue to such a pre-identified third party investor. Moreover, this does not trigger any open offer requirements since the acquisition of shares through underwriting or subscription to the unsubscribed portion of an issue by a SEBI registered underwriter or a nominated investor as per the SEBI (ICDR) Regulations, 2018 is exempt from the open offer requirements under the Securities and Exchange Board of India (Substantial Acquisitions of Shares and Takeover) Regulations, 2011.

Underwriting is a safety net arrangement that the issuers should be allowed to avail in capital markets offerings because, without such a safety net, the issuers may be increasingly wary of accessing the capital markets which does not augur well for any economy. However, at the same time, there have to be checks and balances to ensure that the procurement mechanism in the underwriting process does not become a backdoor entry for pre-identified third-party investors.

For this purpose, the SEBI can make it mandatory to execute procurement agreements between the underwriters and the procured subscribers. It can mandate that such

[29] SEBI Circular RUW Circular No. 1 (1993).
[30] *Id.*

procurement agreements be simultaneously executed when the underwriting agreement is executed and full disclosures of such procurement arrangements have been made in the letter of offer. This will make the procurement process more transparent, and investors will have all the information about the back-stopping arrangements made for the rights issue prior to making any investment. It may also happen that such upfront disclosure of procurement arrangements may boost the confidence of the general investors in the rights issues.

CONCLUSION

Rights issues continue to be the quintessential mechanism of raising capital by issuing equity shares to the existing equity shareholders through a *pro rata* basis. The rights issue mechanism must be streamlined, well-constructed, and more standard in its process, application, and disclosure norms. Recently, there have been several steps taken by the SEBI including the mandatory dematerialisation of the rights entitlements with a T+2 rolling settlement of the traded rights entitlements and the reduction of time in the overall rights issue process by decreasing the number of days at various stages.[31]

However, more efforts need to be made not only towards making the rights issue process faster and efficient but also towards unravelling the complicated jurisprudence of rights issues and keeping it free from potential exploitation by investors and issuers. After all, a rights issue is an exercise of the typical right of first refusal, or in other words, a right of first refusal by each shareholder of a company. How can we let such a spectacularly equitable route of capital raising down in the current Indian capital markets scenario?

[31] SEBI Circular (SEBI/HO/CFD/CMD/CIR/P/2020/12) dated January 22, 2020, https://www.sebi.gov.in/legal/circulars/jan-2020/streamlining-the-process-of-rights-issue_45753.html (last visited February 24, 2020).

ETHICAL HACKERS UNDER THE INFORMATION TECHNOLOGY ACT: THE CYBER TERRORISM CONUNDRUM AND 'PROTECTED' SYSTEMS

Vivek Krishnani [*]

Recurrent cyber offences, particularly due to the introduction of the Aadhaar scheme by the Unique Identification Authority of India (UIDAI), have made conspicuous the loopholes in the infamous Information Technology Act, 2000. Having said that, what is laudable is the acknowledgement of the flaws by the legislature and its willingness to make amendments to the legislation.

In this Essay, the author claims that certain penal provisions governing "systems restricted for reasons of security of the State", even after significant amendments, are unsuitable for the purpose that underlies them. To realise the intent of the legislature, another amendment to the Information Technology Act is not only prudent but also necessary. Accordingly, this Essay argues in favour of narrowing down these provisions to exclude from their ambit those persons to whom liability was never intended to be attributed.

To expound this argument, the author cites, as an illustration, a hypothetical incident of a lapse in the security framework of the UIDAI. In the latter half, deriving inspiration from the other provisions of the IT Act itself and from internationally accepted definitions of the concerned offences, revisions that could better assist in fulfilling the purpose of the provisions have been proposed.

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CONTENTS

INTRODUCTION

"*Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured.*"[1]

Upon a perusal of these lines, one could understand the severity of an act that constitutes crime: *"wrongdoing which directly threatens the society."* Of equal relevance, is the observation that it is something that cannot be redressed by compensation alone. However, there is something more significant than the act (of wrongdoing) itself, which this definition fails to address i.e. the *mens rea* of the accused.

International criminal jurisprudence acknowledges that there can be no crime, large or small, without an evil mind,[2] as the essence of a crime is its *wrongful intent* without which it cannot exist.[3] Consequently, to punish conduct without reference to the state of mind of an actor is both inefficacious and unjust.[4]

[1] SMITH, HOGAN, & DAVID ORMEROD, CRIMINAL LAW 5 (15th ed., 2018).
[2] Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).
[3] BISHOP, CRIMINAL LAW 287 (9th ed., 1930).
[4] Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 109 (1962) (hereinafter "Packer").

I. SECTIONS 70 & 66F OF THE IT ACT: AN INSIGHT INTO THE AUTHOR'S CONCERNS

A strong foundation for introducing the author's argument is the gripping question raised by Subba Rao J. in a famous dissenting opinion: "*whether the intention of the Legislature is to punish persons who break the said law without a guilty mind?*"[5]

First, what exactly constitutes a guilty mind? The answer to this question would be different for different crimes,[6] as each crime consists of a prohibited act or omission coupled with whatever state of mind is called for by the statute which sanctions it.[7] In this regard, the Indian Penal Code, 1860 provides for various ingredients related to *mens rea* which are incorporated in phrases such as "*intentionally*", "*knowingly*", "*dishonestly*", etc.[8] Such phrases have been provided for in the Information Technology Act, 2000 (hereinafter "IT Act") as well. However, no requisite intention has been provided in the language of Section 70(3), which penalises mere access to a protected system: "*Any person who secures access or attempts to secure access to a protected system in contravention of the provisions...*"[9]

Second, this question leads us to another question which, at first, seems quite futile but is worth analysing once we carefully reconsider it: *can the intention of the legislature be to acquit a person even when he has committed the act with the intention "required" by the statutory provisions?* This question will be answered in the affirmative in two situations: first, when the legal provision is not worded according to the intention of the legislature; and second, when the implementation of the provision is not in accordance with the legislative intent.

Both these situations are of great relevance in the case of Section 66F of the IT Act. The provision defines the scope of cyber terrorism under two parts: Section 66F(1)A and Section 66F(1)B of the IT Act. The problem arises due to the latter which penalises anyone who:[10]

> "*knowingly or intentionally penetrates or accesses a computer resource without authorisation or exceeding authorised access, and by means of such conduct obtains access*

[5] State of Maharashtra v. Mayer Hans George, AIR 1965 SC 722.
[6] KD GAUR, COMMENTARY ON THE INDIAN PENAL CODE 132 (2006 ed., 2006).
[7] SMITH & HOGAN, CRIMINAL LAW 116 (14th ed., 2015).
[8] K.N.C. PILLAI, GENERAL PRINCIPLES OF CRIMINAL LAW 8 (2nd ed., 2011).
[9] §70(3), Information Technology Act, No. 21 of 2000, Acts of Parliament, 2000 (hereinafter "IT Act, 2000").
[10] *Id.* at §66F(1)B.

> *to information, data or computer database that is restricted for reasons of the security of the State or foreign relations; or any restricted information, data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the advantage of any foreign nation, group of individuals or otherwise."*

Despite governing an offence as grave as cyber terrorism, the provision has been worded too broadly. It is the *mens rea* required under the provision that broadens it and becomes a cause of concern in two ways.

First, "*knowingly*" accessing a computer system without authorisation becomes fairly easy to prove once we consider the fact that an unsafe system like the Aadhaar scheme comes within the ambit of the provision. This is because the Aadhaar scheme is a system, which can be legally accessed by certain authorised persons only. Additionally, any leak of information from the Aadhaar database would be gravely detrimental to the country due to the contemporary relevance that such information assumes. Due to this, it will be easier to establish that the unauthorised access was accompanied by reasons to believe that such information may be "*likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State,… public order*". Hence, it can be concluded that the Aadhaar scheme is a system "*restricted for reasons of security of the state*" and falls within the scope of Section 66F(1)B of the IT Act.

Second, it brings within its ambit anyone, who "*knowingly*" accesses any restricted information or database in relation to "*contempt of court*" or "*defamation*". It may be noted that defamation or even contempt of court has no bearing on the security of the State, and it is difficult to justify its inclusion. However, this Essay does not deal with the inclusion of defamation and is confined to the ease of proving access to a computer system. The next segment, with the help of an illustration, discusses the same.

An Illustration

The Aadhaar scheme of the Unique Identification Authority of India (hereinafter "UIDAI") involves the collection of biometric and demographic information of 1.3 billion people.[11] It has created the largest biometric identity project in the world and must be scrutinised carefully to assess its compliance with human rights.[12] In fact, the inefficient management of the database is not publicised.[13] Notably, the UIDAI has not only declared the Aadhaar database as a "*protected system*"[14] under Section 70(1) of the IT Act,[15] but has also provided that the biometric information stored amounts to "*sensitive personal data*" under Section 43A of the IT Act.[16]

The latter provision imposes a duty of care on the UIDAI, which is a body corporate,[17] to implement and maintain reasonable security practices and procedures. The practices and procedures that need to be maintained in the case of protected systems (like the Aadhaar database) have been prescribed in the Information Technology (Information Security Practices and Procedures for Protected Systems) Rules, 2018 (hereinafter "2018 Rules"). The author asserts that the UIDAI's compliance with most of the obligations under the 2018 Rules is uncertain. This is due to the non-compliance that has been reported. For instance, the 2018 Rules require the UIDAI to nominate a Chief Information Security Officer (hereinafter "CISO").[18] However, it has been reported with evidence that the UIDAI does not have a CISO to date.[19] Accordingly, far from fulfilling its obligations, the authority has been unable to keep the information secure. What the author wishes to highlight is that the Aadhaar

[11] *Aadhaar in numbers: key figures from UIDAI CEO's presentation to the Supreme Court*, THE HINDU, March 22, 2018, https://www.thehindu.com/news/national/aadhaar-in-numbers-key-figures-from-uidai-ceos-presentation-to-the-supreme-court/article23323895.ece (last visited May 30, 2020).
[12] K.S. Puttuswamy v. Union of India, 2018 SCC OnLine SC 1642.
[13] *Editors' Guild, Others Condemn FIR Against Journo For Exposing Aadhaar Data Leak, Demand Centre's Intervention*, LIVELAW.IN, January 7, 2018, https://www.livelaw.in/editors-guild-others-condemn-fir-journo-exposing-aadhaar-data-leak-demand-centres-intervention (last visited May 30, 2020).
[14] Declaration of CIDR facility of UIDAI as 'Protected System', MeitY Notification no. G.S.R. 993(E), (December 11, 2015), *available at* http://meity.gov.in/writereaddata/files/UIDAI%20as%20Protected%20System.pdf.
[15] §70(1), IT Act, 2000, *supra* note 9
[16] §43A, IT Act, 2000, *supra* note 9.
[17] §11(2), The Aadhaar Act (Targeted Delivery of Financial and Other Subsidies, Benefits and Services), No. 18 of 2016, Acts of Parliament, 2016.
[18] Rule 3 (3)(a), Information Technology (Information Security Practices and Procedures for Protected Systems) Rules, 2018, THE GAZETTE OF INDIA (2018), pt. II sec. 3 (May 22, 2018).
[19] *Aadhaar Truth: UIDAI Never Appointed a Chief Information Security Officer, Reveals RTI*, MONEYLIFE, February 5, 2019, https://www.moneylife.in/article/aadhaar-truth-uidai-never-appointed-a-chief-information-security-officer-reveals-rti/56267.html (last visited May 30, 2020) (hereinafter "Moneylife").

database is a protected system only for namesake, and the UIDAI is not employing reasonable security practices for the fulfilment of its duty under Section 43A of the IT Act.[20]

With this backdrop, let us consider an event of a data leak. Say, "A", an information technology student, after having been able to access the Aadhaar database, has circulated a link on WhatsApp, reporting the 'mismanagement' in the Aadhaar database. The WhatsApp link shared claims that the personal details of 1.3 billion Indian citizens have been easily hacked by him and are accessible therein. As a consequence of the ensuing sharing, the link has now reached thousands of people.

Legalistically, access to a computer system may or may not be criminal.[21] To become criminally liable, the concerned people should be able to form the requisite criminal intent in committing the crime.[22] Ethical hackers who penetrate a computer system to merely learn about the actual working of the computer system do not intend to engage in any criminal activity.[23] Resultantly, anyone who tries to expose the fallacy in the Aadhaar system to make the public aware of such a relevant problem does not engage in criminal activity by merely accessing the database. Hence, "A", who managed to penetrate the database, should ideally not come within the scope of any provision, which governs cyber offences.

Interestingly, as per a literal interpretation of the provision, "A" as well as those who opened the link that was shared would fall within the purview of Section 66F of the IT Act. These individuals not only lacked the authorisation but also accessed the system 'knowingly'. This amounts to saying that they committed an act that satisfies the essentials of the provision.

To buttress the argument, the author now introduces a turn of events in the illustration presented above (hereinafter "the modification"). Let us suppose that the link shared by "A" does not actually provide access to the database and has come to the reach of the public as a consequence of a mere publicity stunt by "A". In such a scenario, opening the link in itself would amount to an 'attempt' to access the system which is an offence punishable under Section 70 of the IT Act.

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[20] §43A, IT Act, 2000, *supra* note 9.
[21] R.K. CHAUBEY, AN INTRODUCTION TO CYBER CRIME AND CYBER LAW 372 (2nd ed., 2012).
[22] Packer, *supra* note 4, at 109.
[23] Abhinav Gupta v. State of Haryana, 2008 Crim LJ 4536.

Considering such circumstances, attention must be paid to the intention of the legislature: *was the intention of the legislature to convict the people, who have accessed the link shared on WhatsApp for offences as grave as cyber terrorism under Section 70 of the IT Act?* Certainly, it was not. However, these individuals "*knowingly*" accessed the information protected for the reasons of the security of the State and attempted to access a protected system. Hence, as per the prevailing regulatory understanding, they would be liable under Sections 66F and 70 of the IT Act.[24]

At the same time, the UIDAI, which has never provided clarity about the security framework that is in place to safeguard the "*sensitive personal data*" of citizens, would evade liability under Section 43A of the IT Act. This is because the compliance of the UIDAI with the 2018 Rules is not known due to the lack of requisite information on the UIDAI's website. This is pertinent because the 2018 Rules form the relevant standard in the case of protected systems such as the Aadhaar database. Additionally, due to the reporting of non-compliance with respect to the obligation of nominating a CISO,[25] there is an increased apprehension that the UIDAI has not employed adequate security measures.

A different perspective, to address the author's concerns, regarding *mens rea* would be the principle of proportionality which holds that penalties should be proportionate in their severity to the gravity of a defendant's criminal conduct.[26] Applying this principle to the illustration, the thousands of people that have out of concern for their personal information, opened the link, would be criminally liable and come within the domain of offences punishable by imprisonment extending up to 10 years[27] or even lifetime.[28] However, the UIDAI which has breached a serious obligation to keep the information secure is liable merely for a civil wrong under Section 43A of the Act,[29] which, in any case, it escapes because of the requirement of 'reasonable' measures. Consequently, the trap of words laid by the statute disregards the principle of proportionality, which, like *mens rea*, is a fundamental principle of criminal law. The same should be an important consideration during the framing of penal statutes.

[24] §§66F-70, IT Act, 2000, *supra* note 9.
[25] Moneylife, *supra* note 19.
[26] Andrew Von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUSTICE 56 (1992).
[27] §70, Information Technology Act, 2000, *supra* note 9.
[28] §66F, Information Technology Act, 2000, *supra* note 9.
[29] APARNA VISHWANATHAN, CYBER LAW 97 (1st ed., 2012).

Having determined the whereabouts of the problem, it is desirable to take into account certain definitions and provisions that can assist in crafting a solution for the problem.

II. DEALING WITH THE CYBER TERRORISM CONUNDRUM

As can be gauged from the illustration, the over-inclusively drafted Section 66F(1)B demands scrutiny, particularly, because it might have the effect of bringing ethical hackers within its scope. In this part, the author elaborates on the essence of cyber terrorism from the definition proposed by Dorothy E. Denning, whose research in the field of cybercrimes has been internationally recognised. Apart from this definition, the author also refers to the definition given by the Federal Bureau of Investigation (hereinafter "FBI") and suggests modifications to the Indian provision, i.e. Section 66F of the IT Act.

Denning's definition is instructive in carving the essential ingredients of cyber terrorism. In her words:[30]

> "*Cyber terrorism is the convergence of cyberspace and terrorism utilizing the computer as the weapon and the target. It refers to unlawful attacks and threats of attacks against computers, networks and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives.*"

Segmentation of this definition aptly depicts the requirements that constitute cyber terrorism: *first*, unlawful access or a threat to access computers, networks or information stored in them, i.e. the act; and *second*, the act must be done to intimidate a government or its people in furtherance of political or social objectives, i.e. the intention.

The *first* ingredient is linked to cyberspace, and the *second* one is very much concerned with terrorism. Thus, the co-existence of these two ingredients is what has been regarded as the "*convergence of cyberspace and terrorism*" in the abovementioned definition.

Mindful of the two ingredients, let us reconsider the illustration (without the modification) discussed in the previous part of the Essay. It must be noted that the act of "A"

[30] Dorothy E. Denning, *Cyber terrorism: The Logic Bomb versus the Truck Bomb*, 2 GLOBAL DIALOGUE 29 (2000).

was not aimed at frightening or intimidating anyone. As stated earlier, the act of "A" was driven by his concern for the security of sensitive personal information. There is no denying that the act of "A" was linked to cyberspace. However, "A" is an ethical hacker whose act was aimed at learning about the security framework. Accordingly, terrorism and its convergence with cyberspace are evidently absent. Even if the act stands established and the first ingredient is satisfied, the intention of doing the act for the purpose of intimidation is missing. As a result, the second ingredient is not satisfied and the act of "A", correctly falls outside the purview of the definition.

This would be the outcome if the definition offered by Mark M. Pollitt, a special agent for the FBI, were to be followed. This definition has been derived from the US Code's definition of terrorism and is an acceptable definition in this regard:[31] Cyber terrorism is:[32]

> "*a premeditated, politically motivated attack against information, computer systems, computer programs, and data which results in violence against non-combatant targets by sub-national groups or clandestine agents.*"

To ascertain the culpability of the act of "A" under this definition, a blow-by-blow analysis of the definition is not required. The phrases "*politically motivated attack*" and "*which results in violence against non-combatant targets*", which find a place in the definition, make it clear to exclude the act of "A". Not only was the act of "A" in furtherance of a completely different object but it also did not result in any violence against any civilian.

Such an outcome is clearly not as off-putting as the one in the case of the Indian provision. Conspicuously, this difference in outcomes arises from the different intentions demanded by the definitions. The requisite intention of "*knowingly*" under Section 66F makes it all-encompassing. Consequently, Section 66F conveniently includes the act of "A", who is merely an ethical hacker.[33]

The author is of the opinion that to better suit the intention of the legislature, the provision could be narrowed through two simple steps. *First*, the phrase "*knowingly or*" which finds a place in the current provision, be omitted. *Second*, restrictive phrases such as "*in*

[31] 22 U.S.C. §2656f(d)(2).
[32] Mark M. Pollitt, *Cyber terrorism – fact or fancy?*, 1998 COMPUTER FRAUD & SECURITY 8-10 (1998).
[33] §66F, IT Act, 2000, *supra* note 9.

furtherance of political objectives" or "*politically motivated attack which results into violence against non-combatant targets*" be included. This would ensure that the wording of the provision meets the ends sought.

III. ADDRESSING THE CONCERNS REGARDING SECTION 70

In this part, examining the general provision with respect to "*computer related offences*" in the IT Act, i.e. Section 66 of the IT Act, the author suggests rephrasing Section 70 of the IT Act to suit the intent of the legislature.

Section 66 of the IT Act,[34] which is a criminal provision, punishes acts, falling under Section 43 of the IT Act when done "*fraudulently or dishonestly*". Essentially, two broad ingredients must be satisfied to bring an act within the ambit of Section 66 of the IT Act. *First*, the *act* should come within the ambit of Section 43, and *second*, the act must be done either fraudulently or dishonestly, i.e. the *intention*.

As regards the first ingredient, Section 43 of the IT Act, in its relevant part, covers the *act* of accessing a computer, downloading, copying or extracting any data or information from such a computer.[35] The analysis undertaken, however, has little to do with the first ingredient. For our purposes, it is the required *intention* which is pertinent to highlight. Briefly, the two degrees of intention mentioned in the provision, could be understood as follows:

Fraudulently - An *act* is done fraudulently when done with an intention to defraud.[36] Where there is a benefit or advantage or even the likelihood of advantage to the deceiver as a result of the deceit, he is said to have an intention to "*defraud*".[37]

Dishonestly - An *intention* to gain wrongfully by getting what one does not have amounts to a dishonest intention.[38] To gain wrongfully simply indicates towards gaining unlawfully.[39]

Applying this legal matrix, let us determine whether the *actions* of the individuals who attempted to access the Aadhaar database by opening the link satisfy the requisite intention.

[34] §66, IT Act, 2000, *supra* note 9.
[35] §43, IT Act, 2000, *supra* note 9.
[36] §25, IND. PEN CODE, 1860.
[37] *In re* B.V. Padmanabha Rao, 1970 Crim LJ 1502 (1969); Vimla v. Delhi Administration, AIR 1963 SC 1572.
[38] §24, IND. PEN. CODE, 1860; §5(3), Ch. 6, The Fraud Act 2006 (Eng.).
[39] KN Mehra v. State of Rajasthan, AIR 1957 SC 369.

Neither does their *act* deceive anyone nor does it involve an advantage or even its likelihood for that matter. Accordingly, it does not amount to a fraudulent act. Similarly, in the absence of an *intention* to gain wrongfully, their act is not dishonest.

Therefore, the *actions* of the people, though not satisfying the ingredients of the less serious offence punishable under Section 66 of the IT Act, clearly satisfy the essentials under the more serious offence punishable under Section 70 of the IT Act. Hence, the addition of either of the two degrees of intention appearing in the former provision to the latter, as an essential requirement would restrict the ambit of the provision. Consequently, the instances such as the above illustration will not fall within the ambit of the provision and would thereby solve the problem to a great extent.

CONCLUSION

This Essay elucidates how certain criminal provisions of the IT Act drafted in an all-embracing manner, require a stricter wording to exclude ethical hackers. This exigency demands that other degrees of *mens rea* be incorporated in the provisions of Sections 66F and 70 of the IT Act.

Alternatively, there is a solution in the event that an amendment making the inclusion of *mens rea* as an element of the offence is considered to be inappropriate. The problem with respect to ethical hackers could be solved by a method of formally authorising ethical hacking either by legislation or by way of inclusion in subordinate legislation. This would to a great extent, suffice in addressing the concerns of the author.

While the government and upon its failure, the judiciary need to take care of the UIDAI's compliance with the 2018 Rules, the solutions proposed regarding Sections 66F(1)(B) and 70 of the IT Act require legislative or executive intervention in the manner recommended in the preceding paragraphs. These provisions must be worded in a manner that reflects the intent of the legislature and facilitates their proper implementation. Admitting that the IT Act is a relatively new law and is still undergoing significant changes, the author highlights these issues that require prompt attention.

BOOK REVIEW

PRIVACY 3.0: UNLOCKING OUR DATA-DRIVEN FUTURE BY RAHUL MATTHAN

*Amlan Mishra**

This review analyses Rahul Matthan's book titled "Privacy 3.0: Unlocking our data-driven future". It discusses three key ideas advanced by Matthan in the book: (i) the conception of privacy and privacy law, as one which is constantly shaped by technological changes; (ii) the critique of the Indian privacy policy, as one shaped by the Indian bureaucracy; and (iii) the need to transcend 'consent' as the core idea of privacy and explore new principles.

First, this review critiques the dialectic, context-specific relationship between privacy law and technology which forms a crucial component of Matthan's account of privacy. The critique highlights that privacy should not be comprehended in a manner that undermines the normative conceptions of privacy. Second, the book's critique of the privacy policy in India is examined by undertaking an analysis of the court decisions and the privacy regime in India. Lastly, the suggestion of the author to "transcend the consent standard", is sought to be understood in the context of the contemporary scholarship and court decisions regarding the same. In addition, the provisions of the Data Protection Bill, 2019 have been weighed against the insights of the book.

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CONTENTS

INTRODUCTION

The years of 2017 and 2018 have brought the right to privacy to the fore of constitutional jurisprudence in India. The debate regarding the constitutional status of the right to privacy was reignited when the then Attorney General, Mukul Rohatgi, submitted during the hearing of the constitutional validity of the Aadhaar scheme that the right to privacy was not recognised in India.[1] While a nine-judge bench of the Supreme Court in *K.S. Puttaswamy v. Union of India* (hereinafter "*K.S. Puttaswamy*"), held that privacy is a fundamental right under the Indian Constitution,[2] there is a lack of doctrinal clarity regarding the scope of

[1] Utkarsh Anand, *Where's right to privacy? You decide, Govt tells Supreme Court*, The Indian Express (July 23, 2015), https://indianexpress.com/article/india/india-others/wheres-right-to-privacy-you-decide-govt-tells-sc/ (last visited May 1, 2020).
[2] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

this right, and how it extends to data privacy in this data-driven age.[3] Thus, it becomes germane to develop scholarship regarding the contours of the right to privacy in the Indian context. Rahul Matthan, in his book titled "*Privacy 3.0: Unlocking our data-driven future*", makes an attempt to comprehend the scope of the right to privacy in India.[4]

The book adopts a narrative-building, story-telling approach instead of a terse, academic style. The book focuses on the unexplored issues in the Indian privacy regime such as the dialectic relationship between technology and privacy; the failure of the Indian bureaucracy to take privacy seriously; and the potential solutions to address the challenges to privacy posed by the data-driven age.

Matthan has been a technology, media, and telecom (TMT) lawyer for over two decades and used to serve on the management committee (MC) of the Indian law firm called Trilegal. He has recently stepped down from the MC and moved to the supervisory board of Trilegal. The book is a testament to his experience in helping the Indian business industry navigate the hotchpotch of Indian technology laws. Using his professional expertise, Matthan provides insights into how a healthy concern for privacy is crucial to unlocking India's data-driven potential. He also draws from his experience with the Indian bureaucracy in drafting an approach paper on privacy laws in collaboration with the Department of Personnel and Training to highlight India's bureaucratic inefficiencies in dealing with privacy issues.

The book makes three main arguments. It seeks to give narrative shape to the conception of privacy and privacy law, as one born out of and shaped in response to the putative dangers posed to the right to privacy by the emerging digital technology in the society (discussed in Part I and II of this review). The strongest contribution of the book lies in its critique of the policy paralysis that plagues the executive branch of the Indian government and how that has led to a piecemeal development of the privacy laws (discussed in Part III). Furthermore, the book makes the case that the Indian privacy regime must transcend 'consent' as a standard informing the notion of privacy and develop other robust principles (discussed in Part IV). These complex arguments have been explained lucidly in the book. Before delving into the critique of the book, it is important to set out the context of the notion of privacy in order to assess the book's contribution to the existing literature.

[3] Apar Gupta, *Balancing Online Privacy in India*, 6 INDIAN J. L. & TECH. 43, 62 (2010).
[4] RAHUL MATTHAN, PRIVACY 3.0: UNLOCKING OUR DATA-DRIVEN FUTURE (2018).

I. CONCEPTUALISING PRIVACY

Theories of privacy across the world have attempted to isolate the 'essence' of privacy in order to understand its conceptual underpinnings. In the United Kingdom, the *Semayne* case decided in 1604, authoritatively declared the essence of privacy through the paradigm of property in the following terms: "*a man's house is his castle*".[5] Therefore, early privacy violations involving private correspondences were sought to be covered under copyright laws.[6] Later, Warren and Brandeis, in their seminal writing, proffered that the 'inviolate personality' of a human is the essence of privacy. Accordingly, they sought to move the conceptualisation of privacy away from the perspective of 'property' to 'personhood'.[7] Others have sought to understand privacy as 'secrecy' in terms of avoiding the revelation of personal information to others.[8] Several cases on abortion rights, relying on the centrality of bodily integrity, have linked the notion of privacy with the 'dignity' of an individual.[9]

The above characterisations highlight that privacy has several dimensions. Privacy violations have no common denominator. Hence, it is not theoretically possible to isolate the 'essence of privacy'.[10] An apt theorisation of the right to privacy has been provided by Daniel Solove which entails reviewing privacy concerns from the standpoint of a 'pragmatist'.[11] Solove creates a new taxonomy of privacy wherein 'family resemblances' between different privacy issues are used to conceptualise an account of privacy based on actual practices.[12] For instance, the problem of *information processing* poses different concerns than the challenges created by *information collection* or bodily *invasion*.

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[5] Peter Semayne v. Richard Gresham, 77 Eng. Rep. 194, 195 (K.B. 1604).
[6] Ronan Deazley, *Commentary on Pope v. Curl (1741)*, in PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer eds., 2008).
[7] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4(5) HARV. L. REV. 193 (1890).
[8] RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 272-73 (1981); *See* in the Indian context, District Registrar v. Canara Bank (2005) 1 SCC 496, 523, which held that bank records remain confidential vis-à-vis the person, even though they are made known to the bank, and thus, it cannot be further publicised without consent.
[9] Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); *See* in the Indian context, Selvi v. State of Karnataka (2010) 7 SCC 263, which recognised that the inviolability of human dignity is hindered, when polygraph test is administered.
[10] DANIEL SOLOVE, UNDERSTANDING PRIVACY 6, 46 (2008).
[11] DANIEL SOLOVE, UNDERSTANDING PRIVACY, 101-171 (2008).
[12] Solove's taxonomy consists of four principal groups: (1) information collection; (2) information processing; (3) information dissemination; and (4) invasion. Each group encompasses a variety of activities that can create privacy concerns.

This review attempts to underscore that while Matthan attempts to utilise this 'pragmatist' approach to privacy, his account of privacy disproportionately emphasises on context-specificity. This is exemplified by the fact that Matthan believes that the privacy laws and the permissibility of restrictions on privacy should change with contexts. As will be demonstrated later, it is here that his account differs from Solove's conception of privacy, who advocates that though privacy problems ought to be understood in their specific contexts, the law devised to deal with the same should incorporate normative standards.

A. Legal Standards for Privacy Violations

Broadly, two tests are adopted in most constitutional democracies to weigh privacy violations: (i) the proportionality test; and (ii) the reasonable expectation of privacy test.[13] The proportionality test,[14] which has also been adopted by the Indian Supreme Court,[15] evaluates whether the governmental measure is the 'least restrictive way' of achieving the legitimate goal. Thus, if the same goal can be achieved using a less infringing measure, then the law will be declared unconstitutional.[16] It is important to note that the concept of 'societal expectation of privacy' is not a part of the proportionality test. The proportionality test incorporates a normative standard rather than a socio-empirical standard that entails taking into account the public perception of reasonability of a particular restriction.[17]

On the contrary, the 'reasonable societal expectation of privacy test', which is widely accepted in the United States (hereinafter "US"), incorporates "*a twofold requirement, first that person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation [is] one that society is prepared to recognize as 'reasonable'*."[18] It is apparent that this test is more responsive to technological and social changes which may influence the perceptions of individuals.[19] Along the lines of the reasonable expectation test, proponents of the Aadhaar scheme have

[13] Gautam Bhatia, *Aadhaar Judgement and the Constitution- I*, Indian Constitutional Law and Philosophy Blog (September 30, 2018), https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/ (last visited May 2, 2020).

[14] The proportionality test has four prongs: (i) the restriction has a legitimate state goal; (ii) there exists a rational nexus between the restriction and the goal; (iii) the restriction should be necessary and the least restrictive way of achieving the goal; and (iv) the need for a balancing exercise to enquire whether the cost of infringement is disproportionately high vis-à-vis the public purpose.

[15] *See* K.S. Puttaswamy, at paras. 509, 632.

[16] In K.S. Puttaswamy v. Union of India II, (2018) SCC Online SC 1642, the petitioners contended that smart cards were less restrictive than Aadhaar cards.

[17] DANIEL SOLOVE, UNDERSTANDING PRIVACY 72 (2008).

[18] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[19] Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 937 (2005).

argued that privacy is an elitist construct which has no 'reasonable necessity' in a society which struggles with food security.[20] As I explain later, Matthan accepts the Aadhaar scheme as necessary for preventing corruption and improving efficiency. While Matthan does not discuss its proportionality, he seems to have accepted the 'reasonable expectation of privacy' test.

B. Government Intervention in Regulation

Theories of privacy regulation vary between two polarities of 'free market' and 'complete governmental regulation'. The allure of the 'free market' theories is that they are driven by concerns about customer confidence and publicity.[21] Companies pride themselves on their privacy features with an aim to attract more customers. It is apparent that the underlying concern of these theories lies in addressing the huge asymmetry of information between the data controller and the data subject.

On the other hand, governmental regulation theories propose a 'complete' intervention by the government as the solution to privacy concerns. However, the lack of industry experience of the government officials may make the rules framed by such regulators untenable and undermine the innovation efforts of the industry.[22]

A third path of 'self-regulation' by the industry presents itself in this context. An industry created body may make rules and policies and ensure compliance with the rules by the members of the industry.[23] The industry bodies can develop mechanisms to ensure industry compliance as per the expectations of the consumers. This approach allows industry experts to devise rules by taking into account the dynamics of the industry. In some contexts, self-regulation has resulted in the creation of ecosystems of compliance through the training of industry peers in the best privacy practices.[24]

However, across the world, complete self-regulation finds very few takers. In the European Union, the privacy laws provide for a designated, statutory regulator, as industry

[20] Harish V Nair, *Aadhaar hearing: Right to life of poor more important than elite class' privacy concerns, says Centre,* India Today (July 27, 2017), https://www.indiatoday.in/mail-today/story/aadhaar-hearing-privacy-supreme-court-1026499-2017-07-27 (last visited May 2, 2020).
[21] Peter Swire, *Markets, Self-Regulation, and Government Enforcement in the Protection of Personal Information*, in PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE (US Dep't of Commerce, 1997).
[22] *Id.*
[23] Henry H. Perritt, Jr., *Regulatory Models for Protecting Privacy in the Internet*, in PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE (US Dep't of Commerce, 1997).
[24] *Id.*

self-regulation has been historically perceived as an invitation to corruption.[25] Countries like Canada have adopted a co-regulatory model whereby the industry develops 'enforceable standards' that are overseen by a privacy agency of the government.[26] Matthan believes that some variant of self-regulation coupled with minimum government oversight should be encouraged given the red tape in the Indian bureaucratic set-up.

II. THE RELATIONSHIP OF PRIVACY WITH TECHNOLOGY AND SOCIETY

In the first part of the book, Matthan builds a dialectic narrative of how the conception of privacy was born out of technology and consequently, shaped by it. The early humans, it is argued, did not have any conception of privacy. In fact, privacy was deemed to be not just "*unacceptable, but dangerous*".[27] Humans wanted to herd together in order to meet the needs of the population for security and food.[28] Matthan relies on sociological studies to contrast our fixation with privacy with the absence of this idea in ancient societies. Matthan argues that this apathy to privacy reached a tipping point when walls were discovered. Walls, as per Matthan, "*facilitated self-expression in a way humans had never experienced before.*"[29] The Western religious traditions with their focus on seclusion as a prerequisite for private communication with God, encouraged individualism which highly valued privacy.[30] Thus the concept of privacy is portrayed as alien to natural creation, arising out of a human quest for creativity, imagination, and similar activities of solitude.[31]

How does technology shape human society once walls allow for the consciousness of privacy? Matthan marshals early cases of privacy in common law to show how the courts conceptualised the right to privacy in response to the inventions of the printing press, yellow journalism, and cameras.[32] For instance, the first authoritative work on privacy by Warren and Brandeis is written as a response to the growth of photography in the West.[33] The article

[25] Barbara Crutchfield George et al., *U.S. Multinational Employers: Navigating Through the "Safe Harbor" Principles to Comply with the EU Data Privacy Directive*, 38 AM. BUS. L. J. 735, 743 (2001).
[26] David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 13-14 (1999).
[27] MATTHAN, *supra* note 4, at 7.
[28] MATTHAN, *supra* note 4, at 11.
[29] MATTHAN, *supra* note 4, at 18.
[30] MATTHAN, *supra* note 4, at 22.
[31] MATTHAN, *supra* note 4, at 24.
[32] MATTHAN, *supra* note 4, at 27-56.
[33] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890).

reflects deep concern about the circulation of photographs and personal documents made possible by modern technology.[34] The article is pivotal as it propounds the conception of an 'inviolate personality' of a human being as the basis for privacy rights and thereby rejects the earlier notion of 'physical places/property' as the foundation for privacy rights.[35] One of the authors of the article later became an Associate Judge of the US Supreme Court and dissented in *Olmstead v. US*.[36] Brandeis, J., in his dissenting opinion, held that the 'inviolate personality' of a human being and not his 'physical property' was the subject of protection under the Fourth Amendment of the US Constitution which imposes a prohibition on illegal search and seizures.[37]

Matthan traces a similar evolution of the right to privacy in India by drawing on the Indian Court decisions regarding DNA use, phone tapping, etc., to demonstrate how the courts reconciled the right to privacy with the use of emerging technology.[38] In *PUCL v. Union of India*,[39] the Supreme Court was confronted with the question of the validity of telephone tapping. The Court, in this case, laid down guidelines that disallow bulk surveillance and impose 'use-restrictions' on the data collected through tapping. Similarly, the courts have allowed DNA testing only in cases of 'eminent need'.[40] Matthan stresses on these cases to underscore that though several technological inventions have raised serious privacy concerns, "*the technology survived and the society taught itself to adjust to account for these challenges*."[41] Thus, he expresses that "*any study of the evolution of privacy law should take place in the context of the technological changes*."[42]

A. Evolution of Privacy: Sacrificing Normativity for Context?

Matthan's narrative seeks to draw a picture of human privacy as one which is highly context-specific and amenable to radical technological changes. However, other scholars have argued that with respect to activities like urination, defecation, and sexual intercourse, humans

[34] *Id.*
[35] *Id.*
[36] Olmstead v. United States, 277 U.S. 438, 478 (1928).
[37] The text of the Fourth Amendment of the US Constitution disallows illegal 'search and seizure' in a physical place.
[38] MATTHAN, *supra* note 4, at 107-108.
[39] PUCL v. Union of India, AIR 1997 SC 568.
[40] Bhabani Prasad v. Orissa State Commissioner for Women, AIR 2010 SC 2851.
[41] MATTHAN, *supra* note 4, at 26.
[42] MATTHAN, *supra* note 4, at 26.

have drawn private boundaries throughout history. Therefore, at least, a part of the human psyche has genetically craved for private spaces irrespective of the context and social conditioning. Even today, in some tribes, who live as hunter-gatherers, privacy of bathing is secured.[43] Thus, Matthan inaccurately attempts to construct a sense of contingency and fluidity in privacy values which has never existed in human society.

However, the overarching theme of the book that privacy laws should evolve in response to particular technological changes is well taken. Recall the discussion in the first part of this review regarding the conception of privacy. Daniel Solove, in 'Understanding Privacy', has similarly sought to conceptualise privacy by using a 'bottom-up' approach based on 'privacy problems' rather than by making generalised assumptions regarding the essence of privacy in isolation.[44] Solove emphasises that it is useful to develop a classification or taxonomy of privacy values based on 'privacy problems' that we encounter. Solove states that inquiry must be "*experimental, making generalizations based on one's encounters with problems, and then testing these generalizations by examining their consequences in other contexts.*"[45]

Does that imply that the normative standards of privacy can be discarded in favour of context-specific evolution of privacy values and privacy laws as suggested by Matthan? According to Solove, while the 'identification and grouping' of these problems ought to be a contextual exercise and therefore, making it responsive to technological change, 'the law' to address these problems should be based on a normative conception of privacy. Solove states that "*we construct laws to bring about a state of affairs we want, not just to preserve existing realities... The law should thus be a tool used proactively to create the amount of privacy we desire.*"[46] The drawback, associated with the context-specific responsiveness to the concerns of privacy is that it may result in individuals voluntarily giving up their privacy without realising the risks involved in surrendering one's privacy.[47] Furthermore, an Orwellian government may gradually condition its people to become normalised to grave violations of privacy.[48] Solove rightly identifies that

[43] *See* Adam D. Moore, *Privacy: Its Meaning and Value*, 40 AM. PHILOS. Q. 215, 221-22, 223 (2003); *See also* John M. Roberts & Thomas Gregor, *Privacy: A Cultural View*, in PRIVACY: NOMOS XIII 199, 203-14 (J. Roland Pennock & J. W. Chapman eds., 1971).
[44] DANIEL SOLOVE, UNDERSTANDING PRIVACY 9 (2008).
[45] *Id.* at 75.
[46] *Id.* at 74.
[47] DANIEL SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 81-92 (2004).
[48] DANIEL SOLOVE, UNDERSTANDING PRIVACY 73 (2008).

"*a theory of privacy should leave room for cultural and historical variation, but not err by becoming too variable.*"[49] Solove believes that in privacy law-making, societal conceptions should have a limited role of 'identifying and grouping' privacy problems.

Thus, Matthan's claim that society and law have changed and should invariably evolve to accept technological changes does not account for the concerns raised by Solove about authoritarianism. Further, it fails to take into consideration the role of law as an instrument to bring about a desirable state of affairs regarding privacy.

B. The Indian Courts on Normativity: From KS Puttaswamy to Aadhaar

I argue here that the Indian courts, with the notable exception of *K.S. Puttaswamy v. Union of India II* (hereinafter "*the Aadhaar case*"),[50] have for good reasons rejected complete contextuality in privacy values by applying the proportionality test. In the *Aadhaar* case, the Supreme Court digressed from its initial position and indirectly attempted to incorporate the standard of the societal expectation of privacy. The Supreme Court, in upholding the larger exercise of the Aadhaar scheme, echoed Matthan's contextuality in dealing with privacy laws.

It is important here to juxtapose the proportionality test with the reasonable expectation of privacy test. As mentioned earlier, the former incorporates a normative standard whereas the latter reflects a socio-empirical standard. In *K.S. Puttaswamy*, Nariman, J., explicitly rejected the application of a socio-empirical analysis in determining the constitutionality of privacy violation.[51] He endorsed a proportionality test over a reasonable expectation of privacy test by characterising the role of constitutional privacy law as the norm-setter. He noted that:

> "*Also, as has rightly been held, the (reasonable expectations) test is circular in the sense that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy. Whether such individual will or will not have such an expectation ought to depend on what the position in law is.....Shri Dwivedi's argument (that this test is valid) must, therefore, stand rejected.*"[52]

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[49] *Id.*
[50] K.S. Puttaswamy v. Union of India II, (2018) SCC Online SC 1642, at ¶342.
[51] K.S. Puttaswamy, at ¶582.
[52] *Id.*

The Court, in the case of *K.S. Puttaswamy*, held that privacy values are not subjective but should "*peg its colours to the mast of the Constitution*."[53] This reflects Solove's understanding that privacy values should be determined by normative standards and should not sway with societal expectations.

The context-driven evolution of privacy law that Matthan proposes for India seems to be the approach of the majority in the *Aadhaar* ruling.[54] Though the majority referred to the normative standard of proportionality in the *Aadhaar* case, it applied the reasonable expectation of privacy test by delving into the question of whether the privacy concern arising due to the Aadhaar scheme was a 'societally reasonable expectation of privacy'.[55] In order to answer it, the Court undertook a 'societal analysis' of privacy and concluded that the information collated under the Aadhaar scheme such as fingerprints, iris scan, is also sought by the government in other contexts such as driving license, passport, visa, etc., as they are "*considered to be the most accurate and non-invasive mode of identifying an individual*." Therefore, the Court held that the privacy interest of individuals in such information is minimal.[56]

In the book, Matthan, similarly, expresses the benefits of the Aadhaar scheme in the Indian context in terms of minimising corruption and leakages. At the same time, he maintains that the negative effects of the Aadhaar exercise cannot be quantified properly.[57] His endorsement of the regime irrespective of the harms implies his preference to settle the privacy concerns posed by the Aadhaar scheme, by taking into account the Indian context of corruption and leakages.

[53] K.S. Puttaswamy, at ¶500.
[54] The Aadhaar case. *See also* Mariyam Kamil, *Aadhaar Judgement and the Constitution- II: On proportionality*, Indian Constitutional Law and Philosophy Blog (September 30, 2018), https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/ (last visited May 2, 2020).
[55] Gautam Bhatia, *Aadhaar Judgement and the Constitution- I*, Indian Constitutional Law and Philosophy Blog (September 30, 2018), https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/ (last visited May 2, 2020).
[56] The Aaadhaar case, at ¶350.
[57] MATTHAN, *supra* note 4, at 107-108.

III. INDIA'S PIECEMEAL POLICY ON PRIVACY AND NAVIGATING THE INDIAN BUREAUCRACY

One of the most astonishing aspects of the Aadhaar exercise is that it was started without any legislative backing.[58] Later, it was passed as a money bill by the lower house of the Parliament, the Lok Sabha, thereby circumventing the upper house of the Parliament, the Rajya Sabha.[59] This reflects how the loopholes in the legislative and executive branches of the government have been exploited in order to enact a measure that directly concerns the privacy of the individuals. In the second part of the book, Matthan explores the functioning of the Indian bureaucracy when the Aadhaar exercise was in its infancy. Pursuant to his meeting with Nandan Nilekani, the chairman of the Unique Identification Authority of India (UIDAI), a regulatory agency responsible for implementing the Aadhaar scheme, Matthan was tasked with the job of creating an approach paper on privacy laws with the Department of Personnel and Training. Matthan's experience reveals how the bureaucracy which is predisposed to value transparency, struggles with the idea of privacy.[60] Matthan highlights that in a workshop with several departments, each department claimed to have developed its own set of regulations to uphold privacy without addressing the broader need to develop a privacy framework in the national context.[61]

The absence of a comprehensive privacy regime has resulted in the executive tweaking the regulatory understanding of privacy to suit its needs. In 2019, the cabinet approved the DNA Technology (Use and Application) Regulation Bill that permits the government to store a individual's personal data concerning his DNA make-up.[62] In a similar vein, the Ministry of Home Affairs issued a surveillance order which authorises several central agencies to intercept, monitor, and decrypt "*any information generated, transmitted, received or stored in any*

[58] Shreeja Sen, *Government narrative on Aadhaar has not changed in the last 6 years: Sunil Abraham*, The Livemint (March 8, 2016), https://www.livemint.com/Politics/l0H1RQZEM8EmPlRFwRc26H/Govt-narrative-on-Aadhaar-has-not-changed-in-the-last-six-ye.html (last visited May 2, 2020).

[59] Suhrith Parthasarthy, *Aadhaar as a money bill,* The Hindustan Times (September 28, 2018), https://www.hindustantimes.com/columns/aadhaar-act-as-money-bill-it-can-lead-to-a-great-deal-of-public-harm/story-Xu3TtHMSXyrrydO4VcBZgM.html (last visited May 2, 2020).

[60] MATTHAN, *supra* note 4, at 122-123.

[61] MATTHAN, *supra* note 4, at 125-126.

[62] The DNA Technology (Use and Application) Regulation Bill, 2019; *See also* Suhrith Parthasarthy, *Towards a genetic panopticon,* The Hindu (December 21, 2018), https://www.thehindu.com/opinion/lead/towards-a-genetic-panopticon/article25791126.ece (last visited May 2, 2020).

computer."[63] This order has a direct bearing on the right to privacy of the individuals in the absence of any regulatory mechanism to deal with privacy violations.[64]

In the dissenting opinion in the *Aadhaar* case, Chandrachud J., expressed concern over the role of the executive and observed that "*unless the law mandates an effective data protection framework, the quest for liberty and dignity would be as ephemeral as the wind*."[65] Even the majority in the *Aadhaar* case looked forward to the implementation of a data privacy framework and took note of the committees appointed for the same purpose.[66] Consequently, a data privacy bill titled the Personal Data Protection Bill was finalised. However, the bill was introduced in the Parliament after mere consultation with 'select stakeholders' and without undertaking any public consultation.[67] At present, it has been referred to a Joint Parliamentary Committee which has invited public comments on the bill.[68]

A. Alternatives to Bureaucratic Regulation

Matthan provides insights into how a privacy regime ought to be developed in order to navigate the inefficiencies of the bureaucracy. He is not in favour of a 'privacy authority' which figures in many privacy regimes across the world,[69] in order to ensure compliance with privacy norms.[70] He proposes a novel "*system of intermediaries, incentivised to operate in the interest of the data subject*."[71] Matthan believes that the technical expertise of such intermediaries would make them better equipped to deal with privacy concerns than the bureaucracy. Their function would be akin to financial auditors as they would audit the data practices of the data controllers in order to allow these controllers to remedy the deficiencies in their practices. The auditors would assign ratings to different companies based on their practices. He proposes

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[63] Ministry of Home Affairs Order No.14/07/2011-T, 2018, THE GAZETTE OF INDIA (2018), pt. II sec. 3 (Dec. 20, 2018).
[64] *See* Apar Gupta, *Is India becoming a surveillance state*, Blackletter (December 25, 2018), https://apargupta.com/is-india-becoming-a-surveillance-state-3eb7dc70821d (last visited May 2, 2020).
[65] The Aadhaar case, at ¶1364.
[66] The Aadhaar case, at ¶¶257.6, 267, 510.4.6.
[67] Nikhil Pahwa, *MEITY privately seeks responses to fresh questions on the data protection bill from select stakeholders*, Medianama (August 20,2019), https://www.medianama.com/2019/08/223-meity-privately-seeks-responses-to-fresh-questions-on-the-data-protection-bill-from-select-stakeholders/ (last visited May 2, 2020).
[68] Surabhi Agarwal, *Joint parliamentary committee wants more time to submit data bill note*, The Economic Times (March 25, 2020), https://economictimes.indiatimes.com/tech/internet/jpc-wants-more-time-to-submit-data-bill-note/articleshow/74800912.cms (last visited May 2, 2020).
[69] For discussion on privacy theory based on complete governmental regulation, refer to Part I.
[70] MATTHAN, *supra* note 4, at 186-187.
[71] *Id.*

governmental intervention only when the companies fail to self-correct the flaws in their practices.[72] Matthan's scepticism of the red tape in the regulatory system leads him to side with this form of government monitored 'self-regulatory' approach.[73]

As discussed earlier, the benefits of self-regulation lie in access to expert advice and the ability of these experts to keep up with the innovation in the industry. Further, self-regulation creates an environment of compliance as opposed to governmental control. Matthan believes that this approach of self-regulation is apt for India. Matthan testifies from his industry experience that the Indian business sector has always valued consumer confidence. They have done so by upholding consumer privacy and complying with international data standards even in the absence of a national privacy framework.[74]

Self-regulatory agencies like the Data Security Council of India have been praised in scholarly writing for the mechanisms adopted by them.[75] Self-regulation is known to create an ecosystem of compliance and educate industry peers in the best data practices.[76] However, as discussed earlier, complete self-regulation has very little acceptance in other countries due to fears of corruption. Matthan does not provide any concrete mechanism to deal with the challenges of corruption and crony capitalism under his proposed privacy regime.

The proposed Personal Data Protection Bill, 2019, contrary to Matthan's belief, provides for a designated privacy authority for regulation of the industry.[77] Furthermore, the selection committee of the authority will comprise members from the bureaucracy.[78] This raises a pertinent concern that the Data Protection Authority may include an overwhelming number of bureaucrats.

Matthan's column served as a reminder that the Data Protection Authority should have more technical members than bureaucrats to better comprehend the needs of the

[72] *Id.*
[73] *Id.*
[74] MATTHAN, *supra* note 4, at 110.
[75] Adrienne D'Luna Directo, *Data Protection in India: The Legislation of Self Regulation*, 35(1) NW. J. INT'L L. & BUS. 3 (2014).
[76] Perritt, Jr., *supra* note 23.
[77] Shreya Nandi & Japnam Bindra, *Data protection law closer to reality with cabinet nod,* The Livemint (December 4, 2019), https://www.livemint.com/politics/policy/data-protection-bill-gets-cabinet-nod-11575443663959.html (last visited May 2, 2020).
[78] The Data Protection Bill, 2019, §41.

industry.[79] He further states that for better regulation, the authority should undertake the functions of not only a policeman but also of a teacher and an ombudsman. Matthan suggests that a strict, penal approach by the regulator without inspiring and engaging with the industry would be misguided.[80] This discussion begs the question of whether the role of a 'teacher' in inspiring an environment of compliance can be better achieved by 'private intermediaries' coupled with some variant of government monitored self-regulation. While it is difficult to answer with conviction, Matthan's advice to limit the number of bureaucrats in the authority must be implemented earnestly.

IV. TRANSCENDING THE 'CONSENT STANDARD' AND THE 'PUBLIC INFORMATION FALLACY'

The courts have relied on the two standards of 'consent' and 'public information' to gauge privacy violations. The consent standard is a basic test that entails determining whether the person, whose information is collected and processed, has consented to the transaction and whether such consent was 'informed'.[81] The second standard of public information holds that if the information is already in the public domain, its collection and processing would not be subject to privacy regulations.[82] Matthan argues that it is time to move beyond these standards.

A. Consent Fatigue and Processing of Data

The book argues that consent has become redundant in today's age because of the sheer number of applications and devices we use. Consent has become "*just another formality which needs to be completed before we start using that app.*"[83] Thus, no data subject is adequately informed regarding how his data will be utilised by these digital firms. In addition, there are a variety of uses that data can be put to, each of which poses different risks.[84] Data no longer

[79] Rahul Matthan, *A blueprint for an effective data protection authority*, The Livemint (12 November, 2019), https://www.livemint.com/opinion/columns/opinion-a-blueprint-for-an-effective-data-protection-authority-11574183950803.html (last visited May 2, 2020).
[80] *Id.*
[81] K.S. Puttaswamy, at paras. 597, 506.
[82] Petronet LNG Ltd. v. Indian Petro Group, (2009) 95 S.C.L. 207 (Delhi). The origin of this case lies in the US cases on the Fourth Amendment, where the courts only recognised a 'spatial' aspect of the Fourth Amendment, and thereby, restricting its application to bounded spaces: *See* Olmstead v. United States, 277 U.S. 438 (1928).
[83] MATTHAN, *supra* note 4, at 176.
[84] MATTHAN, *supra* note 4, at 174.

exists in 'silos' as modern databases speak to each other in myriad ways in order to generate new insights from the aggregated data rather than gleaning data from one database only. He characterises this as the 'problem of aggregation', a concern that the Indian cyber laws have not been able to effectively deal with.[85] This problem of aggregation, by processing otherwise irrelevant and impersonal data, results in disclosure of more information than the sum of information collected from the user.[86]

As per Solove, data aggregation results in the generation of 'digital persons' as "*each individual is living alongside a counterpart who exists in the world of computer databases.*"[87] These aggregations significantly increase the information about a person than consensually shared raw data could. Further, the data subject has no control over such data and such databases may be replete with distortions because these profiles are by nature reductive as they are gleaned from crude, incomplete data.[88] Matthan's narration of the credit rating system is particularly emblematic of this.[89] Though consent is taken at the beginning of the transaction, the data subject in this system has no remedy once the same data is used to deny him a loan owing to some erroneous, reductive data. Matthan proposes shifting the burden of proof to the data controller by making him accountable for the manner in which data is stored and processed regardless of the consent of the data subject.[90]

In this context, the new Data Protection Bill, 2019, provides users with the right to correction, completion, update, and erasure of the data collected by the data controller.[91] However, contrary to Matthan's insistence on the accountability of the data controller, this right has been made conditional and the controller has been given broad leeway to refuse such a request.[92]

[85] MATTHAN, *supra* note 4, at 173.
[86] MATTHAN, *supra* note 4, at 181.
[87] DANIEL J. SOLOVE, THE DIGITAL PERSON 1-10 (2004).
[88] DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 120 (2008).
[89] MATTHAN, *supra* note 4, at 67.
[90] MATTHAN, *supra* note 4, at 183.
[91] The Data Protection Bill, 2019, §18.
[92] The Internet Freedom Foundation, *A Public brief and analysis of Data Protection Bill* (January 25, 2020), https://saveourprivacy.in/media/all/Brief-PDP-Bill-25.12.2020.pdf (last visited May 2, 2020).

B. Public Information Fallacy in India

Section 43A of the IT Act, 2000, and the rules framed thereunder provide for 'purpose limitation on data collection'. However, it applies only to personal information and not other public information collected by the data controller such as social media information.[93] It fails to take into account that aggregation of ostensibly public data is equally harmful.[94]

With the Cambridge Analytica scandal coming to light, users have become conscious of the dangers posed by the information that is put on social media platforms.[95] The deployment of user information to tailor propaganda and influence voting patterns has sparked a conversation in the West.[96] In India, the Ministry of Information and Broadcasting proposed a programme called the 'social-media communications hub'. The programme was intended to monitor social media activities in order to collect data regarding the views of social media users regarding government policies and influence them.[97] This attempt was later withdrawn after protests.

It has been highlighted before that aggregating ostensibly innocuous, non-personal data or data available in the public domain permits the generation of intimate profiles of individuals. However, the reluctance, on the part of the judiciary and policy-makers to make rules governing public information, flows from the notion known as the 'secrecy paradigm'. This results in the courts and regulators treating data either as completely private or completely public without recognising that data may merit protection regardless of where it is found.[98] In India, the Supreme Court has explicitly overruled the 'secrecy paradigm'. It held that privacy rights belong to "*persons and not places*" and therefore, the existence of the

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[93] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011. These rules have been framed under section 43A of the Information Technology Act, 2000.

[94] MATTHAN, *supra* note 4, at 180-182.

[95] Issie Lapowsky, *How Cambridge Analytica Sparked the Great Privacy Awakening*, Wired (July 3, 2019), https://www.wired.com/story/cambridge-analytica-facebook-privacy-awakening/ (last visited May 2, 2020).

[96] Emma Briant, *I've seen inside the digital propaganda machine. And it's dark in there*, The Guardian (April 20, 2018), https://www.theguardian.com/commentisfree/2018/apr/20/cambridge-analytica-propaganda-machine (last visited May 2, 2020).

[97] Krishn Kaushik, *Why track social media chatter*, The Indian Express (July 16, 2018), https://indianexpress.com/article/explained/supreme-court-social-media-communications-hub-whatsapp-messeges-tapping-modi-govt-5261003/ (last visited May 2, 2020).

[98] DANIEL SOLOVE, UNDERSTANDING PRIVACY 111, 139, 150 (2008); *See supra* note 81 for differing cases.

information in the public domain cannot be the sole factor to decide privacy violations.[99] However, some lower courts have considered the 'public nature' of the information to deny reliefs when such ostensibly public information is collected or further publicised.[100] Given this uncertainty in India, the book rightly rings the warning bells for unchecked data processing by data analytics companies.

Curiously, the Data Protection Bill, 2019, which is currently being reviewed by the Joint Parliamentary Committee, explicitly allows the government to collect non-personal data from private players for 'evidence based policy-making' and 'targeting of services'.[101] It also allows the government to frame policies for digital economies by making use of such non-personal data. These provisions are reminiscent of the social media communications hub programme which sought to similarly monitor the social media activities of the users with an intention to influence them. These provisions ought to be reconsidered given that non-personal data, when processed or aggregated with other government databases, can reveal intimate profiles of individuals.

CONCLUSION

The book is an intellectually stimulating read for those interested in privacy law and provides industry insights for individuals troubled by the specter of being deprived of their privacy. For the former, it offers crucial insights to understand the privacy jurisprudence in India. For the latter, it offers a fresh perspective, in contrast to the Orwellian saga that we often find reproduced in popular culture. Matthan attempts to strike a fine balance between the privacy concerns of individuals and the efforts of the industry to innovate. He encourages such efforts through the creation of a transparent privacy framework, particularly through his suggestion regarding the privacy auditors. However, Matthan's highly context-specific understanding of privacy has the potential to undermine the normative conceptions of privacy.

[99] District Registrar v. Canara Bank (2005) 1 SCC 496,523; *See* Gautam Bhatia, *State Surveillance and the Right to Privacy in India: A Constitutional Biography*, 26 NLSI REV. 127, 145 (2014).
[100] Petronet LNG Ltd. v. Indian Petro Group, (2009) 95 S.C.L. 207 (Delhi); Rajinder Jain v. Central Information Commission, 164 (2009) D.L.T. 153 (Delhi).
[101] The Data Protection Bill, 2019, §91.

The book's most important contribution to the existing scholarship lies in the breadth of the disciplines it navigates in order to comprehend the notion of privacy in the data-driven world. As John Dewey wrote "*inquiry begins with problems in experience, not with abstract universal principles*",[102] Matthan provides a holistic understanding of privacy by marrying law and social theory with technology and praxis.

[102] JOHN DEWEY, EXPERIENCE AND NATURE 9 (1925).

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