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FOREWORD

Close involvement with society is the destiny of law and law makers. In order to understand the concurrence of the latest developments in the area of law and society at large, NULJ has yet again achieved relevance by presenting a very diverse and meaningful collection of articles. We are a movement journal - committed to supporting, enhancing, and privileging all the diverse voices in and outside the country. This of course may lead to a contribution leading to the steady march towards justice. We are a collaborative journal, uniting the energy of law school students, lawyers, activists, and community members to generate important practitioner-oriented scholarship. We are a journal striving to live by the social justice values we espouse by sharing resources, rejecting internal hierarchy, and promoting vigorous discussion, and even dissension, within the pages of our journal. The authors have presented ideas and trajectory of thought process that would surely lead us to new paths of enquiry and deliberations. The NULJ Team appreciates their valiant efforts and looks forward to continued support and zeal in encouraging us.

We believe that as a reader you are as inspired, as impassioned, and as motivated to action as we have been through this process. We hope that you will allow us to partner with you in making our unique corner of the earth a more just and equitable place to live.

Prof. (Dr.) Purvi Pokhariyal
Chief Executive, Nirma University Law Journal
Director, Institute of Law, Nirma University

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CONSUMER INTEREST LITIGATION UNDER THE CONSUMER PROTECTION ACT, 1986 IN INDIA: A CRITICAL ANALYSIS

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The technology and law are said to be in race with each other. This requires law to amend itself and evolve so as to keep its promise of maintaining order and rendering justice to the needy who very often are weak. This is also true about the consumer protection laws. The Traders, every now and then, innovate new techniques to lure customers with the aid of modern day well organized advertising agencies. But the Consumer Protection Act, which is meant to protect the common poor consumer against any such injurious acts on behalf of traders, is more than two decades old legislation wherein many lacunas have been identified. One such defect is the limited scope of bringing public interest litigation which in effect renders the Consumer Protection laws an affair of middle class men and resulting in denial of access to equal justice to large section of poor, weak and illiterate masses who are pitched against a well organised and equipped class of men - the traders.

I. INTRODUCTION

Over the two centuries, the science and technology has made tremendous progress in every walk of life. Thanks to the unlimited human intellect and the quest of human beings to achieve higher and higher standards of development. This has actually helped the human beings to transform this world into easier place to live. At the same time it became necessary to

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regulate human conduct in the changed scenario of man and technology interactions. This is done through the instrument of law. When technologies change, the human behaviours change and law has to change accordingly. Therefore, it is one of the well known facts in the modern legal realm that law and technology are always in race with each other. This is because human intellect and creativity has no limits and it goes on exploring new things and experimenting with new thoughts. Since, law is meant to maintain order in society, it becomes imperative for it to evolve and amend itself in order to cater to the needs of changing equation.

It is also one of the well established facts of modern day trade that traders are busy in devising new means and methods to attract customers for their products. 'In order to convince the consumers that their products are having added advantages, they unscrupulously resort to advertising campaign which quit often is either false or misleading. The guises under which false or misleading advertisements appear are as varied as they are ingenious.'[1] They hire the services of professional men who have formed and run marketing or advertising houses for this purpose. These agencies are groups of professional people, properly trained and educated, having a full time job of devising ways and means of attracting and luring consumers. Sometimes they come up with heavy discount offers - which in many cases continue throughout the year; sometimes with false associations usually of self created organisations; or with self named formulas like 'triple action formula' in case of detergents and soaps etc. All this is targeted at a common man, a consumer, who, particularly in case of India, is generally illiterate, poor and bereft of power of understanding the technicalities of the advertisements or the effects claimed by the vendor of his product. In this process, therefore, many traders and the marketing houses cross the prohibited lines marked by the law of the land. But they generally go unpunished and are not held accountable for the profits they make through false claims and misrepresentation.

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[1] Lapointe Machine Tools Co v. J N Laponite Co 115 Me 472 A 348 (1919) c.f. Ahmad Farooq, (1999) "*Consumer Protection in India – Problems & Perspectives*", APH Publishing Corporation New Delhi p. 64.

II. THE LEGAL RESPONSE AND ITS SHORTCOMINGS

The Consumer Protection Act, 1986, was the legislative response to check these tendencies of the trader community and to protect the interests of the general consumers of the country. The enactment of the Act is regarded as '*magna carta'* in the field of consumer protection for checking the unfair trade practices and deficiency in goods and services. The act attempts to remove the helplessness of the consumers against powerful businessmen; described as the 'network of racketeers'.[2] But the working of the Act has shown that it has many weaknesses and need to be revisited in the light of changed technological inventions and the progress made by the human creativity. Under the present law, many acts of misrepresentation by traders go unreported and hence render traders unaccountable because the costs of bringing it to the notice of the authorities is not economical. This is mostly because, when viewed from a smaller scale, a consumer may be made to pay a very small or negligible amount of extra money if the trader falsely charges extra amount for his products. But viewed from a larger scale, the trader makes profits in crores each day by simply charging a negligible amount of extra money from the poor consumers. All this money goes to his kitty by resorting to unfair means and encourages him and other traders like him to resort to those means again and again. Such practices have been declared by the Act as 'Unfair trade practice'[3].

But the vendors resort to new and innovative techniques for the purpose of attracting more and more customers towards their products. Every day new means of deception are invented and utilized. The modern means of communication, particularly the television makes the presentation of these deceptive claims so attractive that one could hardly think of its falsehood. More so when the buyer is an illiterate man unable to differentiate between articles of deception. Even well educated men are deceived, given the manner of presentation sometimes by actors and models who are presented as experts wearing particular uniforms. The finer conditions are usually written, both in print and electronic media in such small fonts that it needs a

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[2] J N Barowalia, 'Commentary on Consumer Protection Act, (4th Ed, 2010), Universal Law Publishing Co, pp 15,16.

[3] *See* Section 2 (r) of the Consumer Protection Act, 1986.

magnifier to read those lines. Example, one advertisement of detergent powder Ariel in its audio states that it has lemon and *chandan* extracts but the finer text of the same advertisement reads 'contains no *chandan* or lemon extracts'. Presuming that an illiterate consumer is watching the advertisement, the untrue audio claim in the advertisement surely amounts to deceptive trade practice.

Another such recent example presently in operation is the trend adopted by the likes of Indian Trading Corporation (ITC) and Proctor and Gamble (P&G). These traders/marketers, in their advertisements declare that on purchase of their products, a specified amount will go towards girl's education or for the education in rural areas in the form of construction of schools etc. Though a noble claim, but this gives birth to many issues: first, can a private corporation force an individual to make a compulsory contribution towards a social cause - which otherwise falls under domain of corporation's personal social responsibility? Secondly, does it amount to taxation by private individuals? And what is the mechanism through which it is ensured that the amount thus collected is spent for the purpose claimed for? Or is it simply another tool of luring consumers by appealing to their emotions and making them believe that they are contributing towards a noble cause?

Legally, no person, whether juristic or natural born, has any authority to tax any other person for personal benefits. It is only the Government that has the authority to tax an individual. The power to tax is an essential attribute of sovereignty. The power is reserved with the legislative bodies at Centre and in States under various provisions of the Constitution.[4] 'In a democratic system, levying tax is exclusively the function of the legislature'.[5] 'Power to tax can be delegated only subject to legislature itself exercising essential legislative functions'[6] otherwise it cannot even be delegated. Therefore, without any support of law, a corporation cannot therefore compel a

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[4] *See* Lakshmi Sadasivan, "*Concept of Taxing Power in Democracy- Indian Perspective*". (2013) at www.legalserviceindia.com/article/I471-Taxing-Power-In-Democracy, html Accessed on 07-01-13.

[5] M P JAIN & S N JAIN, 'PRINCIPLES OF ADMINISTRATIVE LAW' (4th ED., 2005), WADHWA AND CO NAGPUR, p 50.

[6] I P MASSEY, 'ADMINISTRATIVE LAW' (7TH ED., 2008), EASTERN BOOK CO LUCKNOW, p 121.

consumer either to make a mandatory contribution for any particular purpose, no matter how noble the cause may be. And if anybody has to do charity, let he does out of his own pocket. In absence of any legal basis, the practice must therefore qualify to be an Unfair Trade Practice. Section 2(r) defines an Unfair Trade Practice as:

> *'unfair trade practice' means a trade practice which, for the purpose of promoting sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice...*[7]

The definition then precedes on to list some of the unfair trade practices but the definition is not exhaustive. The listed practices have become a category of illustrations and the concept of unfair trade practice is a general concept.[8] But the above stated practice falls in the same category given the fact that it has no legal basis and it is primarily meant for shooting up the sale of their products. It is unfair because there is no means to examine whether or not the money claimed to be gathered is used for the purpose claimed. As emphasized by the House of Lords, 'fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of consumer's necessity, indigence, lack of experience... or any other factor...'[9]

Though it may be argued that these corporations are doing the act in question for the purposes and under the mandate of Corporate Social Responsibility. But the fact remains that a corporation has to fulfil the duty of spending some capital under the scheme of Corporate Social Responsibility out of its own profits. It cannot compel, one way or other its customers to pay a mandatory fee or tax for this purpose. Clause 135(5) of the new Companies Bill 2012, as approved by the Lok Sabha states that:

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[7] Section 2(r) of Consumer Protection Act, 1986.

[8] AVTAR SINGH, 'LAW OF CONSUMER PROTECTION: PRINCIPLES AND PRACTICE' (4TH ED., 2005), EASTERN BOOK CO, p. 158.

[9] Director General of Fair Trading v. First national Bank Plc, (2002) 1 All Er 97 (HL) c.f AVTAR SINGH, 'LAW OF CONSUMER PROTECTION: PRINCIPLES AND PRACTICE' (4TH ED., 2005), EASTERN BOOK CO.

> *'The board of every company... shall ensure that the company spends, in every financial year, at least two percent, of the average net profits of the company*[10] *made during the three immediately preceding financial years, in pursuance of its corporate social responsibility policy'*[11]

However, even if the practice is declared as an unfair trade practice, there still remains the problem of enforceability and effective penalty against such traders. The problem stems from the fact that, generally, when viewed from a small scale, the amounts involved are negligible hence, rendering it uneconomical for a consumer to approach consumer forums.

III. THE WAY OUT

One of the means of tackling the problem is the provision of Public Interest Litigation. Any public spirited person sensing foul play on behalf of any vendor affecting rights of individuals at large could bring it to the notice of the courts. However, the scope of filing a Public Interest Litigation under the Consumer Protection Act, 1986 is very narrow. Though the object of filing public interest litigation before Consumer forums is the same as in case of Public Interest Litigations before High Courts and the Supreme Court, that is the advancement of public justice, but its scope under the Act is limited by the provisions of the Act.

Under the Act, a complaint against a vendor for unfair trade practices can be filed by a 'complainant' defined under Section 2(1)(b) of the Act. It defines "Complainant" as:

> *Complainant means*
>
> *(i) a consumer; or*
>
> *(ii) any voluntary consumer association registered under the Companies Act, 1956 (1 of 1956), or under any other law for the time being in force; or*

[10] Emphasis supplied.
[11] Clause 135(5) of Companies Amendment Bill, 2012.

(iii) the Central Government or any State Government,

(iv) one or more consumers, where there are numerous consumers having the same interest;

(v) in case of death of a consumer, his legal heir or representative who or which makes a complaint;[12]

In view of clauses (ii), (iii) and (iv) of Section 2(1)(b) defining complainant, there is scope for instituting Public Interest Litigation either by a voluntary consumer association or by the State or Central Governments or by one or more consumers having same interest. The definition, therefore, does not impose an absolute precondition of being a 'consumer'[13] for filing a complaint under the Act.

The use of the word 'Complainant' instead of the 'Consumer' implies the intention of the framers of the Act to allow certain other legal entities apart from consumers to file a complaint and bring any act of traders or service providers that is prejudicial to the interests of consumers in general to the notice of consumer courts. The idea is make consumer justice a reality and to seal all the loopholes that may be used by the traders to exploit the common consumer.

However, there are many practical problems in utilizing these provisions of the Act. First, unlike in United States of America, there is no well established culture of voluntary consumer associations who are dedicate to the cause of consumers. There are only few voluntary consumer associations who are either based in the capital city or in the capital cities of progressive states like Maharashtra, Tamil Nadu, Gujarat and Karnataka.[14] Therefore, the requirement of being a voluntary consumer association has not proved to be of much practical utility in India and may not be adequate in future also

[12] Section 2(1)(b) of the Consumer Protection Act, 1986.
[13] As defined under Section 2(1)(d) of the Consumer Protection Act, 1986.
[14] These primarily include Consumer education and Research Centre (Ahmadabad), Consumers Association of India (Chennai), Citizen Consumer and Civic Action Group (Chennai), Consumer Guidance Society of India (Mumbai), Association for Consumers Action on Safety and Health (Mumbai). C. f. Consumer Daddy at http://www.consumerdaddy.com/a-11-major-consumer-ngos-in-india.htm accessed on 19-04-2013

given the populous nature of the country. Secondly, though the State and Central Governments can also file the complaints under the Act, but after liberalization, the Government has taken an active part in trade and commerce and many corporations who resort to these tactics are Government owned and they may not like to file complaints against their own organs. Also that very often the governments are pre-occupied with other projects and duties and consumer interests may be cornered.

Under clause (iv) any consumer or any number of consumers can bring a class action against a trader provided they have same interest, in the product or services. The expression 'same interest' means that the interest must be common to all and they must have a common grievance against the trader.[15] Such a case will, therefore, be of the nature of representative suit. And therefore it will not be necessary that the parties should have same cause of action or their rights should have been infringed in the course of same transaction.[16] However, given the fact that in such consumer cases the amounts involved are very meagre, usually a rupee or less, when viewed at an individual level and also that the consumers are illiterate and poor, the provision also does not seem to be too much helpful. It becomes less economical to bring action against the erring service provider. This helps the erring traders to escape the wrath of law and it encourages them and others like them to indulge in more such activities without being accountable to the law. In this context, the provision of filing a Consumer Interest Litigation for the benefit of all the consumers by a public spirited person can be a helpful tool.

Further, such an option of filing Public Interest Litigation under the provisions of the present Act appears to be restricted to the cases covered under sub clauses (i), (iv) and (vi) of section 2(1)(c) of the Act that defines the term 'Complaint'. The Act defines 'Complaint' as:

[15] *See* C K TAKWANI, CIVIL PROCEDURE, (LUCKNOW, ED. 2006) EASTERN BOOK COMPANY, p. 124.
[16] Tamil Nadu Housing Board v. Ganapati (1990) 1 SC 608.

"Complaint means any allegation in writing made by a complainant that

(i) an unfair trade practice or a restrictive trade practice has been adopted by any trader;]

(ii) the goods bought by him or agreed to be bought by him] suffer from one or more defect;

(iii) the services hired or availed of or agreed to be hired or availed of by him] suffer from deficiency in any respect;

(iv) a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods;

(v) goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.

with a view to obtaining any relief provided by or under this Act;[17]

Thus, these allegations inter alia include that:

(a) An unfair trade practice or restrictive trade practice has been adopted by any trader.

(b) A trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods with a view to obtaining relief provided by or under this Act.

[17] Section 2(1)(c) of the Consumer Protection Act, 1986 § 2(1)(c).

(c) Goods which will be hazardous to life & safety when used are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.[18]

It, however, remains unclear as whether for an action under clause (iv) the complainant needs to be a buyer or any person authorized by the buyer.

For the cases covered under sub clauses (ii) and (iii) it is not possible for a voluntary consumer organisation or the State or Central Government to file a complaint unless it comes under the definition of 'Consumer'. A consumer as defined under Section 2(d) as any purchaser of goods or hirer of service for consideration or any person using such goods or enjoying such services with the permission of the actual buyer.[19]

Further, the allegations in a complaint must be made *with a view to obtaining relief under this Act*.[20] The remedies available under this are enumerated under Section 14 of the Act. On an analysis of the Section, it is clear that in case of Public Interest Litigation, the reliefs that a consumer forum may grant are restricted to those contained in sub-clauses (f) to (h) (c) of Section 14 of the Act. Section 14 of the Act reads as:

If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to 1[do] one or more of the following things, namely,-

(a) to remove the defect pointed out by the appropriate laboratory from the goods in question;

[18] Consumer Protection Act, 1986 § 2(1)(c).
[19] Consumer Protection Act, 1986 § 2(1)(d).
[20] Consumer Protection Act, 1986 § 2(1)(c).

(b) to replace the goods with new goods of similar description which shall be free from any defect;

(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;

(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.

(e) to remove the defects or deficiencies in the services in question;

(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(g) not to offer the hazardous goods for sale;

(h) to withdraw the hazardous goods from being offered for sale;

(i) to provide for adequate costs to parties.[21]

These reliefs inter alia include:

(i) an order to requiring a trader to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;[22]

(ii) not to offer the hazardous goods for sale;[23]

(iii) to withdraw the hazardous goods from being offered for sale;[24]

(iv) to cease manufacture of hazardous goods and desist from offering services which are hazardous in nature;[25]

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[21] Consumer Protection Act, 1986 § 14(1).
[22] Consumer Protection Act, 1986 § 14(1)(f).
[23] Consumer Protection Act, 1986 § 14(1)(g).
[24] Consumer Protection Act, 1986 § 14(1)(h).
[25] Consumer Protection Act, 1986 § 14(1)(ha)

(v) to pay such sum or may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently;[26]

(vi) an order to issue corrective advertisements.[27]

(vii) to provide for adequate costs to parties[28]

The relief mentioned in sub-clause (1)(hb) of Section 14 of the Act is particularly important wherein the consumer courts are empowered to order any sum to be paid by any manufacturer or service provider in case found guilty of any act declared unfair by the Act. This provision will be particularly helpful in cases where a trader illegally charges some extra amount of money, which though negligible if viewed at small scale but involves huge amounts of money when viewed at larger scale. This provision is also important from the point that very often it will be difficult to identify all the affected consumers in such cases. For the purpose of clauses (a), (b), (c), (d) and (c), it will be necessary that the complainant is a consumer or anybody who has used the goods with the consent of the consumer. But it remains unclear as to whether Public Interest Litigation can be instituted by any person other than a consumer or the person using goods or services with the consent of the consumer, for obtaining the relief under these sub clauses.

IV. CONCLUSION

It is evident, therefore, that the option of filing a Public Interest Litigation under the Consumer protection Act is limited both from the point of view of *locus standi* and the reliefs provided for under the Act. However, more than a quarter of century has passed since the time the Act was enacted and since then there have been many developments in the field of information and technology and the trade strategy of trader community. There is therefore an urgent need to amend the Act to the effect of relaxing the rule regarding filing of public interest litigation under the Act. This is important in the

[26] Consumer Protection Act, 1986 § 14(1)(hb).
[27] Consumer Protection Act, 1986 § 14(1)(hc).
[28] Consumer Protection Act, 1986 § 14(1)(i).

context that 'where the harm to the collective is great, it is important that mechanisms are found to litigate such issues. Even where small amounts are involved, these may be significant to the individuals concerned and particulars need to be in place to address their concerns. Unless the full range of consumer concerns are taken on board, consumer law will continue to be viewed as middle class law, for it will only be worth litigating disputes involving high cost gods and services'[29].

It also becomes important to bring such changes into the Act in order to make access to justice a reality for the poor and vulnerable citizens of this country who form a sizable part of the population. The Consumers can thus 'be permitted to aggregate individual claims in groups or class actions'[30] or consumers can be allowed to bring class action on behalf of all consumers. This will in an effective step in achieving the goal of protecting the people in their capacity as consumers which is a manifestation of progressive social and economic policy aimed at enhancing the quality of life and higher standards of living.[31] Unless that is done, the access to consumer courts and consumer justice remains a game of few.

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[29] WILLIAM WHITEFORD, "STRUCTURING CONSUMER PROTECTION LEGISLATION TO MAXIMIZE EFFECTIVENESS" p 271.
[30] *Ibid.*
[31] *See* David Harland, *Implementing the Principles of United Nations Guidelines for Consumer Protection*, (1991) 33 JJLJ 1898, c. f AVTAR SINGH, 'LAW OF CONSUMER PROTECTION: PRINCIPLES AND PRACTICE' (4TH ED., 2005), EASTERN BOOK CO, p. 158.

LEGALIZATION OF GAMBLING ON OUTCOMES OF SPORTING EVENTS - A FARCICAL SOLUTION TO AN UNCONTROLLABLE PROBLEM?

Inakshi Jha*, Shantanu Dey**

Through this paper, the authors seek to delineate the contentious issue of legalization of gambling on sporting events in India within the circumscribing limits of the thriving legislative framework. Adopting a sequential examination of the issue in hand, the authors having engaged in an exhaustive analysis of the Indian Gambling Laws endorsing the objectives of inclusivity proceed towards a comprehensive illustrative perusal of arguments espousing for and against the cause of the issue in hand. Sensitive to the ideological force guiding the movement for the Pro-Legalization Agenda, the paper in its latter half makes a concerted effort to propose constructive structural solutions for the concretization of the change argued for before concluding the matters clarifying the authors stance on the issue vis-à-vis underscoring the "Legislative Dynamism" argument.

I. THE CONCEPT OF GAMBLING IN SPORTS IN THE CONTEMPORARY ERA- AN OVERVIEW

In the modern world beleaguered by the ideologies of materialism and monetary gains, the concept of Gambling in Sporting Events has acquired unprecedented importance as a procedure guaranteeing quick money.

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Gambling is popularly referred, 'to playing a game in which you can win or lose money or possessions in a bet'[1]. Gambling can be ascribed the status of genus and betting can form one of its species as has been simulated in various central and state legislations. It has assumed the nature of a game functioning on a contingent situation specifically the outcome of a sporting event providing it the essence of unpredictability.[2]

The primacy of this activity in the economic scenario can be logically deduced from the enormous cash flow involved as evidenced by reports from KPMG which has estimated India's overall gambling market (most of which is illegal and unaccounted) to be 60 billion dollars which amounts to around 3.5% of India's Gross Domestic Product[3].

The idea of the proposed legalization has assumed essentiality in the Indian context by tracing its genesis from a similar legislative approach being adopted in several other parts of the world wherein gambling has acquired the status of a socially acceptable habit renouncing the illegality associated with it[4]. An escape from the ever-increasing tribulations of the modern life, a disturbingly high percentage of individuals indulge in excessive gambling to attain monetary success, which seems to be one good guess away.[5]

II. STATUS QUO IN THE SUBCONTINENT VIS-À-VIS ANTI-GAMBLING LAWS

The Pre- Independence approach was dominantly defined by the features of the Public Gambling Act. 1867, a central legislation which sought to illegalize gambling with insufficient punitive sanctions but failed to entail the scope of

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[1] *Gamble: Definition*, Merriam Webster (Encyclopedia Britannica), http://www.merriam-webster.com/dictionary/gamble, (Last visited on: November 9 2013).

[2] PAUL M. ANDERSON, SPORTS BETTING: LAW AND POLICY, 459-460, (Springer, October 2011).

[3] *The World Bank: Data- India*, http://data.worldbank.org/country/india , (Last visited on: November 10, 2013).

[4] JULIAN HARRIS AND HARRISH HAGAN, GAMING LAW: JURISDICTIONAL COMPARISONS, 79, (THOMSON REUTERS, 2012 ED.).

[5] A. Blaczynski, A., P. Delfabbro, N. Dowling, K. Heading & D. Rickwood, The Psychology of Gambling, APS Gambling Working Group: APS Final Review Paper, (2010), https://www.psychology.org.au/Assets/Files/APS-Gambling-Paper-2010.pdf, (Last visited on: November 15, 2013).

sports gambling with an inadequate reference to games of mere skill as an exception. The unexplained ambit of the words used "gambling" and "games of mere skill" within this statute unfortunately exposed the lacunae in the law which was sought to be effectively determined by the Constitution of India in 1950[6] and the Apex Court in 1996 in *K.R. Lakshmanan v. State of Tamil Nadu*.[7]

With the coming in of the Constitution of India and the consequent incorporation of Betting and Gambling as part of state list as entry no. 34 of List II, state governments have been delegated the responsibility of making laws on betting. The fact that a significant proportion of states such as Punjab (Punjab Gambling Act, 1961), Kerala (Kerala Gambling etc. 1960), etc.[8] asserted such legislative autonomy via formation of state legislations seeking to stringently ban gambling in any form while others continued to attach credence to the provisions of the abovementioned Act of 1867 rendered essentiality to ensuring judicial clarity over the classification of sports as a game of "skill" or "chance".

This ensuing debate was settled by the Supreme Court in the previously mentioned cases of *State of Andhra Pradesh v. K. Satyanarayana*[9] and *K.R. Lakshmanan v. State of Tamil Nadu*[10] and the subsequent position of legality allowing games such as horse racing and rummy to fall within the penumbra of skill games maintaining silence with respect to any other form of sport concretizing the principle that "The test of legality of gambling vis-à-vis nature of sports is dependent upon the dominance of the element of skill/chance with regard to a recognized sport."[11]

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[6] Seventh Schedule, Entry 34 of List II of Constitution of India- "gambling" includes any activity or undertaking whose determination is controlled or influenced by chance or accident and an activity or undertaking which is entered into or undertaken with consciousness of the risk of winning or losing.

[7] (1996) 2 SCC 226.

[8] FICCI, *Regulating Sports Betting in India,* http://www.ficci.com/sector/37/Add_docs/ficci-faq-on-sports-betting.pdf, (Last visited on: November 29, 2013).

[9] (1968) 2 SCR 387.

[10] LAKSHMAN, *Supra* note 7.

[11] *Id.*

The authors find it particularly unsettling that criminalization of sports gambling conduct has experienced recognition in the sub-continent insensitive to the rationale behind the inception of criminal law certifying the immorality of the act indifferent to the common belief concerning the non-violative nature of such an act consequently infusing the legitimacy of state paternalism.[12] This debate is rooted in the Constituent Assembly Debates wherein the insertion of the entry on gambling was opposed afraid of the implied legalization subsequently clarified by B.R. Ambedkar justifying the resultant empowerment of the state to prohibit such activities.[13]

Furthermore, Section 30 under the Indian Contracts Act, 1872 inadvertently adopts a contractual perspective which primarily aims at achieving a considerable degree of deterrence via rendering the element of voidability and the succeeding unenforceability to gambling on sporting outcomes as a contract consequently depriving the participants of a legal recourse leaving the question of legality untouched.[14]

The absence of regulation and unenforceability paves way for infusion of large amount of funds into the sector pushing one to intercede with the object of influencing the outcome giving birth to the modern day idea of match fixing and spot fixing[15] exemplifying the inevitability of such an undesirable outcome.

Lately the rigidity and archaic nature of laws in India has been exposed with the idea of online gambling assuming primacy. Such lack of dynamicity has necessitated the emergence of the Information Technology Act, 2011 to prevent its citizens from registering at online sports gambling sites by making Internet Service Providers responsible for unblocked offshore operations.[16] This legislative innovation, forms an offshoot of a previous

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[12] Raadhika Gupta, *Legalising Betting in Sports: Some Reflections on Lawmaking*, Economic and Political Weekly, Volume XLVIII, No. 48, (November 2013).

[13] Shri B.R. Ambedkar, *Constituent Assembly Debates*, Volume IX, 2 September 1949.

[14] *See* Subash Kumar Manwani v. State of M.P. AIR 2000 MP 109.

[15] S. Murlidharan, *The Thin line which divides betting and spot fixing,* (May 30, 2013), The Hindu, http://www.thehindubusinessline.com/opinion/columns/s-murlidharan/thin-line-divides-betting-and spotfixing/article4766372.ece , (Last visited on: November 16, 2013).

[16] Salman Waris, *Online Gambling and Betting on Cricket Matches continues unabated,* Indian Law Journal, Volume 2, Issue 3, http://www.indialawjournal.com/volume2/issue_3/article_by_salman.html, (Last visited on: November 21, 2013).

legislation; the Information Technology Act, 2000 which regulates cyber activities in India engulfing the scope of online betting recognizing gambling as cyber-crime tool. Furthermore, the Foreign Exchange Management Act, 2005 legislates upon the issues of cross border gambling transactions and online betting regulation and banning.[17] Yet gambling laws and regulations in this respect are in a nebulous state in the country as the IT Act, 2000 ceases to prevent customers from logging onto overseas websites without protection of national law.[18]

Gambling sites are often situated outside the jurisdiction of Indian courts making enforcement of punishment awarded by Indian authorities an insurmountable challenge. The mitigating strategy administered in the contemporary context has been extension of extra territorial jurisdiction of The Indian IT Act[19] eventually leading to cross-border litigation involving internet based gambling operations as in the US case of *In State of Minnesota v. Granite Gate Resorts, Inc.*[20]

Conclusively, the move of restrictive and restrained legalisation has been backed solely by the two states of Goa and Sikkim which have indulged in licensing and monitoring of the functioning of gambling houses on land and sea.[21] *Seamlessly, amalgamating the utilisation of Information Communication Technology in this sector,* the Sikkim government has recently introduced the Sikkim Online Gaming (Regulation) Act, 2008 and the amended Sikkim Online Gaming (Regulation) Rules, 2009 legitimising the setting up of online sports betting websites showcasing the way forward for the rest of the nation experiencing a policy framework dilemma.

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[17] Animesh Sharma, *Gambling Laws in India!,* (November 2, 2013), http://lawlex.org/lex-pedia/gambling-laws-in-india/8590, (Last visited on: November 27, 2013).

[18] Kapilesh Sharma, *Anti-Match Fixing Law of India in Pipeline but Online Gambling and Betting still untouched,* (May 29, 2013), http://www.opednews.com/articles/Anti-Match-Fixing-Law-Of-I-by-Editor-LNAV-130529-357.html, (Last visited on: November 26, 2013).

[19] SALMAN, *Supra* note 16.

[20] State of Minnesota v. Granite Gate Resorts, Inc., 568 N.W. 2d 715, Court File No. c6-95-7227.

[21] FICCI, *Supra* note 8.

III. EMERGENCE OF THE IDEA OF LEGALIZATION - A STEP TOO FAR?

The Ideological Force Backing the Pro-Legalization Agenda

Legalization as conceived by the Indian policy makers essentially denotes an affirmative approach to such a practice rather than blissfully ignoring its jarring existence. This approach is circumscribed by the complementary ideas of accountability, licensing, detection, deterrence and taxation[22] seeking to eliminate the connotation of illegality and immorality which has compelled the stakeholders and beneficiaries engaged in the process to go underground. [23] The inability of the state to legalize an evil that intrinsically forms the modus vivendi of the society has consequently hurt the government exchequer, depriving the government of its potential tax revenue source[24].

In the wake of the numerous match-fixing and betting scandals marring the sanctity of sporting institutions and the resultant demand to ban competitive events such as the IPL[25], the discourse embedded in the idea of legalization has assumed prominence. The illogicality of the present legislative setup as has been sought to be rationalized by the Indian Courts legalizes horse race gambling on one hand but proposes a strict banishment of an activity of similar nature in other sports including cricket distinguishing the former as a game of skill.[26]

Seemingly, it is utterly naïve to disregard involvement of a certain degree of skill in picking winners in other sports and form an exception for horse racing in the current legal discourse thereby, exposing the persistent logical inconsistency.[27] Therefore, contextualization of gambling in the present

[22] JULIAN, *Supra* note 4, at 331.
[23] MANDAGADDE RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA: ANCIENT, LEGAL, JUDICIAL AND CONSTITUTIONAL SYSTEM, 209-210, (10TH ED. 2010).
[24] ANDERSON, *Supra* note. 2, at 4.
[25] *Banning IPL is not a solution: Ajay Maken,* (May 19, 2012), Hindustan Times, http://www.hindustantimes.com/sports-news/cricket/banning-ipl-is-not-a-solution-ajay-aken/article1-858335.aspx, (Last visited on: November 21, 2013).
[26] LAKSHMANAN, *Supra* note 7.
[27] *Id.*

policy-based discourse directs us towards legalization as a damage-control measure.

Examining the Dichotomous Impact of the Intended Approach

The authors attempting to achieve the twin objectives of preventing a skewed debate and subjecting the issue to a comprehensive examination ensure that vehemence does not see the daylight while assessing the essence of positivity surrounding the legalization of betting. Subsequently, in this section the policy is critically portrayed taking into account the two inevitable sides of the picture.

A. Appreciating the Polarity of the Situation- A Study of the Brighter Side

1. Endorsing the Objectives of Regulation, Accountability and Victim Protection

While betting has not been a novel concept to India, its coupling with the nation's fascination with sports has made it imperative to abandon the euphemism of betting as a vice and present a sanguine outlook towards the benefits of the legalization of sports betting[28]. Moreover, the broadcasting boom has brought about an exponential increase in viewers of sports on media channels. The most rudimentary step towards probing the benefits of sports betting must be the identification and acknowledgment of a mammoth web of individuals and finances involved in betting despite a proscription by the law.

Regulation is only second to recognition. In India, where an astronomical amount of Rs 300,000 Crores of black money is used annually for betting[29],

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[28] Rama Laxmi, *Considers Legalizing Sports Gambling as way to curb match fixing,* (June 25, 2013), Washington Post, http://www.washingtonpost.com/blogs/worldviews/wp/2013/06/25/india-considers-legalizing-sports-gambling-as-way-to-curb-match-fixing/, (Last visited on: December 4, 2013).

[29] Sujay Mehdudia, *FICCI for Legalizing Sports Betting,* (May 24, 2013), The Hindu, http://www.thehindu.com/business/Industry/ficci-for-legalising-sportsbetting/ article4746081.ece, (Last visited on: December 4, 2013).

illuminating upon the indispensability to assay this business. Legalizing sports betting ensures the protection of minors, uneducated and uniformed individuals with a limited income and the elderly with diminishing life savings who are often cheated by brokers in an unregulated market transaction.[30]

It is essential to examine the treatment of gambling on outcomes of sporting events under the umbrella term of wagering contracts. The push for legalization of gambling culls out one of the most prominent gains for the vulnerable in the present scenario wherein the sting of enforceability in the court of law continues to be in the dark owing to its presumed immorality.[31]

Therefore, the espoused and revamped legislative framework possesses the prospect of securing the rights of the weaker party in a gambling contract and can provide an effective legal recourse preventing the unending subsequent contractual violence perpetrated on the section society deprived of considerable bargaining power, a policy also enacted by the United Kingdom and viewed as encouragingly effective.[32]

2. Furthering the State Economic Agenda

Discerning the economic nature of betting transactions can help envisage a tax policy that ensures that legalization of sports betting checks on tax evasion by brokers and bettors as a source of taxable income under Section 115(BB) of the Income Tax Act, 1961.[33] While an earning in a betting transaction is not reported as a source of taxable income, the legalization of such transactions will mandate reporting such income. In India, this can help the Government generate revenue of Rs 12,000 Crores annually which can be reinvested in the promotion of sports that do not receive commercial or national funding.[34]

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[30] ANDERSON, *Supra* note 2, at 337.

[31] Deepaloke Chatterjee and Ranjani Das, *How to Square a Circle: Exploring the Legality of Financial Derivatives in India,* NUJS Law Review, Volume 2, 337-338, (2009 Ed.).

[32] Manu Kaushik, *Should the Government Legalize Sports Betting in India?, (June1, 2013),* Business Today, http://businesstoday.intoday.in/story/betting-in-sports-ipl-spot-fixing/1/195466.html , (Last visited on: December 7, 2013).

[33] ANDERSON, *Supra* note 2, at 452.

[34] MEHDUDIA, *Supra* note 29.

This will further help boost tribal sports which although a gem to India's heritage have been disdained. Investment in sports also has the potential to reignite a passion for forgotten sports like the National Sport of India – Hockey.

Hence, while the ambit of betting broadens beyond the conventional sports of Cricket and Horse racing, a shadowing investment and consequent upsurge in forgotten sports like Kabbadi will ensure India sees minimal extinction of the vibrant sporting culture that has been tarnished due to a lack of funds.[35] The money collected in taxes can alternatively improve infrastructure and promote welfare schemes.

This approach of amalgamating sports betting revenue with the national system has been adopted and proven to be extremely successful and commercially viable for states like Nevada in the United States of America, Isle of Man, Curacao and Gibraltar.[36] In these states the government has molded sports betting to nurture income generation and encourage employment of locals thereby framing the success of legalizing sports betting to empower the community.

3. Resolving the Problem of Plenty in a 1.2 Billion Territory

Trotting along a similar line of argumentation, legalization of gambling taking its natural course instinctively embarks upon us the reduction of unemployment in India. Legalizing sports betting can yield the populous with a new wave of jobs ranging from officers to monitor betting transaction to a new breed of brokers who specialize in a stream of sports betting along with a majority of unskilled workers employed in the implementation of menial economic activity in the betting industry.

Such a demand is a replication of a tried and tested formula which has achieved considerable success cutting across several nations as experienced

[35] FICCI, *Regulating Sports Betting in India- A Vice to be Tamed,* 5-6 http://www.ficci.com/SEdocument/20208/report-betting-conference.pdf , (Last visited on: December 3, 2013).

[36] KPMG International, *Online Gaming: A Gamble or a Sure Bet?*, 14-15, (2010), http://www.kpmg.com/EU/en/Documents/Online-Gaming.pdf , (Last visited on: December 5, 2013).

in the case of the revocation of the liquor prohibition in countries like the USA and a majority of Indian states wherein the prohibition contributed towards the inexorable ramifications in the form of bootlegging, huge black profits and the subsequent legalization espoused the cause of socio-economic-political gains.[37]

While there is a rise in the unskilled labor required, India can also evolve a niche as an Avant grade supplier of cyber-betting due to the available huge human capital trained in cyber and computer science ranging from Computer engineers to cyber traders who can come together to help India build itself as a pioneering cyber sports betting hub.[38] Owing to the knowledge and expertise that swept India during its IT and BPO movement in the early 2000's, India also has the potential to metamorphose as an outsourcing destination to facilitate sports betting and consequent economic transactions.

Due to the huge population and prevailing knowledge in these industries, outsourcing of sports betting transactions will be more affordable in India as compared to other countries, thereby, attracting foreign investment in the Indian sports betting phenomena. Foreign investment can promote the establishment of such complex industries, thereby, pressurizing the Government to competently implement its laws and regulation mechanisms.

In most Scandinavian countries, such as Denmark there is complete freedom on sports betting which has given citizens the freedom to regulate their choices by modeling laws that keep social costs in mind while granting freedom to place bets.[39] This model has advantaged Italy, Spain and most American States. E.g. In Nevada, legal sports betting attracts 30 million visitors generating employment opportunities for thousands of locals.[40]

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[37] Jack S. Blocker Jr., Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation, Journal of Public Health, Volume 96, No.2, 233-243, (February 2006).

[38] Michael Muehle, *Paving the Way for Legalized Sports Gambling?* Rutgers Law Review Commentaries, Volume 65: 1, 23-24, (October 2012).

[39] FICCI, *Supra* note 35.

[40] American Gaming Association, *Sports Wagering,* (June 2012), http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering, (Last visited on: December 4, 2013).

4. Centrality of Transparency to the Solution Base

Accompanying the taxation benefits is a symbiotic increase in transparency of the finances circulating in a betting transaction. While the legalization of sports gambling will ensure a competent taxation framework, it will also scrutinize the flow and sources of the finances. This propels transparency by ensuring that the colossal of black money in India is not in transaction and if already in circulation such black money can be traced and reported.[41]

A competent taxation framework can control money laundering from further corroding the sports industry. More importantly, the transparency diffused by legalization of betting will entrench a vigilance and regulation mechanism to monitor the flow of money and its receivers, thereby ensuring, betting money is not used for illegal transactions such as drug pedaling or terrorist activities promoted by the Underworld Mafia or Independent Terrorist Organizations such as Al-Qaeda who presently benefit from the deficient vigilance system.[42]

Legalizing sports gambling can bolster the legal system by ensuring that a regulated framework ensures betting is not carried about by criminals but by registered agents who will report money that cannot be traced to reliable sources. It will also ensure that the defense of a betting malpractice occurring under foreign jurisdiction does not prohibit trial in the Indian legal setup. This has been witnessed in Sweden, where despite sports betting being legal there is a strict government control on foreign players venturing into the market or taking advantage of Swedish bettors.[43]

This ascertains that dupers posing as betting agents are not allowed to take advantage of their operations. It is pivotal for legalization to be introduced to cover the ambit of online betting which is not included in the present Indian Laws. This will promote litigation and help people gain awareness of their

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[41] JAMES A.R. NAFZIGER AND STEPHEN ROSS, HANDBOOK ON INTERNATIONAL SPORTS LAW,165-166, (2011 ED.).
[42] *Id.,* at 77.
[43] *Online Sportsbooks in Sweden,* http://gamingzion.com/sportsbook/sweden/, (Last visited on: December 1, 2013).

rights in order to protect their finances while betting.[44] Henceforth a strong redressal mechanism can be developed to safeguard rights and ensure speedy relief against illicit betting transactions.

B. Shades of Grey-Demystification of State-Sanctioned Sports Gambling

1. Entrenchment of an Inherently Problematic Practice vis-à-vis State Legitimization and the Rising Social Cost

The strategy of legalization as proposed by the State suffers from a fundamental ideological foible in the form of the state sanctioned gambling, a practice historically viewed immoral in the Indian Context. Contrary to the favored belief that "*One cannot legislate morality",* the Indian Legislature has time and again refuted such a belief by addressing the immorality of acts of killing, stealing, defaming going to the extent of gambling thereby, setting public morality standards irrespective of the personal values harbored by a few.[45] Exploiting such law-morality co-efficiency, the impact of the recommended legalization possesses the potential to single-handedly redefine the acceptable moral code of conduct vis-à-vis the practice of gambling historically frowned upon the Indian context.

Drawing from the jurisprudential analysis furthered by Justice OW Holmes in his *Bad Man Theory*[46], the infusion of legalized gambling into the scheme of matters involves *continuation of the banned conduct and instead of eradicating the evil, the law may instead drive the bad men to engage in it more clandestinely, causing greater harm*[47] thereby, frustrating the primary motive for the concretization of the policy. In pursuit of achieving the goals of regulation, accountability and state opulence via the rule of law, the

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[44] JULIAN, *Supra* note 4, at 141.

[45] Mark S. Putnam, *Legislating Morality and Beyond,* (2004), http://www.globalethicsuniversity.com/articles/legislatingmorality.htm, (Last visited on: November 29, 2013).

[46] Bad Man Theory- "A society's legal system is defined by predicting how the law affects a person, as opposed to considering the ethics or morals underlying the law. Under this theory, the prediction is done by viewing the law in accordance with a bad man's point of view who is not bothered about morals.", *Bad Man Theory Legal Definition,* http://definitions.uslegal.com/b/bad-man-theory%20/, (Last visited on: November 29, 2013).

[47] RAADHIKA, *Supra* note 12.

proponents of the strategy have demonstrated nonchalance to the psychological aspect of the situation transgressing into the financial realms impacting the society at an individual as well as mass level, thereby, contributing to the cause of societal breakdown.

The commencement of the problem starts with the exponentially high reliance on the gambler's attribute of self-discipline, the failure of which sets in a vicious cycle resultantly causing the complementary mental, physical and financial problems[48]en masse termed ludomania, a form of compulsive gambling.[49] Statistics produced by various American Researchers[50] and Australian Medical Association[51] have revealed that adolescents engaging in such activities possess a higher rate in school failure accompanied by a history of family conflict triggered by loss of household income, erratic sexual activity and psychiatric disorders paving way for baleful tendencies to commit suicide arising out of the ensuing depression.

Concluding the matter, the authors believe that the inequity intrinsic to the complications attract essentiality as the prevalence and possible impacts of the State Approval of this antagonistic practice seems to have the most pronounced bearing on the socially and economically disadvantaged individuals and communities who compulsive expose their vulnerability via disbursing a greater proportion of their depleting income for such wagering transactions.[52]

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[48] D.A. Korn & H. Shaffer, *Gambling and the health of the public: Adopting a public health perspective*, Journal of Gambling Studies 15:4, 223-234, (1999).

[49] Dr. Gita Mathai, *An addiction called Ludomania,* The Telegraph, (June 10, 2013), http://www.telegraphindia.com/1130610/jsp/knowhow/story_16989852.jsp, (Last visited on: December 5, 2013).

[50] Nelson Rose, *The Legalization and Control of Casino Gambling,* Fordham Law Journal, Volume 8, Issue 2, Article 1, 243-244, (1979).

[51] F. Lorains and S. Thomas, *Prevalence of comorbid disorders in problem and pathological gambling: Systematic review and meta-analysis of population surveys,* Addiction 106, 406-410, (2011).

[52] M. Young, T. Barnes, M. Paterson and M. Morris, *The changing landscape of indigenous Gambling in Northern Australia: current knowledge and future directions*, International Gambling Studies, 7, 327-344, (2007).

1. Legalization...Sowing the Seeds of the Vices it sought to destroy-Breakdown of Law and Order?

Exploiting the wide gamut of discussion in the previous section, gambling is often chaperoned by an abhorrent alcoholic and drug abuse practice. Occasional wins accompanied by a scourging alcohol or drug addiction[53] can threaten the backbone of the present societal order leading to a social breakdown.

A pathological gambler takes unwarranted risks at his own accord that can lead to cataclysm often twined with gargantuan economic losses forcing the family into penury. This in turn leads to the gambler becoming more abusive and suicidal. An Australian Productivity Commission finding, states that 60% of people with gambling problems have suffered from depression and 9% have considered suicide as an option, has supported this.[54] Two out of three of these gamblers commit illegal activities to pay debts.[55]

Making matter worse, 52% of gamblers with a problem sell their family possession to repay debts and continue betting, leaving the family with no security to back upon.[56] This also instigates a vicious cycle of economic losses, which leads to a despairing enhancement of economic disparity that a gambler tries to overcome by taking steeper risks that typically founder.[57] As a result the economic inequalities perpetuate and the family's social and economic status is tarnished.

2. Impelling Susceptibility of the Field to Commercialization

Apart from abrading the prevailing social law and order, gambling can also lacerate the integrity of sports and rend the quintessential sportsman spirit.

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[53] National Research Council USA, Pathological Gambling: A Critical Review, 130-131, (1999 ed.).

[54] Scottish Executive Social Research, *Research on the Social Impacts of Gambling, 43-44,* http://www.gla.ac.uk/media/media_34552_en.pdf , (Last visited on: December 6, 2013).

[55] D. Anderson, *Problem Gambling among Incarcerated male Felons,* Journal of Offender Rehabilitation, 113-114, (1999).

[56] *Supra* note 54.

[57] *Chapter 5-Social and Economic Effects,* 3-4, http://govinfo.library.unt.edu/ngisc/reports/pathch5.pdf, (Last visited on: December 6, 2013).

Legalization of sports betting can impede sportsmen from competing fairly and the instances of match fixing will escalate, as sports will begin to get invaded by the dominance of money. Matches will get fixed based upon a popularity opinion of the public, which in the Indian context is most often formed by the media who can be paid to advocate the caliber of a team.[58]

Players determining their performance based on the bets placed upon them or their respective teams will trail this phenomena leading to a forlorn future for sports. Hence, it is cogent to vocalize that the congruence of sports and betting in India will fabricate a lethal future of Indian Sports adulterating the youth's perception of this inherently non-commercial sector.[59]

3. *A Policy Welcoming Economic Advancement or Veiling State Weaknesses?*

One of the principal arguments justifying the legalization of gambling on outcomes of sporting events in India has been that the activity is so deeply rooted in the Indian Socio-Economic structure that the violation of a prohibitive law is an inevitability.[60] However, the authors believe that such an approach often sometimes simulates a presumption made by the state to conveniently shift the burden of proving its administrative incapability on the mentality of the Indian Common Man.

The immorality connoted to the tradition of gambling has been reiterated by the judiciary itself in numerous Supreme Court judgments[61] via reference to the ancient texts to conclude on gambling as "sinful and pernicious vice" and successfully deploy the public interest argument to restrict the constitutionally determined freedom.[62]

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[58] Andrew Brocker, *Does Betting Harm the Perception of Sport,* (March 24, 2013), http://www.bettingexpert.com/blog/perception-of-sports-betting, (Last visited on: November 30, 2013).

[59] Avishek Roy, *"One of the Biggest Threats to Sports Integrity is Sporting Fraud": IPL Probe Judge Mukul Mudgal speaks up for the regulation of Sports Betting,* (October 12, 2013), The Daily Mail, http://www.dailymail.co.uk/indiahome/indianews/article-2456903/One-biggest-threats-sports-integrity-sporting-fraud-IPL-probe-judge-Mukul-Mudgal-speaks-regulation-sports-betting.html, (Last visited on: December 3, 2013).

[60] FICCI, *Supra* note 8.

[61] *See* State of Bombay v. RMD Chamarbaugwala AIR 1957 SC 699.

[62] RAADHIKA, *Supra* note 12.

Such a culturally colored and morally influenced perception of betting initiated the proactive approach towards constructing an anti-gambling legal structure and owing to the evident inefficacy of the framework demonstrated by more than half the market share consumed by underground gambling transactions, the validity of such laws and voice for legalization has occupied the center-stage.[63]

Ending the argumentation, the "Prohibition Analogy" encapsulates the issue stating that the imposition of such paternalistic prohibitive laws instils a culture promoting disrespect for the legal system via widespread violations rendering impracticality. This proposed line of argumentation often employed by the state to legitimate such policy-based novation can be confuted by exposing the correlation existing between accessibility to gambling and the rate at which people bet destructively enhanced by the suggested legal approach.[64]

Therefore, arrogating an eclectic approach, gambling distinguished as a modus vivendi of the Indian society is a conscious attempt to obscure the impotence of the Indian Government to effectively execute the laws.

4. *Exposing the Statistical Fallacy of the Pro-Legalization Movement*

The argumentative deliberations confining the issue has often been colonized by exaggerated statistics vis-à-vis potential of expanding the magnitude of government tax revenues with no real change in the revenue and employment generated consequently creating a partially adulterated image of the future of the possible integration of a pro-gambling framework.

Examining the overestimation, the profits taxed for the purpose of such calculation often fail to consider the longevity associated with the implementation of the policy which necessarily leads to flattening out of profits in the long run diluting the rise in tax-based government revenue.

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[63] WORLD BANK, *Supra* note 3.
[64] ROSE, *Supra* note. 50, at 242.

Furthermore, the flattening will take place once all the states incorporate such a legislative change integrating such legalization into their functioning, thereby, sequentially leading us to the concept of Monopoly v. Competition.[65]

Often citing the examples of places like Goa and Las Vegas which are ascribed the status of Gambling Hubs, the pro-legalization propaganda tries to create a false sense of confidence amongst the public.[66] However, once the proposed policy measure undergoes enactment the monopolistic identity credited to the restrictive legalization will cease to exist concretizing the economic concept of competitive markets in the gambling sector[67] subsequently dividing and diluting the profit share earned by the organized legal operators engaging in gambling on outcomes of sporting events.

Ultimately, the argument for such legalization is often buttressed by the possibilities of creation of fostering economic development. However, it is essential to debunk such an argument by examining its contours revolving around the concept of revenue shifting[68] assumes momentousness in the process of countering the popular belief that gambling creates new money as it tends to essentially represent consumer expenditure switched from other sectors of the economy such as consumer goods or investment capital.[69]

IV. BRIDGING THE GAP-A WAY FORWARD

In light of the arguments advanced and analysis of the status quo, it is climacteric to confer about the much-needed solutions in the legal, regulatory framework governing the legalization of sports betting. The

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[65] Margaret E. Beare and Howard Hampton, *Legalized Gambling: An Overview 1984-13,* Programs Branch User Report, 224-225, http://dspace.ucalgary.ca/bitstream/1880/41372/1/ail.pdf, (Last visited on: November 30, 2013).

[66] Jersey's tax take from casinos fell from $477 million in 2006 to just $255 million last year and worse is likely to come as states rush to approve online gambling, See Steven Malanga, *Legalizing Casinos for NY,* (October 8, 2013), New York Post, http://nypost.com/2013/10/08/legalizing-casinos-a-loser-for-ny//, (Last visited on: November 21, 2013).

[67] MARGARET, *Supra* note 65, at 15.

[68] PATRICK BASHAM AND KAREN WHITE, GAMBLING WITH OUR FUTURE: THE COSTS AND BENEFITS OF LEGALIZED GAMBLING, FRASER INSTITUTE DIGITAL PUBLICATION, CANADA, 58-60, (2002).

[69] MARGARET, *Supra* note 65, at 16.

incompetency of the present laws dealing with a startling reality in India today has necessitated a refurbishment in the framework regulating the same.

To protect the economically vulnerable from falling prey to a misfortune, it is suggested that gambling tax be introduced homologous to the application of luxury tax. This can aid a higher tax revenue collection while safeguarding the vulnerable. Similarly, a law instituting the prohibition of minors from placing bets must be introduced to protect their economic and social interests.

A gambling association, responsible for regulating and administering bets can be established and registration must be made compulsory. This commission must grant licenses on analyzing the source and flow of money placed in the transaction and the tax paid before granting licenses.[70] This will check on illegal gambling in India, thereby protecting the bettors who often fall prey to the illicit activities of bookies.

In the constitutional context, it is crucial to amend the Gambling Act, 1867 to include 'authorized games' that bets can be placed on, provided it is a taxed and transaction registered . Currently, the Gambling Act prohibits betting but this is not applicable to 'Games of skills' exposing the horseracing-cricket legislative distinction. Hence, there is a need to fragment the current classification and establish an authorized list of sports that bets can be placed upon.[71]

Regulation must be outlined under entry 42 of the Union list dealing with Interstate trade and commerce to safeguard the commercial interests of parties involved in betting.[72] The Information Technology Act, 2000 should augment to regulate online sports betting transactions and their legality vis-à-vis the Constitution.[73] To aid this, Entry 31 of the union list pertaining to telephones and other modes of broadcasting and communication must be

[70] K.R. Sarkar, Public Finance In Ancient India, 104-105, (2003 ED.).
[71] Julian, *Supra* note 4, at 146.
[72] FICCI, *Supra* note 35.
[73] Julian, *Supra* note 4, at 141.

modified to chalk out regulatory mechanisms such as checking age of bettor online, demanding a tax return on online betting transactions to ensure the applicability of the IT Act effectively.

The central Government must also take the responsibility of imposing a code of conduct, practices and procedure along with making licensing of brokers mandatory. [74] Such licenses must be revoked on the non-payment of taxes or illicit transfer of the money placed in bets, especially with respect to terrorist or mafia organizations. To promote sports that are not in the commercial limelight, the Government can limit the amount placed on bets of a particular sport, thereby ushering bets to be placed on sports that have previously been ignored. This can actuate those sports that need the financial support and encouragement previously repudiated.

V. CONCLUSION-AN ECCLECTIC EXPOSITORY ANALYSIS

The path advocating for the cause of legalization of betting on outcomes of sporting events in India perfectly symbolizes, "*the road not taken"*. The status quo vis-à-vis the anti-gambling framework as has been compendiously outlined emanates a feeling of rigidity and obsolescence in the modern dynamic environment. Demonstrating extreme levels of indifference to the penal provisions attacking the existence of gambling perceived as an immoral practice, the instituted legal framework exemplifies discord between law and reality as proposed by legal philosophers such as Hans Kelsen.[75]

Adopting an objective approach while scrutinizing the contours of the issue, one is often perplexed by the balance of arguments in favour of the pros and cons of the policy change. However, utilizing the Hans Kelsen's theory, gambling as a norm of the modern society has rendered the subsisting legal framework to be meaningless necessitating enforcement of better mechanisms[76]. The stubborn attitude of the Centre has reaped no significant benefits and proved to be a lost economic gain opportunity. It is germane to

[74] FICCI, *Supra* note 35.
[75] RAADHIKA, *Supra* note 12.
[76] *Id.*

appreciate that cons are inevitability for every legislation circumscribing the conduct of billion people and such overenthusiasm vis-à-vis criticism leads to critics overstating the social as well as economic costs of legalized gambling in the sports field.

Change forms the rule of the day and placing the arguments on a weighing scale often paves way for the inference that benefits of the proposed legal mechanism trump over the possible costs which irrespective of the legalization policy will continue to persist. It can be logically held that the opposition experienced by the transformation sought to be introduced is primarily principle based describing the accentuation of the already existing problems by the legislative overhaul and does not constructively counter or establish the need to maintain status quo. Therefore, the overarching principle governing the ideology backing the Pro-Legalization Movement can be befittingly worded as- "*Preference of Consumer Freedom over Government Paternalism via the Instrumentalization of Regulation over Prohibition*".

REASONS TO EMBRACE GOD AND TO DEGRADE

Vikhyat Oberoi*

The world has witnessed loudest screams from the side of religious dogmas. The loudest violence is in the form of religion. What has been addressed as a guest in this paper is the fact that centuries have passed, and we haven't taken the refuge of God yet. We haven't taken the roof of God because the texts which reflects to us their intellectual dialogues concluding the way of life, is kept away from the public. Bhagavad Gita has been tagged as religious book which is to be only translated to us by pastors because of our lack of enthusiasm and indoctrinated mind. This is a smashing example of the Karl Marx theory explaining the control over proletariats through superstructure. The more man understands the true nature and reflection of the spiritual texts like Bhagavad Gita, the more man runs away from his religion. The paper seeks to unlock the text asking people to read Bhagavad Gita as a philosophy rather than mere spiritual text. Thus, concluding that the eyes are the one fooling and the great revelation is yet to descend as many years have deprived mankind of great strength and wisdom that remains locked within our great texts.

I. INTRODUCTION

The great Mirza Ghalib, a poet who believed in his God without ever visiting the mosque and drank even after his religious institution didn't permit him, once said, "I recently came across a learned and an experienced horse; that

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changed lot of religions. First he was with Kareem and then with Chelaram; later with Robert, and at last with Bhuvan Singh. No religion could make him run faster. No one turned him into an elephant, he remained a horse throughout."

The rivers, the sun; the moon and the men, all have travelled in each other's company since time immemorial. And in all ages, men have succeeded to rule over nature; to minimize the role of nature by giving religion a higher value than the rules of nature, and the theory evidences itself when great contributors like Socrates and Galileo were tagged traitors for speaking the truth to the power. Every century has its men who guide mortals towards the ultimate enlightenment, but the powerful rules the market.

The Big Bang theory created small bits of particles which created atoms, stars and further it got into planets and moons. *This universe that we know began in almost absolute simplicity, and it has been getting more complex for about fifteen billion years... It is moving towards some kind of ultimate complexity... An atom of hydrogen might not get there, or a leaf, or a man, or a planet might not get there*,[1] and that final complexity, some like to call it God, and some, ultimate complexity. A man, in this universe renders stability. To nations, the Constitution provides it, to son a father, and to soul, a superman, i.e. God. When man loses all hopes and is in great despair, when man is seeking a better world, when man has no being and when man fails in his exercise, it is the faith that serves him hope. This faith, to some is 'will power' and to some, the ultimate source of the will power, i.e. God.

The bridge between hope and despair and yet another hope is built up by the almighty. When a man is guided by unreasonable demands, he is guided by God who says "*He who has given up all desires and moves free from attachment, egoism and thirst for enjoyment attains peace.* (Chapter II, verse 71)."[2] This by many fanatics must be expressed as leaving the worldly pleasures and going for a pilgrimage, but if read as a great philosophy, it tells

[1] DAVID ROBERTS GREGORY, SHANTARAM, 480 (MARGOT ROSENBLOOM ED., ABACUS 4TH REPRINT ED. 2011).

[2] THE BHAGAVAD GITA 48 (GITA PRESS, GORAKHPUR 36TH REPRINT ED. 2011).

us that even if the world is against you, even if your community and your family, which is your closest is against you, you still have to strive for universal good and the action. As it is explained in the text that action and knowledge is superior to any relation of a being, and a man should strive towards his action, his niche. That is why, even though there *were uncles, sons, nephews, grand-uncles, great grand-uncles, maternal uncles, father-in-law, grand nephews, brothers-in-law and other relations* (Chapter I, verses 33-34)[3], Krishna asked Arjuna to fight the battle of Mahabharata because action is what keeps a man living and not even his kingdom.

Religion evolved as a set of beliefs concerning the cause, nature and purpose of the universe and grew as an organized system of beliefs that bound people to become a close-knit society.[4] Men, who do not believe in the existence of God, are in a state of utopia where they are ready to be the cause of every action that they do. But there certainly exists a herd of men who do have ups and downs in their life and during the great depression, it is the ultimate faith that they seek, and they call it God. Swami Vivekananda once addressed the court of the king of Alvar, where idol worship was ridiculed. He asked one of the ministers in the Court to spit on the picture of the King. And when the minister hesitated to spit, Vivekananda explained that the reason men worship God is because they have their emotions attached to it just like a minister has it for his king. In the same way, men establish a kind of discipline by worshiping and by fasting which has today got convoluted into the overpowering and restricting concept of religion.

Woefully, the hallucination that these rabble-rousers pass on is immortal. The identity of religion has been interchanged with that of a culture, where Hinduism existed even before the very Gods of the religion. Hinduism or any other religion has become more of a culture. Because in a religion one have a culmination point like Bhagavad Gita or Krishna who one could follow and following these philosophical entities one could do no harm to the society. It becomes a culture because it doesn't serve the purpose of humanity and way of life anymore. It then becomes a stringent law without any authentic

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[3] *Id*. at 28.

[4] Manorama Yearbook 448 (Malayala Manorma 48TH ed. 2013).

makers just like in Ireland where a dying woman would not be allowed abortion because the law of the land is Christianity, where the Church decides that aborting a child is sin. It has become a violent and a rotten faith where writers like Salman Rushdie are driven out of the country for their literary freedom (more popularly termed as blasphemy) which gives a choice to readers to have their own beliefs. The Church, the temples, which were to impart peace, imparts illusion. Religion is universal and it is these iconoclastic religions that make this world a bad place. And while one pens down his 'individual thoughts' on 'real religion', one also can't help resisting a lofty appreciation for those who manage to maintain a concept of religion that many of us voluntarily and blindly believe in, with not many questions raised over the past few centuries. "*The greatest harm comes from the fanatic. We may not doubt the sincerity of the fanatic but often he has the irresponsibility of a lunatic. The fanatic is the greatest enemy of mankind*."[5]

II. INDOCTRINATED OBLIGATIONS OF RELIGION

Owing to the meticulously indoctrinated ignorance *of the truth behind this subject, many people who have only heard the name of the Bhagavad Gita, make this assertion that the book is intended only for monks and ascetics, and they refrain from placing the book for study before their children out of fear lest through knowledge of Gita the latter renounce their hearths and homes and turn ascetics themselves. But they should consider the fact that when Arjuna, due to infatuation, prepared himself to turn away from the duty of a Kshatriya and live on alms*,[6] Krishna, with his wise teachings not only made him fight the battle but prepared him to live the life of a householder throughout and perform his earthy duties. *So how can the same Gita produce this diametrically opposite result?*[7] The irony hits the apex when we don't subscribe to such books because we have been taught by the society that it is a religious book. Well, it was never a religious book. It never did ask a mortal to pray. It taught mankind the mantra to a successful, content and peaceful personal, professional and social life like our popular

[5] Kant Immanuel, What Is Enlightenment?, http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html (Last visited Feb. 11, 2013).

[6] GITA, *supra* note 2 at 06-7.

[7] *Id.*

Rohit Sharma's and Shiv Kheras'. There texts are a great philosophy and not merely religious scriptures.

Enlightenment is man's emergence from his self-imposed nonage. Nonage is the inability to use one's own understanding without another's guidance,[8] and nonage in religion is an imprisonment for space and imprisonment means years without a sunrise a sunset or a night sky...[9] The world consists of *1.5 billion non-believers* of God, as the third largest religion in the world.[10] A world where becoming an atheist or agnostic has become a fashion, a public stunt on Facebook options of 'Religious beliefs'. The point here is not to criticize or ridicule them. The point is to disseminate and broadcast the true image of religion and then let people decide the medals of it.

Hindus are believed to attain heaven if they perform rituals and get luxurious life in next incarnation. Rituals like trying to make the black stone in the temple drink the milk, decorating Ganpati's idol with gold and diamond and immersing into the sea. The danger will impact the faith of believers and non-believers when the truth in these great philosophical books will be revealed. The Bhagavad Gita, the poem of the Hindu religion, the root of the derived religion, the sacred text of one billion people reads, "*Arjuna, those who are full of worldly desires and devoted to the letter of the Vedas, who look upon heaven as the supreme goal and argue that there is nothing beyond heaven, are unwise. They utter flowery speech recommending many rituals of various kinds for the attainment of pleasure and power with rebirth as their fruit. Those whose minds are carried away by such words, and who are deeply attached to pleasures and worldly power, cannot attain the determinate intellect concentrated on God* (Chapter II, verses 42-44)." [11] The rituals that many dogmas insist day in and day out were never prescribed by the very founders of 'religion'. Krishna is clearly saying that those who recommend rituals and bluntly follow Vedas and do it for the rebirth are living in a fool's paradise. Not replacing those

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[8] Kant Immanuel, What Is Enlightenment?, http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html (Last visited Feb. 11, 2013).

[9] ROBERTS, *supra* note 2 at 06-7.

[10] MANORAMA YEARBOOK 448 (MALAYALA MANORMA 48TH ED. 2013).

[11] GITA, *supra* note 2 at 41-42.

fanatics, later on in the Bhagavad Gita asks the mortal body to prescribe to yoga and other such rituals. But what needs to be emphasized is that these are the options to attain peace, the peace of human mind, and yoga is one of the ways to attain it. A man, who is engrossed in his duties of action, is not devoid of yoga. But the truth of these statements will always be reduced by the market philosophy; the market fanatics. The heaven mentioned in the text relates to the happy ending that an Indian movie seeks.

Then there are 'Hindus' who believe that they will become kings in their next life if their actions are good and will become monkeys and other excruciating species if they do bad deeds and do not follow their family traditions. Arjuna, who was himself going to kill his relatives in the battle of Mahabharata, was being convinced by Krishna to fight and kill people. Arjuna says, "*Krishna, we hear that men who have lost their family traditions, dwell in hell for an indefinite period of time* (Chapter I, verse 44)."[12] He attempts to not fight the war because he believes that fighting will bring down his family traditions and killing his own relatives will hurt the family traditions and he will become an immortal citizen of hell. In reply to his confused state, Lord Krishna replies, "*Endowed with equanimity, one sheds in this life both good and evil. Therefore, strive for the practice of this Yoga of equanimity. Skill in action lies in the practice of this Yoga* (Chapter II, verse 50).[13]" Here, Yoga is referred to the attainment of stability in the crisis of evenness of mind and rise above the pair of opposites. Krishna is asking Arjun to not be affected by the ups and downs of life because the actions of life, the resume' of a person does not decide its afterlife and he leaves all his certificates in the world itself after he dies.

The Bhagavad Gita also classifies the society according to the work that each one performs. *The four orders of society (viz., the Brahmana, the Kshatriya, the Vaisya and the Sudra), classifying them according to the Gunas predominant in each and apportioning corresponding duties to them...* (Chapter IV, verse 13)[14]. In the same way Plato through his dialogue with

[12] *Id.* at 30.
[13] *Id.* at 43.
[14] *Id.* at 61-62.

Socrates asserts that societies have a tripartite class structure corresponding to the 'appetite, spirit, reason' of the individual soul.

But how many of us know that the real reason behind this classification is the optimum and constructive utilisation of the predominant strengths of different individuals. Today the words 'Brahmana, Kshatriya, Vaisya and Sudra' are directly equated with caste - a stigma we have been fighting over the past few centuries. This is a manmade concept which is NOT prescribed by any God as bloated by the 'gurus and pandits'. And as remarked in the movie 'Oh My God', it is a business that works wonders in a "god fearing and NOT god loving country"

III. THE CONFEDERACY ACHIEVED

So the question that fights umpteenth battles in one's mind is that why for centuries together, we have lived and believed in a flawed theory termed as 'religion'? Who prescribed these theories? The Gods or the Master?

Well the moment one says masters, this very research papers becomes scandalous just as Karl Marx became a threat when he was banished from France for his radical ideas. Well by 'master' one refers to the people who benefit from the creation of this concept of religion, who consciously make an effort to nurture misinterpretations and universalise them. Complementing this and exposing its implication on the society, is Karl Marx's theory of the base and super-structure**.** Till now Newton's apple attracted the earth through the gravity force but Marx with his key and robot theory has brought our wheel of thought into motion asking us to find out the conspiracy behind every truth that has been made to exist. The conspiracy was revealed in his famous book 'Das Capital' where he tells us how it is the 'invisible forces' of the ruling class which he calls 'Base' that set up the stars for the proletariat, i.e. the working class. In simple terms, he has a theory where there were only three types of species that exists in the land of the man; the rich, their army and the poor. The rich is the base. Their army refers to the commanded people and their institutions that servecalled the super structure and the poor men are the proletariats whose thoughts are

shaped by this base through super structure with a systematic intention of consolidating power. The blue ball turns red when the same country which is so religious has produced in their land the person who went against the state and proved to us that it is not God that has created 'hell' or 'heaven' but the man himself.

We see a direct contrast of this in the movie 'Oh My God' which gives reality its genuine shape but thanks to the superstructure for waving off it as 'commercial entertaining cinema'. It shows how the people are mislead in the name of religion. The Bhagavad Gita which is known to be the religious text is not exactly religious but in itself a great philosophy. One would even term 'The monk who sold his Ferrari' or 'The Alchemist' a religious book. For the base, religion is a tool to control the masses. And religion here is what Marx calls 'the super structure'. The proletariats have no choice but to get trapped. Just like a hungry rat knows that the cheese is just bait but his appetite makes him a slave to the base.

First, these guardians make their domestic cattle stupid and carefully prevent the docile creatures from taking a single step without the leading-strings to which they have fastened them. Then they show them the danger that would threaten them if they should try to walk by themselves.[15] The other school of thought is explained by Immanuel Kant, who proposes that nonage is the self-imposed restriction and *laziness and cowardice are the reasons why such a large part of mankind gladly remain minors all their lives, long after nature has freed them from external guidance*.[16]According to him, man himself is responsible in getting misled because he finds it easy to be led by people throughout their life than exercise his own choice.

The point therefore is that, for centuries great revealers of the ultimate truth have been termed as dissenters and banished by the state, systematically consolidating the power of the herder. But these years have also deprived mankind of great strength and wisdom that remains locked within our great texts. There is an urgent need to unlock it with the key not of faith but of

[15] Kant Immanuel, What Is Enlightenment?, http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html (Last visited Feb. 11, 2013).
[16] *Id.*

doubt and then imbibe the new empowering wisdom that has gone negated over the past few centuries for reasons unknown.

IV. CONCLUSION

Caesar non supra grammaticos;[17] Where Caesar refers to the pastor, who has no bigger rank in the society then an individual. There exists a poem, and the majority seems to be running on the basis of this poem from centuries. Those poems are the religious scriptures; the text which are kept away from the society in order to rule the very society. The truth exists deep inside us. We need to help ourselves believe in our intellect and interpret these scriptures in each one's way. The world will be a better place if filled with intellect and interpretations rather than stagnant and misleading pastors. Scriptures like Bhagavad Gita should be taught in school as fictions rather than as religious books and then it is to each one's discretion as to take it as a religious book or a literary text. Just like Salman Rushdie is misunderstood by the mass, even the spiritual texts share the same fate. The debate of not believing these texts should be upheld without any hesitation, but the tag of religious books should first be removed from its nature. Only then will the world step towards the ultimate enlightenment, which the atheist calls the happy end, and the devotionals, the path to reach God.

[17] *Id.*

RELIGIOUS SYMBOLS AND ATTIRE IN PUBLIC SCHOOLS: A COMPARATIVE CONSTITUTIONAL ANALYSIS

Rahul Mohanty*

I. INTRODUCTION

In this paper I will be examining the Secular State's approach towards religious symbols in public schools in a comparative constitutional method. Here in religious symbols I have included the symbols and other religious clothing and attires worn by members of several religions.

In light of the current controversies regarding right to display religious symbols in schools, colleges and other public institutions it has become necessary to do a comparative analysis of several multicultural and 'secular' societies and draw some lessons from them. Although secular values and privacy of religion is being increasingly accepted, there is a danger that secularism itself may degenerate into a dogma and may become oppressive for people by violating their freedom of religion. This paper is therefore an attempt in this direction of finding a pragmatic solution to this problem.

This issue has created a storm of controversies especially in Europe. There are several facets of this controversy. First pertains to display of religious symbols in schools and display of religious symbols by the teachers. In this context I have examined some European countries, some North American Countries and South Africa to get a better perspective.

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II. EUROPEAN COUNTRIES

France:

France guarantees equality of all irrespective of religion.[1] However the strict separation between religion and state practised in France is well known. France embodies the enlightenment principle of religion is private matter and it should not be brought into "public sphere" in its fullest extent. It follows the doctrine of *laïcité* i.e. the neutrality of the state towards religious beliefs, and the complete isolation of religious and public spheres which translates into the French state and government not taking a position on any religion or its practices.[2] However, in practical terms it means the separation between a person's private and public life must be complete. He/she has to practise his/her religion in private sphere only and should not bring it to public sphere and thus it should not affect everyday life of the person.[3] Thus, nothing connected to religion is allowed to appear in public life of a person.[4]

However, the major problem with this approach is most religions are not compatible with staying private. More often than not, the religious codes strive to regulate entire life of a person and do not differentiate between public and private lives. Thus, if a religion prescribes certain attire, it has to be worn always irrespective of private and public life. The French government had enacted a law in 2004 banning 'conspicuous religious symbols' such as Muslim headscarf, Sikh turbans, Jewish skullcap and large Christian crucifixes in schools.[5] In 2010 the French parliament passed a law prohibiting the concealment of one's face in public which prevents Muslim veils that cover the face in all public places and not only in schools.[6] This law,

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[1] 1946 CONST. 1946.

[2] Frederick Mark Gedicks, Religious Exemptions, Formal Neutrality, and Laïcité, Indiana Journal of Global Legal Studies , Volume 13, Issue 2, Summer 2006 pp. 473-492 10.1353/gls.2006.0014; The concept of Laïcité in France, http://www.normandyvision.org/article12030701.php (Last visited on: 21-07-2013).

[3] *Ibid.*

[4] *Id.*

[5] French scarf ban comes into force, http://news.bbc.co.uk/2/hi/3619988.stm (last accessed on: 21-07-2013).

[6] Questions and Answers on Restrictions on Religious Dress and Symbols in Europe, http://www.hrw.org/news/2010/12/21/questions-and-answers-restrictions-religious-dress-and-symbols-europe (Last visited on: 21-07-2013).

approved by the French Constitutional Council, makes it a crime to coerce women to wear such veils.[7] This had created huge debates and protests by minorities especially from Muslims who saw it as directed against Islamic Headscarf which Muslim women were obligated to wear.[8] However, the French government did not back out but justified the move on basis of its 'deep secular roots' and *laïcité* principle.[9] This position is completely different from that of the principles followed by South Africa, India etc. Even most other countries of Europe have only declined to interfere when the school or local administration has imposed such a ban or their judiciary has effectively banned them but few countries indeed have actively banned religious attires in schools.

Switzerland

The 1999 constitution of Switzerland provides in its general equality clause that *"No person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability."*[10] Article 15 which pertains to freedom of religion and conscience guarantees freedom of religion and conscience, gives people right to practice and profess any religion they want and says that each person has right to join any religious organisation but they may not be forced to do so.[11] Article 72 makes Cantons (provinces) responsible for relation between state and church and to preserve public peace among several communities.[12] The interesting observation about The Swiss constitution does not expressly declare it to be secular, nor does it establish a state religion or church. However from the general equality clauses and freedom of religion clauses the proper inference would be that it establishes a secular state.

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[7] *Ibid.*
[8] *Id.*
[9] *Id.*
[10] Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999 art. 8.
[11] Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999 art. 15.
[12] Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999 art. 72.

Coming to the judicial interpretations regarding secularity, doctrine of state impartiality and religious symbols in public schools has been considered in many cases. In the Swimming lessons case the Swiss Supreme Court allowed a Muslim father *"to remove his daughter from co-ed swimming lessons in the second year of primary school"* based on the Koranic dictum that females should cover their body from sexual maturity onwards.[13] Although in this case the girl was not sexually mature, nevertheless the court allowed the appeal on ground of 'strong faith'.[14] Although this case is not about religious symbols, it shows that the Swiss Courts were ready to consider religious beliefs of parents in deciding upon such cases. In the *Genevan vetements religieux* decision, the court held that although *"the scope of religious profession generally covers the right to wear religious clothing"* but on balance of reasonableness it was likely that the feeling of students and their parents will be hurt if a teacher wears such religious clothes and the aim of state should not only be espousing religious freedom but also achieving religious harmony.[15] It said the school might become a place of confrontation if teachers were allowed to wear religious clothes.[16] However, students have been generally allowed to wear religious attire.[17]

In the landmark *crocifisso* decision Swiss Federal Court ruled about the religious symbols in primary schools and upheld a cantonal council of Geneva a female primary school teacher's wearing an Islamic headscarf[18] and also decided on question that whether crucifixes attached to walls of every classroom violated the doctrine of state impartiality.[19] It held that it was important to observe religious and denominational impartiality in public schools as the education was compulsory and children from many religions studied there. Thus, display of religious symbols like crucifixes in classrooms

[13] Cavelti, U. J., "Die Religionsfreiheit in Sonderstatusverhältnissen," Pahud de Mortanges, R. (ed.), Religiöse Minderheiten und Recht, Freiburg i. Ue. 1998 (Freiburger Veröffentlichungen zum Religionsrecht, volume 1), 51; Angehrn, M., Volksschulen und lokale Schulbehörden vor neuen Herausforderungen, dissertation St. Gallen 2004, 162 ff.

[14] *Ibid.*

[15] *Id.*

[16] Marcel Stiissi, Religious Symbols in Switzerland.

[17] BGE 116 Ia 252, E. 7, S. 262 f.

[18] Code of practice of the Swiss Supreme Court 47 (1998), 295.

[19] *Ibid.*

could conceivably be seen as instruction to follow Christian precepts in education and offend people and make an impression on young students.

However, it is has been said that children wearing religious attire like headscarves would be allowed in Switzerland.[20]

United Kingdom

In United Kingdom the position of law is more ambiguous. UK has accepted the religious diversity and made some exemptions, like allowing turbaned Sikhs exemption from wearing helmets.[21] However, this does not mean that it has uniformly allowed the wearing of religious attire in all places including schools. Indeed in many cases restrictions in name of security etc. have been imposed. For example, Sikhs' are not allowed to carry *Kirpan* in Airports.

Recently in *R*. (Begum) *v*. *Governors* of Denbigh High School, the Court of Appeals allowed a girl to wear 'jilbab' (an Islamic attire) in her school. However, in House of Lords the case was decided in favour of the school.[22] It observed that the school had allowed other Islamic dresses like the hijab, a headscarf, and trousers and tunic, but banned the full body covering Jilbab. It had "taken immense pains to devise a uniform policy which respected Muslim beliefs".[23] In case of Sarika Singh, the girl was allowed to wear the Sikh bangle '*Kara*' by the High Court of Wales and held that it was an expression of her Sikh faith and that she was a victim of unlawful discrimination by the school which had prevented her from wearing it.[24] In another case of Aishah Azmi, a British Muslim teacher alleged discrimination by the school for dismissing her when she declined to remove the niqab (full

[20] Stiissi, op.cit., supra. C.f. Gloor (ann. 21), 2; Jean Francois Aubert, L'islam a l'ecole publique, Ehrenzeller, B. u.a. (ed.), Festschrift ffir Yvo Hangartener (Dike Verlag, St. Gallen 1998), 479 et seq.

[21] Bangle discrimination case: Religious symbol cases that have come to court, http://www.telegraph.co.uk/news/religion/2469623/Bangle-discrimination-case-Religious-symbol-cases-that-have-come-to-court.html (Last visited on: 21-07-2013).

[22] [2006] UKHL 15.

[23] School and religious symbol cases, http://news.bbc.co.uk/2/hi/uk_news/7530726.stm (Last visited on: 21-07-2013).

[24] *Ibid.*

face covering veil) in presence of any male colleague.[25] Although the School was ready to allow her to wear niqab anywhere in school, it insisted that she must remove it while teaching.[26] The employment appeal tribunal held that the *"Respondent had shown that the imposition of the prohibition was a proportionate means of achieving their legitimate aim (of improving education."* However, the court found that she had been victimised for complaining, and awarded £1,100 for victimisation and reprimanded the Borough for not following statutory grievance procedure.[27]

There have been certain other controversies which have not come to courts but have been resolved by school allowing for hijabs etc.[28] It can be concluded from these cases that there is no settled principle of law in UK regarding this but the courts are approaching this issue cautiously in a case-by-case basis. Generally it can be deduced that courts are willing to allow some religious attire like Kara, Hijab etc. but are unwilling to allow full body covering veils etc. on the ground that they will impair education.

III. VIEW OF ECHR

Lautsi v. Italy

This was the landmark judgement of the European Court of Human Rights in which it allowed the Schools of Italy to display crucifixes in their classrooms which was mandated by Italian Law.[29] In this case Mrs. Soile Lautsi complained that the display of crucifixes in classrooms violated principle of secularism and created an atmosphere of indoctrination into Christian religion.[30] However, the Supreme Administrative Court in Italy upheld the law saying that the crucifixes symbolised values like tolerance, mutual respect which characterised the Italian civilisation but did not symbolise the

[25] Azmi v. Kirklees Metropolitan Borough Council [2007] IRLR 434.
[26] *Ibid.*
[27] *Supra* note 23.
[28] *Ibid.*
[29] Lautsi v. Italy, Application no 30814/06: ECHR (Grand Chamber).
[30] *Ibid.*

Christian religion.[31] The ECHR held in 2009 that the law violated the Articles 2 and 9 of the European Convention on Human Rights.[32] It held that among many meanings of crucifixes the symbol of Christianity was predominant and that it violated secular principles. However, the matter went to the Grand Chamber of ECHR and in 2010 it held on basis of margin of appreciation principle, to uphold the ruling of Italian Courts.[33] It decided that since the Christian ethos and symbols like crucifixes had been integral part of Italian nation and its civilisation it would be better to leave such matter to the country than deciding it in a European Court.[34]

Sahin v. Turkey[35]

In this case the ECHR upheld a ban on headscarf by the University of Istanbul does not of Sahin's freedom of thought, conscience, and religion under Convention Article 9.[36] The Court also stated *that "the University of Istanbul's regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as "necessary in a democratic society".*[37]

South Africa

The South African Constitution has been acknowledged as a fairly multicultural constitution respecting the religious and cultural rights of all communities. The general equality clause of the constitution prohibits the state's unfair discrimination on basis of religion among others.[38] Article 31 provides right to any cultural, religious or linguistic community to enjoy and practise their culture.[39] Article 15 provides that

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Sahin v. Turkey, (hereinafter Sahin), Application no. 44774/98, Council of Europe: European Court of Human Rights, 10 November 2005.
[36] ¶ 117 Sahin.
[37] ¶ 188 Sahin.
[38] S. Afr. Const. 1996 art. 9(3).
[39] S. Afr. Const. 1996 art. 31.

"1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

2. Religious observances may be conducted at state or state-aided institutions, provided that

a. those observances follow rules made by the appropriate public authorities;

b. they are conducted on an equitable basis; and attendance at them is free and voluntary.

3. a. This section does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."[40]

This part of the South African Constitution is very important as it is very significant departure from the European Approach to secularism and freedom of Religion. Unlike European model, where we saw that the state is being required to maintain impartiality through effecting separation of state and religion, here the state is equally accommodating all religions. The provision on religious observance being done in state or state aided institutions might sound shocking and completely anti-secular to a person trained in the European model. However, the South African approach is in consonance with approach of other countries like India, with instead to strictly separating religion and state actually recognise religion and incorporate the symbols of religion in their institutions.

[40] S. AFR. CONST. 1996 art. 15.

The South African Constitution promotes a 'Co-operative Model' for religion and public education according to which although they have different spheres of influence they cooperate.[41]

In the landmark case of MEC for Education: KwaZulu-Natal & Ors. v. Pillay the Constitutional Court of South Africa recognised the right of students to wear religious attire to school. In this case a Hindu mother contended that by preventing her daughter from wearing nose stud the school was violating their right to equality and right not to be discriminated against on the grounds of religion, conscience, belief or culture.[42] The Constitutional Court held that the School had unfairly discriminated her, the school governing body has to amend the School and dress code with a view not only to *"accommodate religious and culturally based deviations, but also to set out the procedure for applying and possibly granting such exemptions"*.[43] This can be contrasted with positions of countries like France, which follow almost militant secularism and ban any sort of religious symbols wore by anyone.

Similarly, in Antonie case a Rastafarian student was suspended for five days from the school for arranging her hair in dreadlocks and wearing a cap over it.[44] The court ruled in her favour and held that such prohibition and the punishment meted out to her violated her human dignity and freedom of expression. Commenting on freedom of expression the court held that the freedom of expression does not include only freedom of speech, it includes the freedom to *"seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles."* [45] In the Monayi incident, an educator confiscated a nine year old

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[41] Religion and Schools, http://www.erp.org.za/htm/issuepg_religion.htm (Last visited on: 21-07-2013).

[42] Pillay v. MEC for Education, KwaZulu Natal AR 791/05 2006 ZAKZHC 8 (5 July 2006) (hereafter Pillay (N)) originally brought in the Durban Equality Court as case AR 791/05.

[43] Pillay (CC) ¶ 117.

[44] Learners' religious-cultural rights: A delicate balancing act, http://www.dejure.up.ac.za/index.php/en/volumes/46-vol-1-2013/164-article-6.html (Last visited on: 21-07-2013).

[45] E de Waal, Re Mestry and CJ Russo, Religious And Cultural Dress At School: A Comparative Perspective, ISSN 1727-3781 available at: http://dx.doi.org/10.4314/pelj.v14i6.3 (Last visited on: 21-07-2013).

student's goatskin bracelet because it contravened school jewellery rules although the student Sibusiso was given that bracelet during a religious ritual and was not supposed to be taken off-it had to come off by itself.[46] This matter was resolved by The Gauteng Department of Education which spoke out in support of Sibusiso and said that they cannot recognise a school policy which did not recognise cultures of various students.[47]

Although cases involving wearing of religious attire by teachers or display of religious symbols in schools have not come up yet, it is submitted that in South Africa, such cases will be decided differently than they were decided in Swiss courts in the light of the 'assimilationist' and diversity promoting approach of the Constitution of South Africa. The South African Constitution has expressly recognised the right to religious observances in public institutions, so there is no reason why the courts will disallow wearing of religious attire or symbols by teachers.

United States of America

The Freedom of Religion has been protected in U.S. through First Amendment, which includes the free exercise, free speech and non-establishment of religion by state clauses.[48] In U.S. it has been long settled position of law that students are allowed to wear religious attire in schools and on this basis they cannot be discriminated against.[49] In the case of Tinker v. Des Moines Independent School District[50] the Federal Court held that the students do not "shed their constitutional rights to freedom of speech or expression at the school gate".[51] School can restrict free speech and expression relating to religion only if it materially or substantially disrupts

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[46] *Ibid.*

[47] *Id.*

[48] First Amendment: An Overview, http://www.law.cornell.edu/wex/first_amendment (Last visited on: 21-07-2013).

[49] Morse v. Frederick, 551 U.S. 393 (2007); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Widmar v. Vincent, 454 U.S. 263 (1981); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[50] 393 U.S. 503 (1969).

[51] *Ibid;* Religious Clothing at School, http://aclj.org/education/religious-clothing-at-school. (Last visited on: 21-07-2013).

school discipline.[52] However, when it comes to religious attire to be worn by teachers the courts in US have been largely on the side of schools. For example, in the case of United States v. Board of Education, the court dismissed that religious discrimination claim by a Muslim teacher against the board of education which had banned him from wearing religious attire. In states such as Oregon and Pennsylvania statutes actively banning teachers in public schools from wearing any religious attire or marks.[53] However, these statutes have been repeatedly upheld on ground on state's religious neutrality.[54] However, this does not mean that religious attire by teachers is banned throughout U.S. Indeed in Arkansas and Tennessee there are laws explicitly allowing teachers to wear religious attire in public schools.[55] In the states where there is no such law regarding religious attire to be worn by teachers, courts have mostly allowed the teachers to wear religious symbols and dresses.[56]

Canada

Canada follows a policy of accommodation of minorities in its Freedom of religion laws and does not prescribe 'one-size fits all' equality.[57] *Hence "Canada's form of religious neutrality attempts to make laws receptive to the particular needs of minorities, rather than espousing a more uniform conception of equality".*[58] Canadian courts have largely allowed the presence of religious symbols in schools and other public institutions. For example, the Ontario Human Rights Commission states that a school or organization

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[52] *Ibid.*

[53] May a teacher wear clothing not approved by a teacher dress code?, http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13027 (Last visited on: 21-07-2013).

[54] Cooper v. Eugene Sch. Dist. No. 41, 301 Ore. 358 (1986), app. dismissed, 480 U.S. 942 (1987); U.S. v. Bd. of Education, 911 F.2d 882 (3rd Cir. 1990).

[55] *Supra* note 53.

[56] *Ibid;* Moore v. Bd. of Education, 212 N.E. 2d 833 (Ohio 1965); Rawlings v. Butler, 290 S.W. 2d 801 (Ky. 1956); Zellers v. Huff, 236 P.2d 949 (N.M. 1951); City of New Haven v. Town of Torrington, 43 A.2d 455 (Conn. 1945); Johnson v. Boyd, 28 N.E.2d 256 (Ind. 1940); Gerhardt v. Heid, 267 N.W. 127 (N.D. 1936).

[57] Freedom of Religion and Religious Symbols in the Public Sphere, http://www.parl.gc.ca/content/lop/researchpublications/2011-60-e.htm (Last visited on: 21-07-2013).

[58] *Ibid.*

has a duty to accommodate a person's religious head coverings like turbans[59] and Sikh kirpans.[60,61] However, on the controversial issue of full face covering Islamic veils like niqab, the Canadian Supreme Court held that such issues *"must be determined on a case-by-case basis after balancing the sincerity of the witness's beliefs and the deleterious effects of requiring her to remove the veil against the risk to trial fairness".*[62] The students and staff alike have right to observe their religious observance and to ask for religious holidays.[63]

IV. CONCLUSION

In conclusion it can be said that Schools are the place where young minds are formed and nurtured. Students in schools are in an impressionable age and are definitely influenced by what they see and hear. This is precisely the reason (apart from the plea that it obstructs education) why many states have feared allowing religious symbols to schools. They fear that they might be influenced or indoctrinated by a certain religion. However, I believe that this apprehension is not true. On the contrary if a child, from early childhood, sees many different religious and cultural symbols then he will grow up to respect them. Diversity will help in creating a sense of tolerance and celebration of diversity in the child's mind. Therefore, the religious symbols should as a matter of principle be allowed to be wore - not only by students but also by teachers. As it is the case in South Africa and Canada religious holidays and observances must be respected by the state. In today's world almost every society is multicultural and in such multicultural societies we cannot afford to ignore diversity of cultures in schools.

In Europe we can see these symbols and clothing are becoming a source of cultural tensions and the aggressive secularism propounded by France,

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[59] Sehdev v. Bayview Glen Junior Schools Ltd. (1988), 9 C.H.R.R. D/4881.

[60] Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] S.C.J. No. 6.

[61] Ontario Human Rights Commission, *Policy on Creed and the Accommodation of Religious Observances,* 20 October 1996.

[62] Freedom of Religion and Religious Symbols in the Public Sphere, http://www.parl.gc.ca/content/lop/researchpublications/2011-60-e.htm (Last visited on: 21-07-2013).

[63] Policy on creed and the accommodation of religious observances, Commission scolaire régionale de Chambly v. Bergevin (1994) 22 C.H.R.R. D/1 (S.C.C.); http://www.ohrc.on.ca/en/policy-creed-and-accommodation-religious-observances/specific-cases (Last visited on: 21-07-2013).

Turkey etc. is causing grievance for many religions. In contrast, countries such as U.S., Canada, and South Africa which are based in immigration and are essentially multicultural are accepting these symbols and hence these conflicts are being averted.

So I suggest that the Canadian and South African models are most suitable and ought to be followed by secular countries around the world.

THE RIGHT TO KILL: THE CASE OF THE BATTERED WOMEN

Shreyas Gupta *

The current law of self-defence within the definitions of the Indian Penal Code is so narrowly defined, that it fails to argue for the case of battered women, who have lost the basic integrity to function as an autonomous individual. The paper calls for a review of the doctrine of self-defence so as to extend it beyond the boundaries of mere physical harm. A need for change in the current regime is looked upon using the case of the battered women. The idea of psychological self-defence is introduced, explained and justification is sought for the same using constitutionality of the current law and the proposed law. The proposed psychological self-defence doctrine is given a thorough explanation and reference is drawn from common law jurisdictions that have positively identified the issue and amended their law respectively. The example of the battered women is used throughout the paper to exemplify the problem with the current self-defence law. It is used further to substantiate the need for a change within the current doctrine of self-defence.

I. INTRODUCTION

The area of Provocation Law, owing to the current judgements in the common law scenario, has evolved up to a level to include the idea of *battered women*, even though in such cases, a reasonable amount of time passes between the act/s of provocation and the actual commission of the

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crime. The basic difference lies in the fact that the Provocation in the case of battered women is not sudden and grave but is gradual and spread over a long period of time. The criminal act committed by the battered women is not the result of a sudden one-time provocative act done by the male counterpart. The provocation in such cases constitutes a series of repeated attacks on her and escalated forms of mental, emotional and moreover, physical torture and abuse.

The case of *R. v. Ahluwalia*[1] highlights the fact that exposure to a certain emotion over a prolonged period of time, is acceptable as a reasonable defence using the *Partial Doctrine of Provocation*. This defence was not disregarded, even though there had been a clear time gap between the provocative acts of the husband and the commission of the criminal act by the woman.

Through this research paper, we are trying to establish the fact that most of the women, who have been battered and have ended up committing these crimes, do so under a '*psychological self-defence'*. This sort of psychological self-defence has not been properly discussed and assimilated into the law of self-defence and this exclusion forms the basis of this paper. Many a times, these women are often convicted of homicide or murder, yet what seems problematic to the courts', is an absolute inclusion of this idea of self-defence and the arduous task of incorporating it into such cases, in-spite of the fact that reasonable and ample evidence is present in such cases, so as to prove the prolonged provocation that leads to the actual act of the crime.

The doctrine of self-defence is understood and expanded loosely around the physical aspects of the person in question. Section 96 and 97 of the Indian Penal code define Self-defence and the rights that a person has when acting in self-defence. The use of such force so as to protect oneself is justified as self-defence only where the person using such force reasonably believed that he or she was in imminent danger of death or serious bodily injury and there was no other option, but to resort to deadly force to avert that danger. In most of the situations, where the battered woman kills her husband she can

[1] R. v. Ahluwalia, (1992) 4 All E.R. 889.

use the defence of self-defence when the batterer (the husband) was in the act of battering his wife. However, this defence fails when it is used in cases where the batterer is not involved in any sort of violent act that may affect the accused physically or to put it simply cause sudden and grievous hurt. The case of Kiranjit Ahluwalia clearly demonstrates similar circumstances, where the accused threw petrol onto her husband in his bedroom, in order to set it alight.[2] The contention that seems to stem at this point and is of relevance to most of these battered women who kill their husbands in a similar fashion is that they ought to be protected under the broader meaning of 'self' and that an application of the psychological self-defence is the need of the hour.

A careful analysis is to be followed so as to firstly, ascertain the identity of this battered woman and secondly, to reasonably justify the idea of psychological self-defence. We analyse certain cases and examine how the doctrine has been applied in the context of Indian criminal law and why an expansion to the former is necessary in view of the developments within various other common law jurisdictions.

II. STATISTICS AND THE BATTERED WOMAN:

Women who have been battered over a prolonged period have been recognized through various empirical studies, reports and other sources. Statistics are essentially and extremely important when being discussed in a court of law, so as to create the need of the inclusion of a certain kind of law in order to adjust with the changing society. The courts should be presented with the particular pattern of violence existent, the relative prevalence of the violence and a cultural pattern of violence against Women.[3]

In the case of *Olga Tellis v. Bombay Municipal Corporation*[4], the court did accept the fact that a reasonable study and analysis of the statistics of slums

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[2] *Id.*

[3] Asmita Basu, Violence against women: a statistical overview, challenges and gaps in data collection and methodology and approaches for overcoming them (April 11, 2005), available at http://www.un.org/womenwatch/daw/egm/vaw-stat-2005/docs/expert-papers/basu.pdf.

[4] (1985) 3 SCC 545.

should be used in deciding the verdict of the case. The report prepared by NCRB (National Crime Records Bureau) places the total number of crimes committed against women at a staggering 9.8% of the total committed crimes. Whatever be the case at hand, the injuries on women range from simple mental abuse to being attacked and hurt with knives, razors, machetes, broken bottles, iron bars etc. The battered women suffer from broken bones, teeth, miscarriages, concussions etc. Many, if not all are subject to sexual abuses, forced sexual intercourses, group sexual intercourses, bondage etc.

III. THE BATTERED WOMEN SYNDROME:

The battered women syndrome came to light during the 1970s, when Walker[5] coined the 3 phase cycle theory and postulated the existence of such a cycle. The cycle involves a series of 3 phases, where the first stage is referred to as the 'tension building phase'. In this phase, the women include verbal abuses, minor physical abuses and physical attempts by the women to oppose the husband. The second stage is where the tensions between the couple rises and the scene turn to an 'acute battering incident'. The characteristics of this stage include a severe beating or a verbal abuse followed up by a severe beating. Phase three involves the time when the batterer becomes remorseful, regretful and assures the woman that the relationship between him and the battered woman is bound to exist and the battering incident would not be followed by subsequent ones. The third phase is often the critical phase, as often the tension mounts again and this phase leads on again to the first stage of mild battering. The cycle keeps on repeating and the level of violence inflicted on the woman escalates with each new cycle.

Walker further builds upon Seligman's theory of *'learned helplessness'*, where the woman trapped between these phases, chooses to passively being battered, even though she has ample opportunities of escaping the same. According to Walker, battered women who have been under constant exposure to painful incidents, lose their will to respond to the harm situation and are eventually trapped in this never ending cycle of battering.[6] Moreover,

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[5] *See generally*, LENORE E.A. WALKER, THE BATTERED WOMAN SYNDROME (3RD ED. 2009).

the incentive to escape the cycle is defeated by the financial incapacity[7] of these battered women along with the fact that most of their family members and friends encourage them to remain with their batterers and to continue their relationship with them.

IV. THE PSYCHOLOGICAL SELF-DEFENCE ARGUMENT

The narrow doctrine of self-defence and its application to the cases where a woman is battered, results in the acquittal of only those women, who have killed the husband in an act where the husband was actively engaged in inflicting an injury. The doctrine does interfere or try to protect those women, who kill so as to protect themselves, not from an imminent physical attack on them, but from an extremely serious psychological injury. The idea here is that these women, who actually do this, do so to protect themselves not from an attack that may eventually kill them, but from an injury that can strictly be defined in psychological terms. The women in essence, are unable to escape the vicious cycle of repeated torture inflicted on them. The threats may not be physically imminent, however, there is a threat of such a nature so as to cause a psychological paralysis within the accused battered woman.

The issue is perfectly highlighted in the case of *Sara Thronton,* who was eventually convicted of murder and her appeal[8] was rejected. The case involved around the woman, who was facing her abusive and violent husband, who told her that he would kill her while she slept.[9] The convict ended up stabbing her husband. In such a case, the battered woman had been psychologically paralysed. It could certainly be stated that the attack from the husband could come about at any time, if not immediately or that night itself.

This state of the battered women could very well be described as a stage of

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[6] *Id.*
[7] *Id.*
[8] R. v. Thornton (1992) 1 All E.R. 306.
[9] Aileen McColgan, *In Defence of Battered Women Who Kill*, 13(4) OJLS, 508, 508-529(Winter, 1993).

learned helplessness or to simply put it in blunt words, utter hopelessness. Now, is it reasonable enough that the battered woman be convicted as a criminal and be punished for something which she did purely within the limits of psychological paralysis. We are attempting here to make a distinction between cases where a complete defence to murder or culpable homicide could be sought for. The distinction is to flow from an over-arching principle of psychological self-defence. The attempt seeks to apply this principle over all sorts of criminal offences where there has been the use of a deadly force. The specific use of the battered woman example is deliberate as it perfectly fits within the demands of such a doctrine and its application.

Criminal law stems from the assumption and understanding that an accused is not to be convicted or be declared a culprit, if the crime was done without his or her free will. The law is further substantiated by the point that such an act of using deadly force is objective in nature. What this means is that, a reasonable person would do so acting under a natural instinct to protect the self. This virtue is found in existence in the foundations of natural law, and has further been adapted and generalised under the banner of common law.[10]

The existence of such a doctrine means that a battered woman, who is affected by internal and external conditionality is bound to do the same that a reasonable person would, if faced with similar circumstances. The doctrine of self-defence primarily deals with physical integrity and as such does not deal with other forms of existence such as the psychological integrity of an individual. The proposed psychological self-defence doctrine aims to protect this much excluded aspect of human integrity. The doctrine is an extension of our understanding of the protection of human life under Article 21 of the Indian Constitution. The right to self-defence has to satisfy the provisions of this article. "Life" in Article 21 is not merely the physical act of breathing. Article 21 has given protection to life as a substantive right and the article if properly understood, does not prescribe any particular procedure.[11]

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[10] *See generally*, GEORGE P. FLETCHER, CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL, UNIVERSITY OF CHICAGO PRESS (1990).

[11] A.K. Gopalan v. State of Madras, AIR 1950 SC 27: (1950) SCR 88; Samatha v. State of A.P., AIR 1997 SC 3297: 1997 (4) SCALE 746: (1997) 8 SCC 191: (1997) Supp 2 SCR 305.

The fundamental right to life has to be understood more extensively and an application of Article 21 to the current proposed doctrine, only adds to its relative existence and enactment under law. The fundamental right to life which is the most precious human right must, therefore, be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.[12]

The Article furthers the extent of this right by protecting every limb and faculty through which life is enjoyed.[13] The relative psychological existence of battered women can very well be construed under the application of this article. The extremely diminished psychological existence of a battered woman essentially violates and nullifies the right of enjoyment of this faculty that is integral to human existence. Indian courts have further interpreted this right to enable a person to be protected against torture. Any sort of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of article 14 and 21.[14]

The courts have in effect construed this law so as to protect individuals from cruel and inhuman practices, yet what we argue is a broader application of the same so as to create a broader argument of defence based upon the lines of a psychological existence that has been impliedly acknowledged by the courts in their interpretation of the article.

The current doctrine of self-defence further clarifies the argument that even in cases, where the accused does not wait for the aggressor to cause a

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[12] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746.
[13] *Id.*
[14] Munshi Singh Gautam v. State of Madhya Pradesh, AIR 2005 SC 402: (2005) 9 SCC 631: 2004 (9) SCALE 390.

grievous injury and acts in self-defence he or she is bound to be acquitted by law.[15] The battered woman, who kills her aggressor when he is not in the course of causing hurt to her, is to be protected by the application of this doctrine that does not necessitate that the individual be attacked in the course of her self-defence. A battered woman is also protected by the law that states the inclusion of injuries received by the accused, circumstances whether the accused had time to have recourse to public authorities as factors that are to be examined and considered on the plea of self-defence.[16]

The proposed defence is not defeated by a strict application of the rule stated above, even if the accused had time to approach public authorities as the accused mostly acts under self-defence in her house which necessitates the use of the *castle doctrine*. The castle doctrine enables a person to use reasonable force, even deadly force so as to protect himself or herself in cases of violation of the integrity of the individual or the property of the individual at large. The castle doctrine is the basis for the inclusion of self-defence as a doctrine within common and eventually Indian law that adapted it for its own use. The castle doctrine simply enables the individual to use deadly force, when within the limits of one's house, even when one can reasonably approach public authorities. Even in cases where there is no defence evidence but from the prosecution evidence itself there is a probability of the accused having acted in self-defence or at least, there is basis for a reasonable suspicion in that direction, that is sufficient to entitle the accused of an acquittal.[17]

The psychological injury can constructively be defined as an extreme and extended (in time) impairment of one's psychological functioning, that invariably diminishes or extinguishes the physical existence of an individual. As stated above, the proposed doctrine rests upon the principle that the existence of life is not to be merely perceived strictly in a manner that gives precedence to physical existence, but also to encompass and protect the psychological existence of an individual. In the case of battered women, the

[15] Mohd Ramzani AIR 1980 SC 134:1980 Cri LJ 1010 (SC).
[16] Biran Singh 1975 Cri LJ 44(SC); Ramesh Chandra 1982 SCC (Cri) 136.
[17] Chandrasekhran Adithripad 1987 Cri LJ 1715 (Ker); Seriyal Udayar 1987 Cri LJ 1058 (SC): AIR 1987 SC 1289.

psychological meaningfulness and the integrity of the individual is so damaged and diminished that the capacity to function autonomously is completely impaired. The case of R. v. Ahluwalia is a landmark, as far as the inclusion of the psychological effects of living in a battering relationship as pleading evidence.[18]

V. REVIEWING THE CHANGE IN LAW WITHIN COMMON LAW JURISDICTIONS

In the last two decades, there has been a great deal of review and reform around the criminal law related to individuals within intimate relationships.[19] The province of Victoria[20] and Western Australia[21] have provisions that allow the accused to respond in self-defence in situation where there may or may not be the existence of an imminent threat to the individual in question. The recommendations set out in the Victorian Law Reform Commission's Defences to Homicide report, were eventually enacted in a new homicide act[22] that set out to expand the self-defence doctrine and introduce expert family evidence with regards to family violence within the pleading system. The provisions have made it easier for domestic violence victims to plead self-defence and be acquitted. The same law has defeated the provisions of provocation law and declared it redundant and outdated.[23]

In Canada, the law on self-defence has been majorly transformed and simplified in the year 2011 using a new statute.[24] It has abandoned the use of 'justification' so as to protect people who pre-mediate homicide or use contract killers.[25] The Supreme Court of Canada in its rulings in 1990 and 1994 has further substantiated on the issue of 'imminence'. It states that as

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[18] *See supra* note 1.

[19] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, *Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia,* 34 UNSWLRS, 467, 467-469(2012). Canada and New Zealand.

[20] *Id* at 470.

[21] *Id.*

[22] *Id.*

[23] Tyson. D, *'Victoria's New Homicide Laws: Provocative Reforms or More Women "Asking For It"?',* 23(2) Current Issues in Criminal Justice, 203, 203-235.

[24] *Citizen's Arrest and Self-defence Act*, SC 2012.

[25] *Supra* note 19, at 470.

this is an aspect within the Canadian Criminal Code, it acts only to assess the relative threat faced by the accused.[26]

The case of *R. v. Lavallee*[27] set out the precedent within Canadian Law, which made expert psychological testimony admissible within the pleading process. Broadly, the law within these jurisdictions has enacted changes so as to include the ideas of psychological hurt, admission of expert testimony into the trial system.

VI. CONCLUSION

The inclusion of psychological self-defence within the current doctrines of law may have seemed to be overambitious as it proposes a completely new doctrine based upon the complex paradigm of human psychological existence. However, a closer look at the provisions of the right to life within Article 21 of the Indian constitution actually allows and creates the need of such a creative and adaptive use of self-defence law.

The depiction and usage of the example of battered women was specifically to simulate the exact conditions, where the current law fails to tackle and address the situation and the existence of this group of tortured souls who have no respite in life, other than their husbands and when the husband take the form of the oppressor, there is no hope left and the women have no recourse to resort to.

Contrary to the current law, which gives paramount importance to the physical existence of human life, the proposed doctrine tries to give equal importance to other aspects of human living and essential functioning. The proposed doctrine attempts to give more meaning to the psychological aspects of life that make it worth humane and living.

The paper tries to serve the sole purpose of making the law makers aware that a certain group of women exist, who have been badgered and battered

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[26] *Id.*

[27] R. v. Lavallee, (1990) 1 S.C.R. 852.

all throughout their life at the hands of their husbands and when they resort to violence, the act should be taken into perspective of the situation they reside in and go through. The defence of provocation needs to be extended and its ambit needs to be widened in order to include the interests of these badgered souls.

RTI ON POLITICAL PARTIES - TOWARDS A MORE DEMOCRATIC DEMOCRACY

Akarshita Dhawan*, Himaja Bhatt**

I. AMENDMENT BILL 2013: OBJECTING THE OBJECTIVES OF THE PARENT ACT

A Bill seeking to amend the Right to Information (RTI) Act, 2005 to shield political parties from providing information under the transparency law compels us to relook at the very deliverables of the Right to Information Act.

Considering the legislative intent which admits the need for an informed citizenry, and "*to contain corruption and to hold Governments and their instrumentalities accountable to the governed*"[1], we see that the very objective of this Act is to enable Citizens to have atleast the minimum requisite information needed for making an informed decision and to hold all the instrumentalities of the Government accountable. Having the required information will help citizens, from all strata of society, to elect truly accountable representatives and in doing so it furthers the basic tenet of democracy.

There is little doubt regarding the importance of the participation of the entire populace of the country in the working and affairs of a true

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[1] Right to Information Act, Preamble (2005).

democracy. In *R.P.Limited v. Indian Express Newspapers*[2], the Apex Court supported this view while reading into Article 21 the right to know. It was observed that the right to know is a necessary ingredient of participatory democracy.

The right to vote and to participate in the affairs of the country is worthless unless the citizens are well informed on all aspects of the issues, in respect of which they are called upon to express their views. One sided information, disinformation, half-baked information and non-information are all equally responsible for creating an uninformed citizenry which makes democracy a mockery.[3] This clearly undermines the objectives of the Act, enshrined in the Preamble, which is the cornerstone of the entire transparency law in India. Hence, anything in contravention of the goals of the Act would render the freedom pre-supposed under this right meaningless.

This Amendment Bill passed in 2013 seeks to restrict the scope of the term "Public Authorities" by explicitly excluding from its purview the voice of the citizens - their representatives-political parties. This article attempts to review the interpretations of "Public Authority" under S.2 of the RTI Act made by several jurists and judiciary in light of the proposed controversial exclusion of political parties from the ambit of Public Authority by the Amendment Bill pending before the Parliament. This bill is triggered by a recent judgment delivered by the Central Information Commission in *Anil Bairwal v. Parliament of India*[4] wherein political parties were held to be public authorities.

II. UNBRIDLED DEMOCRACY: WAY TO *DEVILCRACY*

The pending RTI Amendment Bill seeks to amend S.2 of the RTI Act that is the definition clause, also the functional dogma of the Right to Information machinery. S.2(h) is to RTI what Art. 12 is to fundamental rights. Both are however, not disconnected concepts. Right to Information is essentially a

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[2] AIR 190 (SC 1989).

[3] Secretary, Ministry of Information and Broadcasting, Government of India & Ors. v. Cricket Association of Bengal & Anr. AIR 1236 (SC 1995).

[4] File No. CIC/SM/C/2011/001386, dated 03/06/2013.

fundamental right under Art. 19(1)(a) as well as under Art. 21. The Parliament by restricting the scope of s.2 is creating a bottleneck, obstructing the free flow of information which is diametrically opposite to what the Act seeks to achieve. Thus, it is an attempt to override the legislative intent behind the Act as well as the inferred indication of the provisions.

Re-asserting the idea of analogy between s.2 of the RTI Act and Art.12 of the Indian Constitution, the jurisprudence behind the expansive view of 'State' under Art. 12 adopted by the Courts in a series of judgments[5] holds good for determining the ambit of 'Public Authority' under s.2 and every authority which is an instrumentality or agency of the government must be brought within the definition of 'Public Authority'. However, all public authorities need not fall under the definition of 'state'. Public Authority is a superset of which state (Art.12) and 'A body discharging public functions' (under Art. 226) are subsets, so although political parties contend that they do not comply with the pre-requisites of 'State' or 'A body discharging public functions', this contention undoubtedly does not preclude political parties from being 'Public Authority' within the meaning of Section 2(h)(d)(i) of the RTI Act.

The very same proposition finds judicial sanction in a recent CIC judgment, which may prove to be a milestone in restructuring politics. The issues which emerged before the Commission in the case of *Anil Bairwal*[6] can be broadly classified into three sets, namely, contentions based on the functions performed by political parties; extent of indirect finance received by these parties from the government and whether this indirect financing amounts to substantial financing for the purposes of s.2(h) of the RTI Act along the lines of legislative intent.

In India, the political parties are entrusted with issues of great criticality and a large chunk of the duties which they discharge are of a public character. For instance, political parties hold the power to decide how the government

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[5] Biman Krishna Bose v. United India Insurance Company Ltd. & Anr. (2001) 6 SCC 477 ; Ajay Hasia v. Khalid Mujib Sehravardi AIR 487 (SC 1981).

[6] Anil Bairwal v. Parliament of India, File No. CIC/SM/C/2011/001386, dated 03/06/2013.

should function and also decide policies that directly affect the lives of millions amongst the public. These parties are constantly engaged in discharging functions which are of public interest. This action should reinforce and further the offering of transparency of their financial operations to public. The political parties are the life and blood of the entire constitutional scheme in a democratic polity and have a committed and binding nexus with the populace.

III. SUBSTANTIALLY FINANCING-ABSOLUTELY ACCOUNTABLE

Political parties are indirectly financed by the Central Government and the State Governments in various ways such as allocation of plots/buildings/accommodation in prime locations/free air time on government TV channels during elections, etc. These facilities are not only provided to them at nominal rates but their maintenance, upgradation, modernization, renovation, etc. are often also done at State expense. [7]

It would be ironic to expect that political parties which do not uphold democratic principles in their internal functioning will respect those principles in the governance of the country.[8] If we look closely, the aggregate public funds that are spent on providing facilities to these political parties would amount to hundreds of crores. With such wide ramifications of their actions on the public, should they be exempt from the scope of public accountability? Certainly not! Given that the entire political setup in our country revolves around a handful of dominant political parties. As was held by the Central Information Commission, *"It will be a fallacy to hold that transparency is good for the bureaucracy but not good enough for the political parties which control those bureaucracies through political executives"*. [9]

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[7] *Ibid*.
[8] Law Commission of India, Reform of Electoral Laws (1999).
[9] *Supra* note 6.

Allocation of houses, real estate, exemption from tax and providing property on subsidized rate amounts to 'indirect financing' within the meaning of s.2(h)(d)(ii) of the RTI Act.[10] Political parties cannot function without the funding it receives from the government and by this financial support, it becomes substantially dependent on the government and thus considering this factor, it is a public authority.[11]

Further, this funding is unconditional; a truly independent body would have been under an obligation to return the fund it receives. Thus, it becomes a dependent organization substantially financed by the government.[12]

The political parties cannot take the defense that the financing received by them does not cover a majority of their expenses and hence does not amount to substantial financing given that the Central Information Commission has clarified the stand regarding 'substantial financing' by stating that for a private entity to qualify to be a public authority, substantive financing does not mean 'majority' financing. *What amounts to "substantial" financing cannot be straight-jacketed into a rigid formula of universal application.* The Commission has held that percentage of funding received by the body, whether the funding amounts to "majority" financing, whether the body is controlled or autonomous are irrelevant and impermanent tests. On the contrary, achieving a felt need of a section of the public, or securing larger societal goals seems to be more germane.[13] Political parties are involved in predominantly public functions and receive substantial public financing. Substantial financing has been held to mean agricultural plots, concessions, grants, subsidies as well as other facilities which would translate into cash flow and not just direct financing.[14]

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[10] The Sutlej Club v. State Information Commission (Complaint No. : CIC/SM/C/2011/0838) ; Mr. Tilak Raj Tanwar v. Government of NCT of Delhi, (File No. : CIC/AD/A/2011/001699).

[11] Indian Olympic Association and others v. Veeresh Malik & others (WP)(C) No. 876/2007

[12] *Ibid.*

[13] Amardeep Walia v. Chandigarh Lawn Tennis Association (File No. CIC/LS/C/2009/900377).

[14] Bangalore International Airport Limited v. Karnataka Information Commission, ILR 3214 (Kar 2010).

CIC, in *Anil Bairwal v. Parliament of India*[15] took the view that allotment on concessional rates and exemption from income tax liabilities (which exempts them from paying roughly 30% of their income) of political parties sums up to substantial financing. The political parties enjoy an almost unfettered exemption from payment of income tax, a benefit not enjoyed by any other charitable or non-profit non-governmental organization.

Certain political leaders opine that political parties must be exempt from Income tax liabilities since they work for strengthening the democratic polity. If that be the case, by the same logic, another facet of the very same democratic polity also includes accountability to public and the so called 'strengtheners of the democratic polity' must be made answerable to the public.

IV. INTENTIONAL DISREGARD TO LEGISLATIVE INTENT

Now, looking into the parliamentary intention behind the ambit of 'public authority', it is worthwhile to refer to the judgment given by Justice Ravindra Bhat in *Indian Olympic Association v. Veerish Malik and others*[16] which makes it clear that the political parties can also not take the defence of their not being 'constituted or established by a notification issued by an appropriate government' In this case, he constructs the following provisions of the RTI Act :-

(i) Body owned, controlled or substantially financed;

(ii) Non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government.

The controlling clause in the definition which reads 'established or constituted by or under' a notification issued by the appropriate government cannot be construed to exclude certain bodies like political parties from the ambit of public authority because if such was the intention, then the sub-

[15] *Supra* note 6.
[16] *Supra* note 11.

clause (i) would be surplusage since the body would have to be one of self-government, substantially finances and constituted by a notification issued by the appropriate government. Secondly, it is anomalous to expect a 'non-governmental organization' to be constituted or established by or under a notification. These two points culminate into the objective indication of extending the scope of public authority and it is not necessary that organizations have to be established or constituted by a notification issued in that regard. As Justice Bhat says, the parliamentary intent is to expand the scope of the definition and not restrict it to the four categories mentioned in the first part by bringing within its purview other bodies or institutions, regardless of the mode of constitution of a body, if it receives substantial financing from appropriate government, it is deemed to be a public authority.

S.8 and 9 of the RTI Act list the exempted circumstances wherein information can be denied. However, political parties have not been incorporated in the list. This non-incorporation reflects their far-sightedness to include certain exceptional situations and the absence of political parties is a strong indicator of their clear intention to not exclude it from the domain of RTI. Hence, it can be said without any doubt that political parties fall within the extended definition of 'public authority', if not by way of literal interpretation.

V. CLASS WITHIN A CLASS: VIOLATIVE OF ARTICLE 14

The legislative attempt to over-ride the decision providing for the inclusion of political parties within the definition of 'public authority' amounts to arbitrary classification. The proposed amendment to RTI Act, excluding political parties from the definition of public authority, may not withstand constitutional challenge[17] as it is creating a class within a class without having any consideration to the principle of intelligible differentia having reasonable nexus with the objective of the RTI Act.[18] The classification is not based upon a real and substantial distinction and is, moreover at conflict

[17] INDIA CONST. art. 14.
[18] A.G. Vahanvati, Parliamentary Panel Report (2013).

with the objective of the legislation, far from being in furtherance. The RTI Act was enacted to provide for an effective framework for effectuating the right of information recognized under Article 19 of the Constitution.

The CIC rightly identified the intent of the legislature in the case of *Anil Bairwal v. Parliament of India*. The proposition before the Commission in that case was with regard to the construction of the term 'public authorities'- whether it covers within its ambit the activities of political parties, or not. This is a step ahead of interpretation, which, ordinarily consists of discovering the linguistic meaning of authoritative legal text. Going beyond the semantics involved, the court seeks to provide contextually what may constitute the phrase 'public authorities'. It is undoubtedly an instance of construction and not interpretation. Interpretation recognizes or discovers the linguistic meaning of an authoritative legal text. However, conceptually, construction gives legal effect to the semantic content of a legal text and goes on to conclusions which are in spirit, even though not within the letter of law.[19] This judicial construction, although ahead of interpretation is not judicial creativity and the intervention is not totally uncalled for since there have been numerous cases wherein the substantial question of law hinges upon the scope of the term 'public authority'. However, mere exercise of defining the scope is not judicial creation but is judicial application of mind to ascertain the intent of the legislature.

This is not beyond the scope of the powers or functions of the judiciary. Legislations are written in a very general language which needs to be understood correctly before their application. A marginal space is always left for their construction in accordance with changing circumstances, thus, preventing them from becoming obsolete and helps in adapting them to dynamic societal changes. This by default, necessitates the judiciary to interpret and construct statutes; forming an important function of the judiciary-the prime function in most cases! For it is judiciary which puts life into the words of a statute. It is essentially the duty and province of the judiciary to say what the law is. Obviously, those who apply rules to varying

[19] In Re Sea Customs Act, AIR 1760 (SC 1963).

sets of facts and circumstances must necessarily interpret the rules to further the ends of justice.[20]

VI. JUDICIAL LEGISLATION - A NECESSARY TRANSGRESSION INTO SEPARATION OF POWERS

The judicial announcement of including political parties within the domain of 'public authority' under s. 2(h)(d)(ii) is the judiciary's construction of the phrase and cannot be termed as judicial over-reach. The Central Information Commission, despite being a quasi-judicial body is essentially engaged in discharging judicial functions. It would not be wrong in doubting to call this act of the judiciary as judicial adventurism, which has a connotation of a tag of acting ultra vires attached to it. Rather, this is judicial activism, a philosophy of the judicial process, which has developed as a practice by entrusting the court with the responsibility of intervention over decisions of policymakers through precedents in case laws which is binding on future courts.[21]

In the absence of judicial activism, the function of our Honorable judges would have been reduced to a mere resolution of the present dispute without making clear the prevalent law. This is further supported by Antonin Scalia J. when he indicates that a judge, when presented with a fact, simply decides the result and cites the specific features of the circumstances to support the decision. Such a law becomes valid for future by virtue of the doctrine of stare decisis, and decisions thereby acquire permanence required of law.[22]

The argument that judiciary, by virtue of the doctrine of separation of powers, is not to interfere with the functions of the legislature, seems baseless in a country like India where strict separation of powers is not followed with absolute rigidity. Yet it is pertinent to note that even though

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[20] Ashok Kumar Gupta v. State of Uttar Pradesh AIR 226 (SC 1951).

[21] Nicholas Katers, 'judicial Activism and Restraint: The Role of The Supreme Court' <http://www.associatedcontent.com/article/21725/judicial_activism_and_restraint_the.html, Last visited on January 30, 2014.

[22] JUSTICE ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, PRINCETON UNIVERSITY PRESS, 1997.

judges are not entrusted with the task of bringing new laws into existence because the constitution provides for a complete separation of judicial powers[23], lawmaking occurs when judges issue decisions that create binding precedents for prospective cases[24] by virtue of the doctrine of stare decisis.[25]

Ours, being a parliamentary system of government, believes in a close liaison, or collaboration between the various organs and a customized version of the doctrine along with its modified nuances as applicable in India. As the Supreme Court has pointed out that there are demarcations of functions which are designated to the organs, and the Constitution framers did not contemplate one organ assuming powers of another, yet, there is no separation between them in its absolute rigidity.[26]

Legislation, not being a self-executing document, leaves little doubt for the necessary power of review by some independent organ of the system. In the absence of such an authority, there would be prevalence of discord as a natural consequence, if different organs take conflicting action in the name of the constitution, or when the government takes action against the individual. Hence the judiciary is empowered as a neutral and independent body to actively indulge in the interpretation and construction of law made by the legislature and in the garb of legislation judges often make law.[27]

In agreement with the view of Justice A. S. Anand, former Chief Justice of India, it is imperative for the judiciary to act with caution and proper restraint, falling short of assuming power to run the government. Judges are not entrusted with the authority of introducing new laws and have to act within certain restrictions. Simultaneously, it is to be necessarily respected that the validity of judicious exercise of judicial activism is to be respected.

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[23] INDIA CONST. art. 50.

[24] Frederick Schauer, Opinions as Rules, 53 U. CHI. L. REV. 682, 684 (1986) (reviewing Bernard Schwartz, The Unpublished Opinions Of The Warren Court (1985).

[25] INDIA CONST. art. 141; This well-known principle is Latin for "to stand by things decided." Black's Law Dictionary 1414 (7th ed. 1999).

[26] Ram Jawaya Kapoor v State of Punjab, AIR SC 549 (SC 1955); In re, Delhi Laws Act, 1912, AIR 332 (SC 1951).

[27] Justice Markandey Katju, 'Separation of Powers, Judicial Review and Judicial Activism' <http://justicekatju.blogspot.in/2013/10/separation-of-powers-judicial-review.html>, Last visited January 30, 2014.

The role of judges in such cases, go beyond the traditional "interpretative" role that has been assigned to them, and shifts to a model by which judges seek to make law, encroaching on the separation of powers doctrine, in its strict interpretation. Simultaneously, they must remain within bounds of the customized version of the doctrine as applicable in India. Hence, the judiciary is well within its functionary limits to actively interpret and construct laws, consequentially validating such a decision given in the case of *Mr. Anil Bairwal v. Parliament of India*.[28]

VII. LEGISLATIVE SOVEREIGNTY VERSUS JUDICIAL SUPREMACY

While there has been some discussion on the issue of activism by the judiciary, fitting into the doctrine of separation of power as suitable for the country, it is pertinent to note that there are also instances of the legislature, while remaining within its prescribed four-corners, and using its law making powers to reverse the outcome of some judgments.

This instance of the legislature passing a Bill to amend the RTI Act reverberates with many such episodes of the Parliament overturning judicial decisions so as to nullify their effect and cause less inconvenience to the Parliament itself. In such cases there is no controversy regarding the legislature destroying the foundation of separation of powers. Nevertheless, the Parliament exercising its law making power with the soul objective of nullifying the opinion of the judiciary has a mala fide intention due to conflicting interests. It is hence, definitely unjustified in doing so.

There has been an ever-continuing conflict between Parliament sovereignty and judicial activism. As Wade points out; "All law students are taught that Parliamentary sovereignty is absolute. But it is the judges who have the last word. If they interpret an Act to mean the opposite of what it says, it is their view which represents the law."[29]

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[28] *Supra* note 6.

[29] WADE, CONSTITUTIONAL FUNDAMENTALS, 65. J.A.G GRIFFITH, THE POLITICS OF JUDICIARY (1977).

The famous decision of the seven-judge Bench in Madan Mohan Pathak v. Union of India,[30] stipulates that bringing legislation in order to invalidate the court's judgment would amount to *trenching* on judicial power. This judgment went to the extent of making impermissible all legislations which indirectly takes away the right embodied in a judgment. Yet, governments consistently encroach upon the judiciary's law making power as prescribed by the Constitution.[31]

Some assert that judicial review is undemocratic as the judges who interpret and declare statutes unconstitutional are neither elected by, nor are responsible to, the people.[32] With regard to this argument, the immediate question arising relates to the political parties as representatives of the people-do they truly present the voice of the masses? It is not necessary that members of houses represent majority vote. Data analysis shows that the electoral participation in general elections since independence was less than or equal to 50% of the total population of India. Of this 50% also, only a few vote for those candidates whom we see as policymakers in the Houses of the Parliament. Hence, the very base of the claim that majoritarianism is synonymous with democracy, falls, as the Parliamentarians are elected by a small percentage of the population-not amounting to even a simple majority.

This view is based on the inconsistent assumption that democracy is equivalent to majoritarianism, and that the power of the majority in a democratic society must be absolute and unfettered.

It is a baseless argument because legislative procedures embodying bare majority rule are not symbolic of democracy and it is not the sole characteristic of democracy as a substantive concept, but is rather only an institutional framework of a democratic regime.

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[30] 1978 AIR 803.

[31] INDIA CONST. art. 141.

[32] Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv LR 129 (1889); Schwartz , A Basic History of the US Supreme Court, 87 (1970).

In addition, while considering the reliability of the legislature as a representative body, it is to be kept in mind that it is not always necessary that the majority view is correct. In fact, it is possible that the majority suppresses the minority rights for their own benefit. Therefore, the power of the majority cannot be unrestricted as it would lead to arbitrariness and discrimination. Hence, the judiciary, through judicial review, keeps such a tendency in check. As Chief Justice Warren has said; "The Courts essential function is to act as the final arbiter of minority rights". No system is perfect, however, the chances of a system having 'checks and balances' is likely to be more successful than one which is devoid of this.

It is further argued that a democracy need not have all officials elected, and that judicial review is democratic as it promotes democracy by safeguarding the rights of the people and cabining government organs within the confines of the constitution.[33] Judicial supremacy is one of the essentials of the Dicean concept of rule of law[34] that shows the importance of having an independent judiciary as a factor behind development.

Acknowledging the stand taken by the Honorable Supreme Court that mere apprehension that the legislature overriding the judiciary may not be a healthy practice and may lead to abuse of power in a particular case are no grounds for limiting the powers of the Legislature[35], it is reasserted that in the present case the act of the legislature has gone way beyond a mere apprehension of abuse of power as is evident by their vested interest which would have otherwise been detrimental to the interest of the political parties.

Allowing the so called democratically elected representatives of the people, which do not represent the public at large, to have the ultimate say in a matter which affects all citizens, would tantamount to them judging their own cause with a tainted perspective smeared, with its inimacil myopic self-serving intimate interests.

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[33] Rostow, 'The Democratic Character of Judicial Review', 66 Harv LR 193 (1952); Black Jr.,'the People and the Court: judicial Review in a Democracy' (1960).

[34] Dicey, An Introduction to the Study of the Law of the Constitution, (Macmillan and Co., 3rd Edition,1889).

[35] Kanta Kathuria v. Manak Chand Surana, AIR 694 (SC 1970).

Hence, besides being in flagrant disregard of transparency and principles of a participatory democracy, the pending Amendment Bill also defies the basic rules of natural justice, particularly *nemo iudex in causa sua* i.e. no one shall be a judge in his own cause. As Ms. Aruna Roy, a leading campaigner for the RTI Act has rightly said, the government has become a judge in its own cause and has delivered its own judgment. There exists a clear conflict of interest and it is sound logic to assume that Legislature will not amend a statute in a way that its benefits are taken away. Further, this Bill presents an exceptional situation in the sense that since both, the party in power and the opposition parties have been milking profits out of the exclusion of parties from the ambit of RTI, the usual oppositional check on partisan-oriented majority proposals in the Parliament would be absent in this case. The Legislature and the Executive are politically partisan bodies and are committed to certain policies and programs which they wish to implement. Therefore, opportunities of political convenience must be carefully cutbed. The Amendment Bill in question is one such instance where the Parliament to safeguard its illegitimate vested interests is trying to override judicial decision in order to tilt the law in its favor, thus clearly and conclusively violating the principles of *jus naturale*.

VIII. CONCLUSION

The RTI Act has been given an over-riding effect vis-a-vis other laws which clearly suggests that its application is intended to be the general rule save in extraordinary circumstances. As has been stated time and again, political parties do not present such an exceptional situation and hence there is no clear reason why they should be excluded from the domain of RTI.

Judicial pronouncements suggest that a progressively higher level of transparency is required in the functioning and expenditure of political parties.[36] It is a major concern since the current transparency system provides no effective check on political parties' functioning. The closest that the public can get to access information about political parties is through

[36] Union of India v. Association of Democratic Reforms & Anr. AIR 2112 (SC 2002); Common Cause (A Registered Society) v. Union of India AIR 3081 (SC 1996).

their Income tax return which is again a very misleading source of information, since tax evasion is a common practice of politicians. The fact that Article 324 empowers the Election Commission of India to require the political parties to disclose expenditure incurred by them in relation to elections is also irrelevant because of two reasons.[37] Firstly, only the election expenditure is covered and for all the other times the parties escape scott-free and unaccountable. Secondly, the relations between Election Commission and various political parties are not completely clear and above reproach.

'Public Authority' is broader and more generic than the word 'State' under Article 12 of the Constitution. Hence, the intention of the Parliament was clearly based on giving the citizens the right to information over all entities owned by them, as well as where their money is being invested or spent. Common sense suggests that since the public funds all the luxuries which politicians lavishly enjoy, they should be made accountable to the public.

The question assumes greater significance in the context of amendments made for political convenience. Particularly so, when the amendment is intended to benefit the amendment-makers alone. The claim of the centre that exemption of political parties from the ambit of RTI is justified on the grounds of threat of potential abuse which the inclusion holds cannot stand the test of reasonableness since the courts have repeatedly held that mere possibility of future abuse cannot be a reasonable ground of challenge.

Exclusion of political parties from the purview of RTI is clearly unintended by the makers of RTI Act, 2005 since it is not expressly provided for in the list of 22 exempted organizations in the statute under S. 8 and S.9. Had the Legislature intended, it could have incorporated political parties in this list. But the non-incorporation indicates a different intention. In addition, the establishments of the Parliament, Judiciary, President and the Governors have also been brought under the surveillance of the common citizen and this further raises doubts regarding exclusion of political parties from such surveillance. Thus, the quasi-judicial body has rightly identified the intent of legislature and the arguments of judicial over-reach hold no merits.

[37] Common Cause v. Union of India, AIR 3081 (SC 1996).

Acknowledging that judicial restraint is an essential virtue to ensure separation and supporting the view that judiciary can act only as an 'alarm-clock' but not as a 'time-keeper'. It cannot be ignored that judiciary in India has been the most vigilant defender of democratic values. Thus, the construction of public authority to include political parties is, in our view, under no stretch of imagination, an instance of judicial over-reach.

In the course of this article we have broadly invoked two reasons to justify the inclusion of political parties under the umbrella of Public Authority, namely, substantial financing by government and the criticality of the role being played by these political parties in our democratic set up which also points towards their public character, bringing them in the ambit of section 2(h).[38] Finally, we come to the conclusion that if not strictly within the letter of the particular provisions of S.2 then at least, in spirit, these political parties can be said to have been constituted by their registration with the Election Commission of India, a fact akin to the establishment or constitution of a body or institution by an appropriate government.

Lastly, our Constitution as befits the Constitution of a Socialist Secular Democratic Republic recognizes the paramount nature of the public weal over private interest. Natural justice, ultra vires, public policy, or any other rule of interpretation must, therefore, conform, grow and be tailored to serve the public interest and respond to the demands of an evolving society.[39]

Thus, this Amendment Bill, which is now under the scanner of Parliamentary Standing Committee, in the guise of removing the 'adverse' effects of the CIC decision, which included political parties in the ambit of 'Public Authority', thereby, making them accountable to public, is in reality a means to reverse a politically inconvenient judgment. While our esteemed Parliamentarians opine that such inclusion is not 'fit' for the Indian system and would hamper the 'smooth functioning' of the RTI machinery, we firmly dissent from the validity of the justifications put forth by the so-called 'representatives of people' supporting such self-serving exclusion.

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[38] *Supra* note 6.

[39] Swadeshi Cotton Mills v. UOI, AIR 818 (SC 1981).

SPECIAL LEAVE PETITIONS, AN IMPEDIMENT TO JUSTICE: NEED FOR STRUCTURAL CHANGES TO ENSURE EFFICIENT TIME ALLOCATION OF THE COURT

Arthad Kurlekar*, Jaimini Vyas**

The Supreme Court (SC) has consistently faced the problem of the Special Leave Petition privilege being misused. This paper considers directives, judgments and observations by the SC in that regard. It analyzes the problem, examines viable solution models deployed in other jurisdictions and comes up with a unique model to assist the SC in strengthening the floodgates against frivolous SLPs. We propose a Board to be created by the SC by passing rules as per its power to examine the SLP applications both formally, that is for compliance with procedural requirements and substantially, that is on the legal issues, and opine. The subsequent step would be to engage a senior counsel for advice as to the merits of the case. These will also be a cog in the wheel to reduce the backlog of cases, as well as add substantive opinions of experienced legal minds while being merely supplementary and not resulting in a delegation of the SC's duties. Further, SLPs that the court finds frivolous should be fined on a regular basis to create deterrence.

I. INTRODUCTION

Recently, the Supreme Court has expressed anguish over the frivolous number of SLPs filed. In *Mathai @ Joby v. George*[1], the will of the defendant was challenged as not being genuine. The special leave jurisdiction of the

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[1] (2010) 4 SCC 358.

court had been invoked, praying before the court, to enable the petitioner to send the will of the defendant for forensic testing a second time, which was rejected by the Trial Court and the High Court. The Court held that such a claim was tantamount to trivialization of the discretionary power of the court.

Article 136 in its nature and scope, enables the preservation of the most coveted principle in the common law system, the rule of law.[2] It is symbolic of the principle, to the extent that it allows discretion to the Supreme Court to the self-ascribed limits. The court may, if it deems fit invoke the Article 136 jurisdiction suo motu or can at the instance of the parties take up the matter at hearing. The court has on several occasions remarked that it was the High Court that was intended to be the final court of appeal and Article 136 was just a provision to ensure that substantial justice is done.[3] Having said that, the corollary, which can be corroborated by the Supreme Court decisions, is that the provision is to be used judiciously. A vast number of Special Leave Petitions are filed and summarily dismissed by the court. The backlog of the cases ironically vitiates the actual objective of the article. Wastage of Court's time leads to unnecessary delay in conclusions.[4]

II. THE ISSUE OF FRIVOLOUS SLPS AND INEFFICIENT TIME ALLOCATION

Indiscriminate Filing of SLPs

Each day a vast number of SLPs are filed and rejected on several procedural, technical and substantive reasons. The delay caused to the court is actually detrimental to the health of the institution of judiciary. As pointed out by K.K. Venugopal in 1997 there were only 19,000 pending cases in this Court but now, there are over 55,000 pending cases. In a few years' time the pendency will cross one lakh cases. In 2009, almost 70,000 cases were filed in this Court, of which an overwhelming number were Special Leave

[2] INDIA CONST art. 136.
[3] Dhakeshwari Cotton Mills v. CIT AIR 1955 SC 65.
[4] Sanwant Singh v. State of Rajasthan AIR 1961 SC 715.

Petitions under Article 136. In contrast, the U.S. Supreme Court hears only about 100 to 120 cases every year and the Canadian Supreme Court only 60 cases. Thus, it is observed that the magnitude of the problem in India is rather enormous. Right to a speedy trial is construed as a right under Article 21 and Article 14, within the chapter of fundamental rights in the Indian Constitution.[5] In 1987, Justice Venkataramaiah had foreseen the current predicament. In *P.N. Kumar v. Municipal Corporation of Delhi* disposing of a writ petition under Article 32 he observed that:

> *"This Court has no time today even to dispose of cases which have to be decided by it alone and by no other authority. A large number of cases are pending from 10 to 15 years. Even if no new case is filed in this Court hereafter, with the present strength of Judges it may take more than 15 years to dispose of all the pending cases."*[6]

The gravity of the problem is apparent and can further be illustrated by the following figures. Total pendency has gone up from 19,000 in 1997 to 53,221 in 2009, an increase of over 150% in about 12 years. An increase at the same rate would bring the total pendency of cases to 1,25,000 over a period of the next ten years.[7]

Here, it is important to distinguish the writ jurisdiction from that of special leave. The special leave allows the Supreme Court to admit for deciding not just a final judgment but any order of the court. To that extent Article 136 grants the Supreme Court the power to review any decision of any court or administrative body whereas jurisdiction of the court under Article 32 is an original jurisdiction granting certain writ remedies to be filed before the court. Article 32 is a matter of right of the party before the court, whereas Article 136 is a matter of discretion of the court.[8] Supreme Court on several

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[5] K. K. Venugopal, R. K. Jain Memorial Lecture: Towards A Holistic Restructuring of the Supreme Court of India, January 30, 2009, available at: http://www.hindu.com/nic/venugopal_lecture.pdf (Last visited on February 5, 2013).

[6] (1987) 4 SCC 609.

[7] K.K. Venugopal, *supra* note 5.

[8] Article 32 falls within the chapter on Fundamental Rights whereas Article 136 falls within the chapter on Powers of the Supreme Court.

occasions has reiterated the function and established the sanctity of Article 136.

The Supreme Court's View in the Matter of Frivolous SLPs

Even prior to the Indian constitution a similar discretion was conferred to the Privy Council as is conferred to the Supreme Court by virtue of Article 136. Sir George Rankin pointed out in the case, that for them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice and that misdirection as such, even irregularity as such will not suffice and that there must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law.[9] But today even small matters are brought to the Supreme Court. Justice Katju, illustrates the point by citing examples of cases, where even allowing amendment petitions to claims are fought up to the Supreme Court.[10] The probable misuse of Article 136 was immediately pointed out and taken care in one of the first SLPs in the case of *Pritam Singh v State*.[11] The judgment suggested sparing and exceptional use of Article 136, and suggested uniform guidelines for the use of SLPs.[12] The subsequent line of cases, did focus on the sparing use of the provisions of Article 136 but did not subscribe to the requirement of particular guidelines to be set for allowing SLPs. The result was enunciated by Justice Dalvi in a private interview. He said that using Article 136 for common matters, was like asking a super-specialist doctor for general medicines. Such is the degree of misuse of SLPs.[13]

The *Bengal Chemicals Ltd v. Their Workmen*[14], the court restricted the scope of SLPs to cases where there was a violation of the principles of natural justice, causing substantial and grave injustice to parties. Though, this

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[9] *See*, George G. Feller v. The King AIR 1943 PC 211; Mohd. Newaz v. Emperor AIR 1941 PC 132.
[10] Mathai, *supra* note 1.
[11] AIR 1950 SC 169.
[12] *Id.*
[13] lnterview with Anil Dave, J., Supreme Court (May 16, 2011).
[14] AIR 1959 SC 633.

principle was not directly referred to by the subsequent cases. The point to note here is that these principles have not been overruled though it may be said that the jurisprudence regarding SLPs took a turn from hereon.

In *P.S.R. Sadhanantam v. Arunachalam*[15], Justice Krishna Iyer substantiated the reasoning for limiting the scope of SLPs. He said, "The wider the discretionary power, the more sparing its exercise. A number of times this Court as stressed that though parties promiscuously 'provoke' this jurisdiction, the Court parsimoniously invokes the power. It is true that the strictest vigilance over abuse of the process of the court, especially at the expensively exalted level of the Supreme Court, should be maintained and ordinarily meddlesome bystanders should not be granted a 'visa'."[16]

Under the constitutional framework it was the High Courts which were meant to carry out the functions as the highest appellate body, and the Supreme Court was there ideally as a supervisor. The intervention of the Supreme Court was deemed to be only that as to correct the High Courts in exceptional matters.[17] The current position of the court merely suggests that the SLP provision should be used sparingly and in exceptional cases, when a substantial question of law remains ambiguous and unresolved or where it appears to the Court that interference by this Court is necessary to remedy serious injustice.[18]

Inefficiencies Associated with Frivolous SLPs

There are several reasons why floodgates of litigation have opened: firstly, the failure of the court to lay down substantial and strict guidelines regarding filing of SLPs; secondly, the lack of faith within the judiciary of achieving speedy justice through formation and implementation of such guidelines; thirdly, delay of justice and fourthly inefficiency in dealing with the cases at hand.

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[15] AIR 1980 SC 856.
[16] *Id.*
[17] Narpat Singh v. Jaipur Development Authority [2002] 3SCR365.
[18] J.P. Builders v. A. Ramadas Rao (2011) 1 SCC 429.

Be that as it may, the hypothetical obliteration of Article 136 is inefficient, if justice is the purported output of the court. The justification for the requirement of Article 136 can be given on economic grounds. The first situation would be where there was no Article 136 or a provision for special leave. In such a situation all appeals to the Supreme Court would be either on certificate by the High Court or through a very narrow writ jurisdiction under Article 32.

To that extent Article 136 forms a pareto-superior alternative in that Article 136 provides for a mode which allows furtherance of justice or correction of grave injustice. Justice as such could be classified as a non-rivalrous resource. What it suffers from is the 'tragedy of commons'. Filing of rivalrous SLPs is comparable to the over-exploitation of the resource (of justice) resulting in lower efficiency. The current system, thus, needs betterment to the system to speedily dispose of the cases in order to increase the efficiency of delivery of justice. This gives rise for the need of a rule-based model for the implementation of Article 136 intra vires the Constitution of India.

At this point it is important to establish how the over-exploitation of the judiciary may lead to the depletion of its effectivity and thus the output. Increase in the number of cases, would certainly reduce the amount of time given to one case, also it would naturally increase, the time taken to dispose off one case, over a span of time. With lower available time per case and increase in the number of hearings thus increasing the discontinuity and the total duration of the case, it may lead to serious injustice for both parties. In cases where there is a mis-trial or a prejudice several years have gone by and the accused is left disheartened with the justice system (assuming that he is innocent). For instance, a person charged with murder and refused bail, is declared by the Supreme Court to be not-guilty may have suffered through the process for such a long time that he might have lost the peak of his life fighting a trial, when in fact he had done nothing wrong. Even for a victim, waiting for years to get justice may be a frustrating exercise. It may be argued that by ensuring a speedy trial if justice itself becomes the function of time then it creates a trade-off (quicker trial with a higher probability of error, slow trial with a lesser problem of error but which itself is unjust). The

model which the authors seek to propose does not offer this trade-off but in fact avoids it, yet offering a speedier trial and ensuring an inherently fair procedure.

III. PROPOSED MODEL AND COMPARATIVE PERSPECTIVES

Theoretically, the discretion of the court begins when the appeal is filed and continues throughout the duration of the proceeding. Thus, the court may at any time either reject or dismiss the petition.[19] The Supreme Court on one occasion has said that an SLP filing is similar to that of a person at a gate, requesting the gate-keeper to allow entry.[20]

Thus, owing to the nature of the discretion being exercised in admitting or rejecting an SLP, it is possible to create an alternate body for handling SLPs. Now, the authors will explain the features, characteristics, advantages and limitations of the alternate body they propose.

The Authors' Proposition

The authors propose the creation of a body (hereinafter referred to as 'Board') with the sole objective of procedurally and substantively analyzing the SLPs before they are filed in Court. A proposed SLP will be taken to the Board prior to being taken to the Supreme Court. The Board on receiving such an application will initially review the application solely on procedural grounds for any technical errors and will advise the filing party to rectify any such errors found. Unless compliance with such action is met by the petitioner, the petition cannot proceed to be heard by the SC. The opinion of the Board shall be available to both the parties for information and further action. Such an opinion shall have advisory value or persuasive value but shall not be considered in any way either binding on the court, or as a conclusive determination of merit of the case. The opinion of the Board would aid the court proceeding without procedural hassles. All powers of the Supreme Court under Article 136 shall remain vested in the Supreme Court.

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[19] V. N. SHUKLA CONSTITUTION OF INDIA, 11TH EDN, 502 (M.P. SINGH ED, 2011).
[20] *Id.* at p. 503.

In accordance with *Sampath Kumar v. Union of India*[21] and *L. Chandra Kumar v. Union of India*[22], where it was stated that the role of the court may be supplemented by another quasi-judicial body, but cannot be substituted by it; the Board will in no manner 'take-over' the discretion granted to the Supreme Court Article 136, but will assist the court so as to reduce the time spent on the number of infructuous, technically-impaired and frivolous SLPs. That is the reason why the authors propose advisory jurisdiction of the Board and not a binding opinion. Despite the advisory value of the opinion of the Board, the procedural aspects of the opinion of the Board, will be de facto binding upon the party filing the petition. It would be because if the party refused to comply with the advice of the Board, the objective probability of the case being accepted in the Supreme Court substantially reduces.

Such a Board, the authors propose should be created by inclusion into the Supreme Court Rules. In this regard, the Board will have the powers granted by the Supreme Court and will be regulated by it, which is necessary because the Board will be dealing with the discretionary power of the Supreme Court, which has absolutely no legislative interference. Any curb on the discretionary power would be held as restricting the power and thus, unconstitutional.[23] For the purposes of the legislative power of the Supreme Court in matters of framing its rules, it falls within the ambit of State under Article 12. Thus, if the Board is constituted under the Supreme Court Rules, the appointment of judges, the functioning of the Board etc. will be subject to fundamental rights and thus, be transparent and open to scrutiny.

It may be argued that an advisory opinion may be disregarded as merely procedural, but in order to obtain a clearance and opinion from the Board, all technical fallacies in the SLP would have been dealt with and the court will have opinion of judicially trained people such as retd. judges of the Supreme Court, look through and suggest their opinion to the judges presiding over the case. This will automatically give the judge an insight into some important nuances of the case. One may allege bias and violation of the

[21] AIR 1987 SC 386.
[22] (1997) 3 SCC 261.
[23] *Supra* note 22.

right to a fair hearing, but such is not the case either, for even when in an appellate jurisdiction case, the judge has an opinion of the High Court and trial court, of judicially trained minds, in consideration. Despite having such an opinion there are numerous cases where the Supreme Court bench disagrees with the High Court. If bias was allege in case of the advisory opinion of the Board, logically a bias has to be alleged in appellate jurisdiction as well, which is not the case. Hence practically, the Supreme Court has complete discretion to disagree with the opinion of the Board and accept or reject an SLP.

With regard to the appointment of members of the Board, the authors propose 5-7 retired judges of the Supreme Court subject to the court's discretion regarding the requirement should individually handle SLPs. The appointment of members would be made similar to the appointment of judges of the court, except of course the requirement of Presidential consent considering the body would be quasi-judicial. With regard to it falling in the ambit of Article 12 of the Constitution, the authors propose that the body be subject to Fundamental Rights granted under our Constitution and for that a separate legislation be formed in order to create the body. As distinct from the judicial appointments of the Supreme Court, the appointments of the judges to the body shall be open to the public. The Board serves an important function of reviewing SLPs prior to them being heard by the Supreme Court. Conflicts of interests, prejudices and biases from within the Board are not a remote possibility. Subjecting it to Fundamental rights would ensure transparency within the operation of the Board.

Justifications of the Proposal

It may be argued that the procedure will lead to some delay in filing SLPs and prima facie might result in further delay, resulting in no different a situation than before. But such an argument would not be valid. For pressing matters like personal liberty, the original writ jurisdiction of the Supreme Court may be invoked under Article 32. It is a fundamental right which the court cannot reject as distinct from the court jurisdiction under Article 136 which is solely discretionary. As a fundamental right, the Court

becomes constitutionally bound to hear cases under Article 32, for pressing situations. In dire cases, an Article 226 application may be filed with the concerned High Court. Though it is admitted that the court has discretionary power, there are adequate constitutional measures to account for immediate attention. Also, a Board supplementing the power of the supreme court, will aid in clearing the burden of the court as the time spent by the court correcting technical details of SLPs or hearing frivolous SLPs will be diverted to clearing other appellate cases.

The second theoretical question arises directly out of Article 136 is that the words 'may, in its discretion'[24] need to be analyzed. If the provision read, 'the Supreme Court may grant', it still would not have granted the petitioner the right to admit an SLP. It would have been left to the court. So then, the question arises what function do the words 'in its discretion' serve? The answer to that is that the Supreme Court may reject an SLP even without reasons. Then why do we need rules or why then should a body be instituted for filing of SLPs to review? The Supreme Court may reject herewith all SLPs pending before it without arguments and still would be valid. What function does the Board serve?

The answer to this is that, the Board does not seek to serve any substantive determination of a matter. What the Board seeks to serve is saving time and making the time of the court and the resource of justice more efficient. If the Supreme Court rejects all SLPs pending before it, that is neither the concern of the Board, nor does it preclude the purpose of the Board. The sole duty entrusted to the Board is to demystify and bring to the forefront those cases where there is genuinely a miscarriage of justice, and to dissuade frivolous SLPs from being filed without trampling upon the jurisdiction of the Court.

Thus, having a transparent body to review the SLPs to be filed in the courts procedurally, aids the to-be petitioners in filing the petitions and adhering to the guidelines prescribed by the Supreme Court, and opining upon the viability of that SLP to give the future petitioner a rational idea of whether the SLP is bound to fail or succeed. It is here that the authors re-iterate for

[24] INDIA CONST art. 136.

emphasis that the procedural errors having been taken care of by the Board and the Senior Advocate signing the petition, it will be an exceptionally rare case, where the Supreme Court would have to, despite all measures, go into matters of procedure.

After the opinion of the Board is received, the party filing the SLP will have to take advice of a senior advocate of the Supreme Court. This is not a novel procedure; it has been applied in the case of review petitions, for the same purpose of analyzing the merit of the case.[25] Additionally, the SLPs which the court finds frivolous, even after the two-step process taken, may be fined, in order to create deterrence. It will ensure that not only fewer advocates will want to argue for frivolous SLPs, but in fact members of the bar will contribute to the reduction of the number of cases, as they could give legally sound advice about the filing or not filing of the SLPs. A bona fide victim of substantial injustice would no way be deterred by the fine provision because of the wrong done to him or in public interest but a person with either malafide or one who knowingly files a frivolous SLP after the 2 step process would at least reconsider the decision to file an SLP, in the apprehension of the fine being imposed by the Court. The fine may be imposed at the discretion of the Court just as exemplary punishment in order to deter filing of frivolous SLPs. Such a conferment would despite increasing the workload at that time, offset it with the deterrent effect a fine may have on filing of those frivolous SLPs.

The requirement of a senior advocate further clarifies matters. It can be explained in two cases: Case 1, the Board has given a positive feedback. In such a situation, if the senior advocate gives a positive feedback, the SLP is deemed to be strong and worth presenting before the court. But if the senior advocate declines to give his assent, it comes to the court then the SLP is still worth being considered as there is a division of opinion. Case 2, if the Board gives a negative feedback of the SLP, and, then if the senior advocate gives a positive feedback, the case would still be worth being heard. But if the senior advocate too gave a negative feedback, then the case probably having been declined a certificate for appeal, having been given a negative feedback by

[25] INDIA CONST art. 137

the bench and by the senior advocate, gives a clear signal to the judges that it is frivolous and not worth spending too much of the court's time. Despite sending out such a signal, if the petitioner wishes to proceed with it to the court, the entire mechanism as proposed by the author does not violate either right to be heard of the petitioner nor does it clamp the jurisdiction of the court, but would aid the judges in assessing its merits.

Other Proposed Models and Comparison

On a few prior occasions creation of mechanisms to relieve the tremendous burden of the Supreme Court, have been contemplated. In *Bihar Legal Support Authority v. Chief Justice of India*[26], Justice Bhagwati proposed the creation of a National Court of Appeal, specifically dealing with constitutional and public laws having the power to entertain matters of Special Leave. It is important to compare the model proposed by the authors with the recommendations of Justice Bhagwati.

Creation of a National Court of Appeal would entail conferring partial power of the Supreme Court upon the National Court of Appeal. The intention behind creation of a court of appeal such as the one proposed by the Justice Bhagwati, though noble, would create certain theoretical conflicts. The first is the power to hear special leave petitions itself. Such a power is the exclusive prerogative of the Supreme Court. Such power is vested with the Court to remedy gross injustice and ensure the functioning of the state on principles of the rule of law. As discussed above, Article 136 is one of the forms of the manifestation of this power.[27] A National Court of Appeal cannot perform the functions of the Supreme Court in as much as the duty of the court to ensure the rule of law. Without that, if only the power to hear special leave petitions is conferred, an ideological conflict of the court's superiority arises. The model proposed by the authors does not in any way duplicate, or re-assign the power of the Supreme Court to hear SLPs but merely aids the court in sifting through the cases and efficiently allocating its time. It merely saves the court's time which may otherwise be spent in dealing with infructuous SLPs.

[26] (1986) 4 SCC 767.
[27] The other being Article 32, Article 142.

The second proposed model can be found in the 229th Law Commission report.[28] It is peripheral to the current topic the authors seek to deal with but it becomes of certain relevance in matters of pendency of cases.

The report proposes the creation of four Regional Courts as highest appellate authority. The Supreme Court will have the power to hear Special Leaves and Constitutional matters. Such a model though at first may seem acceptable to some, conflicts would again rise regarding the appellate jurisdiction of the Court. Normatively, the High Courts are sufficient to deal with cases and the Supreme Court should interfere only in case of exemplary matters. Even normatively, creation of the regional courts with the powers anticipated by the Law Commission report would conflict with the power of the court to deal with appellate matters. No such problem is seen in the model proposed by the authors. Even if the implementing law can chalk out the distinct jurisdictions and may not necessarily lead to conflicting ones, the petition or cases remain within the judicial system. Additionally, the Supreme Court has an over-arching power under Article 142. The court has an unrivaled, unbridled, unique power to be used as its discretion. To do what is necessary to secure the ends of justice. If the Supreme Court were not to interfere with the distinct jurisdiction of the Regional Courts, the suggestion would create a situation very similar to the one created in the case of *L. Chandra Kumar v. Union of India*[29] where the Supreme Court held that the power of the Supreme Court could not be substituted. The model provided as stated above merely supplements the power of the Court and in effect avoids the assuming of power from the Supreme Court.

The model proposes a sort of 'filter' to the cases which increases efficiency of the Court by making more time available to it by reducing its workload. The Board does not have the power to dismiss a case as that would be unconstitutional, but the procedural flaws it is supposed to rectify occurs outside the court, without wasting the court's time, thus giving the court more time to focus on the Special Leave and other matters which it already

[28] Law Commission Report India, August 2009, available at: http://lawcommissionofindia.nic.in/reports/report229.pdf (Last Visited on February 5, 2013).
[29] *Supra* note 22.

has before it. In addition, apart from procedural errors, the opinion of the members of the Board, even though advisory in nature would reduce the time required for the Judges to ascertain the maintainability of the petition, thus further increasing time for the cases at hand.

IV. CONCLUSION

In times of dire need, where there is a monumental backlog of cases piling upon the court, it is in the interest of justice that certain measures be taken to reduce the burden of cases without either trampling upon the jurisdiction and power of the courts and the rights of the person to natural justice. The proposed model by the authors takes care of both these restrictions and seeks to reduce the number of cases. It rests on a delicate balance between foreclosing the jurisdiction of the Supreme Court, and yet restricting the number of cases and thus, is significant. The need of the hour is to implement an alternate mechanism, probably one that the authors propose or a similar model for furtherance of justice. For the reasons discussed above, among the models discussed in the paper, the authors' model has the upper-hand in terms of its viability, effectiveness and its validity in terms of the Constitution.

INVALIDATION OF CBI - HAS THE GUWAHATI HIGH COURT STIRRED UP THE HORNET'S NEST?

Anmol Vashisht*

I. INTRODUCTION

The Guwahati High Court on 06th November, 2013, in Sh. Navendra Kumar v. Union of India[1] invalidated in one stroke the functioning, jurisdiction and composition of the Central Bureau of Investigation. Pursuant to the findings of presiding-judge Justice A. Ansari, the premier investigation agency of the country stands void. The judgment has far-reaching implications as it is likely to stoke the hopes of those who fear its investigation and prosecution. The judgment is a momentous one as it restricts the power of the executive to infringe upon the rights of its citizens. It answers a fundamental question- whether an institution created by a mere executive fiat can impinge upon the right to life of its citizens? The case questions for the first time the existence of the nation's most cherished investigation agency.

The case begins with analyzing the importance of Article 21, the ineffaceable mandate to the state to protect the life and liberty of its citizens. It continues to elaborate upon the importance of separating legislative and executive functions; and the possible limits on executive power. The court believes that the sanctity of the right to life must be preserved and its ambit must only be curtailed in situations that warrant so. Even such situations must be backed

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[1] W.A. No.119 of 2008 in W.P.(C) No. 6877 of 2005.

by legislative sanction and any such executive command that intrudes upon this space is a manifestation of executive tyranny.

II. BRIEF FACTS OF THE CASE

The case had been presented before the Guwahati High Court and is an appeal to the judgment passed by the same court in 2007. The petitioner, Sh. Navendra Kumar, fears prosecution by the Court of Special Judge and has appealed to the High Court to quash the proceedings against him. He pleads that the existence of CBI is marred with obscurity and the agency needs to be struck down. The basis of its establishment can be traced to a mere executive order passed by the Ministry of Home Affairs back in the year 1963. The petitioner, *inter alia,* contends that by establishing an investigative agency—armed with potent weapons to investigate, file charge-sheets and prosecute the offenders— on a mere executive *fiat* has caused grave injustice to many. He pleads that in a country governed by rule of law, the power of the executive needs to be checked for tyranny and sanctioned against possible abuse. The executive by establishing CBI on a mere diktat has abused its power. Consequently, the court must strike it down.

III. SUBMISSIONS OF THE PETITIONER

The Petitioner has challenged the constitutional validity of CBI, an investigative agency formed pursuant to the passing of an Executive Order/Resolution No. 4/31/61-T (dated 01-04-1963) by the Ministry of Home Affairs. The petitioner contends that the agency is a non-statutory body inasmuch as no law has been declared to lay its birth. It has been unduly exercising powers of the police including—registration of FIR, arrest of persons, 'investigation' of crimes, filing of charge-sheets and prosecution of the offenders. Although the Parliament is empowered to make law on the 'Central Bureau of Intelligence and Investigation', CBI cannot carry out the functions of the police inasmuch as the Constitutional scheme does not permit the Central Government to carry out functions of the police that is exclusively within the domain of the State Government[2]. Further, the

[2] ¶11.

Petitioner argues for the unconstitutionality of the Delhi Special Police Establishment Act (hereinafter DSPE Act), 1946 as the same is *ultra vires* the Constitution as it offends Article 372(1)[3] of the Constitution that prohibits Parliament to legislate laws on 'police'.

IV. SUBMISSIONS ON BEHALF OF CBI

Replying to the contentions of the Petitioner submits the following-

I. That the CBI derives its power to 'investigate', like a police force as contemplated by the Cr.PC, from the DSPE Act, 1946.

II. That the CBI is only a change of the name of the DSPE and the CBI is, therefore, not an organization independent of the DSPE.

III. That the creation of CBI may also be taken to have been covered by Entry 80 of List I (Union List) of the Seventh Schedule to the Constitution of India by virtue of the expression, 'Central Bureau of Intelligence and Investigation' occurring in Entry 8 of List I (Union List).

IV. Under Article 73 of the Constitution of India, the executive powers of the Union extends to matters with respect to which Parliament has the power to make laws and the resolution, dated 01.04.1963, whereunder CBI has been constituted, can be treated to have been issued by virtue of Union of India's executive powers as embodied in Article 73.

V. That the Central Government can also be treated to have constituted the CBI by taking recourse to its powers as specified in Entry 1 and 2

[3] Article 372(1) reads as follows-72. Continuance in force of existing laws and their adaptation- Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority".

of List III (Concurrent List) of the Seventh Schedule to the Constitution of India.

V. CONCLUSION OF THE COURT

Since the inception of CBI by the impugned resolution is undisputed, the Court perused the same and concluded that the constitution of the CBI was an executive decision and that too, was taken without citing, or referring to, its source of power. Moreover, the same lacked presidential assent. Further, the expression 'As a first step in the direction' appearing in the resolution goes to show that CBI was constituted as an *ad hoc* measure to deal with certain exigencies. Further, the apparent failure of the resolution to refer to the DSPE Act goes on to show that the agency was never meant to be its part. Thus, the court rejected the first contention of the Respondent.

Secondly, the court concluded that since the DSPE Act had conferred a name to its establishment, the Delhi State Police Establishment (and not CBI) the Executive is prohibited from using any other name. If a statute gives a specific name to an organization, created by the statute, it is not permissible to confer a new name on the organization by any executive instructions.[4]

Regarding the third submission of CBI, the court referred to the Constitutional Assembly Debates to obtain a better understanding of Entry 8 of List-I, '*Central Bureau of Intelligence and Investigation*'[5]. The Constitution makers were against permitting the Canter to make investigation into crimes. The word 'investigation' therefore is intended to cover general enquiry for the purpose of finding out what is going on. This investigation is not investigation preparatory to the filing of a charge against an offender which only a police officer under the Criminal Procedure Code can do.[6] As regards Entry 80, the Court concluded that the Entry mainly

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[4] ¶ 43.

[5] The expression has been explained by Dr. B.R Ambedkar as follows-The idea is this that at the Union office there should be a sort of bureau which will collect information with regard to any kind of crime that is being committed by people... and thereby be able to inform the Provincial Governments as to what is going on in the different parts of India so that they might themselves be in a position to exercise their Police powers in a much better manner."

[6] ¶ 54.

empowers the Parliament to extend the operation of a police force and not create a separate police force for investigation.

As regards the fourth submission, the Court read together Articles 73, 245 and 246 of the Constitution. Their bare reading makes it clear that the power of Executive is co-extensive with the power of Parliament to make laws. However, the same is subject to various restrictions. First, this exercise is subject to provisions of the Constitution and, secondly, this exercise of executive power shall not, save as expressly provided in the Constitution or in any law made by Parliament, extend, in any State, to matters with respect to which the Legislature of the State also has power to make laws. Thirdly, the exercise of executive power cannot be stretched to the extent of infringing fundamental rights. The power is also fettered by the distribution of powers by the seventh schedule. In other words, once a legislation occupies a field, neither any of the States nor the Union can exercise its executive powers on the same field inasmuch as the legislation is the primary work of the Legislature and not of the Executive.[7] Thus, 'police' being a state subject in List-II prevents the Executive from exercising its power on the same.

The Court rejected the final submission too. The Concurrent List can only be resorted to in situations that are not covered by List-I and II. Since Entry 8 of List-I specifically empowers the Parliament to enact a law on 'Central Bureau of Intelligence and Investigation', their final argument does not hold water either.

VI. STRIKING DOWN OF IMPUGNED RESOLUTION AND INVALIDATION OF CBI

The impugned resolution was passed by the Ministry of Home Affairs and was not a decision of the Union Cabinet. It also lacked the presidential assent. In view of the aforementioned, the Court concluded that the

[7] ¶ 110.

resolution can, at best, be termed as a departmental instruction which cannot be termed as 'law' within the meaning of Article 13(3)[8].

The prescribed actions of the CBI include arresting of persons, conducting searches and seizures, prosecuting the accused, etc. Its actions invade the right to privacy of an individual and encroach upon their personal liberty. Consequently, the impugned resolution is *ultra vires* the Constitution as it seeks to violate Article 21. Thus, the court quashed the resolution, whereby CBI had been constituted; and declared CBI as unconstitutional. The court, however, refused to quash the DSPE Act.

VII. ANALYSIS OF THE CASE

The case of *Sh. Navendra Kumar v. Union of India* is sure to create a lot of heated discussion. By invalidating in one stroke the existence of the country's premier investigation agency, the case has stirred-up the proverbial hornet's nest. CBI has been in existence for more than thirty years. It has successfully investigated high-profile cases involving politicians and criminals using sophisticated scientific techniques. It is known for investigating the 2G case, the well-known Priyadarshini Matoo case and the recent Coal-allocation scam.

The importance of the case can be gauged from its far-reaching consequences and the impact it is to have on the investigation agency. While the Supreme Court has put a stay on the order, it is necessary to attend to the questions raised in the proceedings as they relate to various subjects—abuse of executive power, legislative division between states and the much venerated ambit of Article 21.

[8] The court for its conclusion placed reliance on D. Bhuvan Mohan Patnaik v. State of AP (AIR 1974 SC 2092) wherein the Court had concluded that departmental instructions are neither 'law' within the meaning of Article 13(3) and neither do they constitute "the procedure established by law" under Article 21 of the Constitution.