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FOREWORD

Nirma University Law Journal provides a new and exciting way of exploring the changing dynamics of law. The journal is designed to cover a broad spectrum of topical issues, which are set within the framework of a changing global scenario; highlighting the catalytic nature of legal frameworks for society. The result is a coherent exposition which offers the reader a clear overview of the broader thematic influences on the law generally whilst also focusing more specifically on current manifestations of legal questions.

Though leaders of today emphasize the need to embody all disciplines in one spectrum to analyze problems with creative zeal. Education in the real sense is the spirit of enquiry resulting in new knowledge and path breaking insights on mundane ideas and ways of living. The Nirma University Law Journal aims to encourage writings that are inter-disciplinary in nature expounding contemporary issues across discipline like Sociology, Political Science, Public policy and Economics in the context of Law. It showcases contemporary issues and challenges specific to law; with an inter-disciplinary approach towards knowledge. It is the endeavor of the Institute to become the beacon of legal education by encouraging synthesis of knowledge and best practices cutting across academia and research fraternity.

We thank all the contributors for their ingenuity in expressing new ideas and hope that the journey of legal research is fruitful for the fraternity and students at large.

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

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THE EXIGENCY FOR AN INSURANCE FRAUDS CONTROL ACT IN INDIA: CHALLENGES TO BE ADDRESSED

Abhijith Christopher*
S.B. Aditi**

ABSTRACT

Ever since the advent of the economic reforms in 1991, the Indian insurance industry has been growing at a rapid rate, and is expected to reach an estimated value of 280 billion US dollars by the end of the current year. It has also experienced a paradigm shift from being a public sector exceptionality to an insurance industry in favor of market - oriented fair competition. Given this substantial development which has ubiquitously been sidelined by the escalating pandemic and economic instability, insurance frauds have also gained pace in our nation. These frauds not only amount to a repugnant breach of the principle of utmost good faith but also obstruct the functioning of the entire insurance industry. In the light of the above, the paper will initially examine the different circumstances under which fraud risks arise and the need of stricter legal compliance mechanisms for the same, after which it will undertake a cross-country analysis of different fraud control acts from other nations which have enforced Insurance Fraud Control Acts so as to contribute towards a more practical understanding of the same. Insurance frauds are often termed as a low-risk high reward game for criminals as there is no specific legislation

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in the country to control them, and the Insurance Act, 1938 which was passed during British rule to undertake the regulation of the Indian Insurance Sector, does not attenuate the issue in any way, and hence, recommendations will be made to herald the bringing about of an Insurance Frauds Control Act in our nation.

Keywords: *Insurance, Economic instability, Pandemic, Regulations*

I. A BRIEF INTRODUCTORY OUTLOOK ON THE SCENE PERTAINING TO INSURANCE FRAUDS IN INDIA

The word 'fraud' finds its roots in the word *'fraus-fraudis'*, which means the commission of an act of bad faith done in order to obtain a profit.[1] Insurance fraud is a widely prevalent phenomenon that is seen in India as well as many other nations around the world. One major lacuna that can be pointed out in this regard is that it does not get enough attention despite being a serious one, even though it may not be as frequent as the other forms of financial and economical criminal acts. Furthermore, it is a matter of concern that the term 'insurance fraud' is not defined under the Insurance Act, 1938.[2] There are laws such as the Indian Penal Code, 1860[3] within our legal system that deal with issues such as forgery, fraudulent act, and cheating, .etc. But none of these laws are specifically oriented toward the attenuation of insurance frauds and are not effective in acting as a deterrent towards curtailing the growth of the same. So as to trace the origins of the Insurance Act, it is a colonial law that was passed in 1938 by the British in India, in order to regulate and control the insurance sector. The early 1900's marked different nations such as America exploring the need for and coming up with a law for the purposes of insurance. In England, the Marine Insurance law was passed in 1906 for the purposes of marine insurance. With regard to the other forms of insurance, the common law of Britain was applied. The Indian Insurance

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[1] Elena Popa, *Insurance Fraud*, 2008 AGORA INT'L J. JURID. SCI. 225 (2008).
[2] *Insurance Frauds and Remedies in India*, INDIA LAW OFFICES (Oct. 25, 2020, 1:51 AM IST), https://www.indialawoffices.com/knowledge-centre/insurance-frauds-and-remedies-in-india.
[3] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

Act of 1938 borrowed extensively from the law of Britain and all the different forms of insurance, but missed out on the essentiality of the inclusion of the term 'Insurance Fraud', and the deterrent measures to be undertaken in order to curb the same. Often, due to various insurance companies getting affected by rising instances of fraud, genuine non-life insurance scheme customers have to pay higher premiums as a result of the same.[4]In the United States, rising cases of insurance fraud approximately costs each family around 400 to 700 dollars each year in increasing premium costs.[5]

The term 'insurance' can be interpreted as an arrangement of indemnity between the insurance company (insurer) and the individual (insured) seeking the coverage against accidental financial loss or risk management.[6] This contract entails paying of a premium amount to the insurer company by the insured, either monthly, quarterly or annually, depending upon the terms of the policy so obtained. Life insurance, Health insurance, Auto insurance, disability insurance are a few examples of insurances being offered by insurance companies. About 472 million people across India have been covered by health insurance policies for the fiscal year 2019.[7] The expression 'insurance fraud' means the abuse of insurance contract between the insurer and the insured through illicit means, for the sole reason of monetary gain.[8] It is a general belief that insurance policies can only benefit, when the insurer receives them via insurance claims. These insurance scams are not exclusive to a single category or gender rather insurers are equally accountable for the damages incurred by the industry.[9] It involves insurers

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[4] Deepak Bhawnani, "*India's insurance industry hit by frauds; insurers pay higher premium to compensate"*, FINANCIAL EXPRESS (Oct. 25, 2020, 3:54 PM IST), https://www.financialexpress.com/industry/indias-insurance-industry-hit-by-frauds-insurers-pay-higher-premium-to-compensate/1926553/.

[5] *5 Most Common Types of Insurance Fraud*, TRANSUNION (Oct. 25, 2020, 11:55 PM IST), https://www.iovation.com/topics/5-most-common-types-of-insurance-fraud#:~:text=Insurance%20fraud%20(not%20related%20to,per%20year%20in%20premium%20costs.

[6] Michael Clarke, *Insurance Fraud*, 29 BRIT. J.CRIMINOLOGY 1 (1989).

[7] Sandhya Keelery, *Number of lives covered under health insurance in India FY 2014-2019*, Statista (Oct. 15, 2020, 11:58 AM IST) https://www.statista.com/statistics/657244/number-of-people-with-health-insurance-india/#statisticContainer.

[8] Zoran Pavlovic et al., *Fraud and Corruption in Insurance,* 2014 J. Eur. Crim.L.R. 43 (2014).

[9] StijnViaene et al., *Insurance Fraud : Issues and Challenges*, The Geneva Papers on Risk and Insurance, Issues and Practice, 29(2) 313, (2004).

providing fictitious policies, churning, or even misrepresentation. In addition, a substantial number of insureds have begun to file deceitful claims for which they are not even entitled. These fictitious claims vary from completely dishonest claims, wherein no genuine loss has been caused to the insured to deliberate exaggeration of the loss, misrepresentation of material facts that might impact the decisions of the insurer or even faking a death.[10] The thin line between obtaining an insurance policy and pressing claims on the same is a concern that results into such frauds.These frauds not only amount to a repugnant breach of the principle of utmost good faith but also obstruct the functioning of the entire insurance industry.[11]

II. THE EMANATION OF FRAUD RISKS: ORIGIN AND CAUSES

The insurance industry, since time immemorial, has been vulnerable to schemes of a fraudulent nature, and subduing the presence of the former has been a worthwhile part of undertaking business.[12] In the United States, one in each set of ten claims that are presented to insurance for the sake of payment are either partially, or wholly fraudulent.[13] In India, back in 2019, insurance frauds caused a loss of Rs. 45,000 crore to the insurance industry.[14] The impact that rampant health care fraud can have on a nation is wide reaching and quite significant.[15] In this regard, it is essential to examine whether where these frauds actually arise; so as to eventually lead to a more informed consensus on what is a more effective remedy with respect to the

[10] Michael Clarke, *The Control of Insurance Fraud – A Comparative View*, 30 Brit. J. Criminology 1 (1990).

[11] Saon Ray et.al ,*India's insurance sector : Challenges and opportunities*, Indian Council for Research on International Economic Relations (Oct 24, 2020, 04:05 PM IST) http://hdl.handle.net/11540/12245.

[12] Guy E. Burnette Jr., *Defending against Insurance Fraud*, 18 Practise Tips 43 (1989).

[13] A.M. BEST CO., BEST'S INSURANCE MANAGEMENT REPORTS, Release No. 46 (1987).*See also* Steven P. Del Mauro, *Health Insurance Fraud: Fighting Back*, 26 BRIEF 11 (1997).

[14] S.K. Sethi, *Insurance Fraud Control Act; an urgent need in India*, Business Today (Apr. 8, 2020, 4:16 PM IST), https://www.businesstoday.in/opinion/columns/insurance-frauds-control-act-an-urgent-need-in-india-fraudulent-claims-indian-penal-code/story/400212.html#:~:text=India%20does%20not%20have%20an,insurance%20industry's%20pocket%20in%202019.&text=In%20percentage%20terms%2C%20most%20insurers,claims%20can%20even%20touch%2035%25.

[15] *Consumer Info & Action*, National Health Care Anti-Fraud Association (Oct. 29, 2020, 3:35 PM IST), https://www.nhcaa.org/resources/health-care-anti-fraud-resources/consumer-info-action.aspx.

same. Fraud risks due to external causes can arise at different stages: while registering clients, reinsurance, underwriting, and the process of filing claims.[16] The most common causes of insurance fraud, which can arise both on the part of the provider, as well as the consumer, have broadly been classified into four sub-heads as explained below.

PADDING CLAIMS

In the Insurance Industry, there are many instances where there are cost reports and *"padding claims"* that charge insurance beneficiaries outrageously high prices and bill Insurance Companies for certain costs that have no relation to the purposes that they are intended for.[17] This is an issue that is immensely pervasive and is applicable across all the different insurance industries; the healthcare insurance industry, the automobile insurance industry, and the other different variants of the former. This issue arises at the point where the insurance claimant or the beneficiary, while filing for a claim, orchestrate it not just to acquire compensation for the loss suffered, but to unlawfully benefit from the same.[18] It further involves the increasing of the claim amount to make up for the remaining deductible amount that the beneficiary has to pay.

ORGANISED ACCIDENT STAGING OR STAGED CRASHES

Back in the 1964, in the USA, a Chicagoan who went by the name of Le Roy Anderson used to lead one of the most well-known and the biggest fraud rings in the nation from the city of San Diego to Buffalo.[19] He had a group that used to stage different auto accidents, and they went on to unlawfully

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[16] *Supra* note 13.

[17] *Legislative History of the Health Insurance Portability and Accountability Act of 1996*: P.L. 104-191: 110 Stat. 1936: August 21, 1996. (1996).

[18] *Padding, Inflating, and Embellishing Insurance Claims*, Sherlock Investigations Inc. (Oct. 22, 2020, 8:46 PM IST),https://www.claimspi.com/uncategorized/padding-inflating-and-embellishing-insurance-claims/#:~:text=Padding%20is%20extremely%20common%20and,policy%20holder%20has%20to%20pay.&text=Inflating%20an%20insurance%20claim%20is,to%20profit%20from%20the%20loss.

[19] WALL STREET JOURNAL, August 28, 1964. *See also* Jeffrey O'Connell, *The Frustrations of Insurance*, 43 UNIV. CIN. L. REV. 847 (1974).

gain around half a million dollars from such activities. The gang members used to drive their cars all over the city until they came across a possible victim. Then a gang member would suddenly swerve his/her car suddenly on from of the car of the victim and stop abruptly, thus leading up to the victim ploughing his/her car into the backside of the ring member's car. Considering the law prevailing at that time which stated in general that the driver of the car driving in the rear side is to blame, the members of the gang raked in a lot of money for car damage. This is a classic example of what an organized accident staging, or more popularly known as a staged crash is. A staged crash is said to occur drivers deceptively lead other unsuspecting drivers into crashes so as to make insurance claims of a false nature. The issue, as can be inferred from its name, is primarily applicable to the automobile insurance sector.

INCREASING BACKLOG OF CASES IN THE JUDICIARY

The pendency of multiple cases before the courts of our country has been a widespread issue, since time immemorial. Considering this gradually mounting backlog of cases, initiating legal action against instances of insurance frauds is not something that occurs commonly, and frauds that do not involve substantially big amounts are not pursued further after a certain point in time by the litigants who initiated the action. This is mostly due to the immense amount of time that gets invested in pursuing such matters, and the considerable amount of energy that one requires in order to pursue the same.Nowadays, the total number of cases pending in our nation stands at approximately 3.7 crore, with 62,000 cases pending in the apex court itself.[20] Furthermore, considering that cases on insurance fraud fall under cases of a criminal nature in general, it is not possible to think of alternative dispute resolution mechanisms with regard to setting such matters.

[20] Kartikeya Sharma, *A Supreme Court, if you can keep it*, Bar and Bench (Oct. 28, 2020, 9:46 PM IST), https://www.barandbench.com/apprentice-lawyer/a-supreme-court-if-you-can-keep-it.

III. "NO PROSECUTION WITHOUT SANCTION": LOOPHOLES IN THE INSURANCE ACT, 1938

The words *"no prosecution without sanction"* have been used in different statutes in India[21] and Singapore[22] to emphasize upon the fact that there can be no prosecution for an offence, unless there is a preordained sanction authorizing the same. As stated earlier, the term 'insurance fraud' is not defined under the Insurance Act, 1938.[23] There are laws such as the Indian Penal Code, 1860[24] within our legal system that deal with issues such as forgery, fraudulent act, and cheating etc. But none of these laws are specifically oriented toward the attenuation of insurance frauds in our nation. Furthermore, the policy of the Insurance Regulatory and Development Authority (IRDA) states that every insurance company must set up and establish a Fraud Monitoring Network. The framework of such a network must comprise of measures to mitigate, detect, prevent, and protect insurance company employees, intermediaries, and policy holders from fraud risks. And such policies are not effective without the existence of effective prosecution remedies against individuals who violate the former. And the sanctioning of such prosecution can be made possible only by means of a statutory authority, which is a potential Insurance Fraud Control Act in this case.

IV. THE NEED FOR STRICTER LEGAL COMPLIANCE MECHANISMS

Insurance is a crucial financial instrument which accounts for an improved risk control of erratic financial risks. In order to provide appropriate financial security, it is paramount to create such an insurance market which is sound and secure for insurance providers, with a strong institutional backing for its supervision. Insurance industry has been eulogised as an

[21] Maharashtra Drugs (Control) Act, 1960, No. 11, Acts of Parliament, 1960 (India).
[22] The Census Act, 1973, No. 47, The Statutes of the Republic of Singapore, 1973 (Singapore).
[23] *Insurance Frauds and Remedies in India*, India Law Offices (Oct. 25, 2020, 1:51 AM IST), https://www.indialawoffices.com/knowledge-centre/insurance-frauds-and-remedies-in-india.
[24] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

industry having tremendous potential, well-regulated yet the most challenging and unexploited sector in India. Besides that, the journey to success in this sector is fraught with potholes of regulatory uncertainty and overreach that require insurance firms to pursue the skills of a rough racer who can persistently navigate these potholes and overcome emerging threats and disputes.[25] Insurance fraud has been rampant and it is difficult to recognise the fraudster with the conventional approaches.[26] The stimulus behind insurance fraud are largely attributed to the indignation of insurance company or retaliation by the insurer for some personal service exchange which they assume to be detrimental to them.[27] The background of inadequate due diligence in determining terms of new policy conditions by insurance companies and the strategic skills of the opportunist fraudsters to locate those who are on deathbed and then in extorting other officials to produce false certificates have led to increased number of insurance frauds.[28] The perpetrators are often under the belief that these frauds only hampers the excessive earnings of the insurer. But in reality, insurance frauds have caused considerable distrust and repugnance among the general public and one with a genuine claim feels the brunt.[29] When the industry unfolds one scam and set certain rules and protocols to be followed in order to avoid its contingency in the future, another scam takes place. The insurance industry is draining damages due to the growing number of insurance frauds in the world and has been thrown into a problematic situation. It suffers a loss of around Rs. 40,000 crore every year which makes up for 8.5 per cent of the revenue that the industry generates.[30]

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[25] ShailajaLall et al, *India: New Insurnce Laws – Its scope and challenges?*, Mondaq (Oct. 30, 2020, 12:50 PM IST) https://www.mondaq.com/india/securitization-structured-finance/674252/new-insurance-laws-its-scope-and-challenges .

[26] Nicola J Morley , Linden J. Ball et al., *How the detection of Insurance fraud succeeds and fails*, PSYCHOLOGY, CRIME & LAW, 12(2) : 163-180 (2007), (Oct, 14, 2020, 03:56 PM IST), http://doi.org/10.1080/10683160512331316325.

[27] *Supra* note 9.

[28] ShailajaLall, *India: New Insurnce Laws – Its scope and challenges?*, Mondaq (Oct. 30, 2020, 12:50 PM IST) https://www.mondaq.com/india/securitization-structured-finance/674252/new-insurance-laws-its-scope-and-challenges .

[29] Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 U. Miami L. Rev, 907 (1992).

[30] Nirmala Konjengbam, *Fraud in Insurance sector*, OUTLOOK INDIA(Oct 30, 2020, 10:04 PM IST) https://www.outlookindia.com/outlookmoney/insurance/frauds-in-insurance-sector-3706.

The present regulators lack expertise and are unequipped to cope with the diverse and varied forms of insurance frauds taking place every day. There are no particular guidelines as to what is specifically classified as insurance fraud. For certain insurance firms inflating loss value or knowingly exaggerating a claim is constituted as a fraud and for certain firms there are some forms of systematic practices (misrepresentation of documents, claiming for an existing illness etc.) that they consider as insurance fraud. Moreover, in most of the cases, due to a lack of proof , the fraud is not recorded.[31] This needs both clarification in objectives and directives of the insurance regulators and a well-defined and organized allocation of resources between various insurance authorities involved. Insurance frauds are often termed as a low-risk high reward game for criminals as there is no specific legislation in the country to control them, and the Insurance Act, 1938 which was passed during British rule to undertake the regulation of the Indian Insurance Sector, does not attenuate the issue in any way. Therefore, there is an immediate need to enact a new insurance fraud prevention act in India to create a fear of external sanction among the perpetrators. The retribution for such frauds must be swift in order to deter its happening.

V. A CROSS-COUNTRY ANALYSIS OF DIFFERENT FRAUD CONTROL ACTS

So as to contribute towards a more practical understanding of the present topic, this section will comprise of a cross-country analysis of different fraud control acts whereby the legal regimes governing and regulating cases of insurance fraud in France, and the United States will now be elaborated upon. The responses of the aforementioned countries will be analysed in order to *firstly* illuminate the different variations as to what extent fraud is perceived as a major problem, *secondly* to determine the variations and similarities in the responses to this problem, and *thirdly* to ascertain the difficulties that the former would have faced in achieving control. This data in turn, can potentially be utilised in order to contribute towards the

[31] *Supra* note 5.

bringing about of a more comprehensive insurance fraud control act in our nation.

UNITED STATES

The United States is said to have a vast history of acknowledging insurance fraud as a matter of concern and, as a result, has the most advanced monitoring and control system. In 1987, the US Chamber of Commerce asserted the cost of the insurance fraud to be 25 per cent of the policy premiums which comes out to be around $15 billion per annum.[32] The need to have an insurance fraud control scheme was felt within the industry. The drive then eventually developed regional and thus, national investigative data-collection, training and capacity building and regulatory control competence.[33] Further, the proactive publicity of fraud by the control authorities and insurers has also played a critical role in creating an apprehension for the fraudsters. It allowed companies and insurers to rebuild the confidence of genuine insured individuals and persuaded them that their interest is being sternly preserved. At present, the federal legislation does not treat insurance fraud as a single crime. Insurance fraud is considered as a crime in all states and is subject to mail and wire laws of the country which enables the jurisdiction of government authority over such frauds [34]. The study of the legal regime controlling and managing insurance fraud cases and the recent developments in United States in relation to the same can made out from a bare perusal of the following.

THE SYMBOL OF A DEVELOPED FRAUD CONTROL SYSTEM

The entire fraud control system in United states is administered through national institutions along with a company based special investigation team.[35] In the 1960s the number of insurance frauds steadily grew, leading to

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[32] *Supra* note 7.
[33] *Id.*
[34] S K Sethi, *Insurance Frauds Control Act : an Urgent need in India*, Business Today (Oct 29, 2020, 04:40 PM IST) https://www.businesstoday.in/opinion/columns/insurance-frauds-control-act-an-urgent-need-in-india-fraudulent-claims-indian-penal-code/story/400212.html.
[35] Richard A. Derrig, *Insurance Fraud*, The Journal of Risk and Insurance, 69 (3) 271, (2002).

the establishment of a specialized national investigation agency. Later in the year 1971, it came to be known as the Insurance Crime Prevention Institute (ICPI). Since then the agency has been expanding immensely covering more than 10,000 fraud arrests with a conviction rate of 80 per cent. The agency aims to investigate all the unusual cases in all the sectors of insurance. It has the potential to interfere in the working of the highly skilled perpetrators and get the publicity required to dissuade more amateurs.

ESTABLISHMENT OF EFFICIENT SYSTEMS FOR DATA PRESERVATION AND ARSON CONTROL

Arson emerged as a major concern in the US in 1970s. It was one of the largest obstacle that is usually posed by the insurers, and its abuse by fraudsters and syndicated criminals was a considerable challenge. In order to tackle the issue of Arson in the country, the Property Insurance Loss Register, was launched under the umbrellas of the American Insurance Association. It keeps a computerized database on fire damages recorder by fire insurers, retains records on fire claims for a duration of five years, and also the details on all robbery and embezzlement reports of more than $1000 for a term of three years for the purpose of arson regulation in the country.[36]

Moreover, an intelligence unit, the Insurance Committee for Arson Control was formed in 1978 which now accounts 85 per cent of US property/casualty insurers.[37] It provides guidance and suggestions to authorities as well as policymakers and facilitates promotion and advertising.

TRAINING PROGRAM SCHEMES FOR INSURANCE PERSONNEL

Insurance fraud is never stagnant rather it is motivated by the intricacy and evolving opportunities in the business environment. It is important to be well-trained in order to counter the emerging danger of such frauds. The US insurance system provides for a wide range of training programs for insurance employees. These training schemes aids the personnel in proper

[36] *Supra* note 15.
[37] *Id.*

identification and prosecution of fraud. Further, an anti-fraud awareness programme is run by the Property Loss Research Bureau which offers general guidance and training to insurance personnel. The US Insurance Service Group operates a network for third-party claims of injuries. It retains a registry for around 30 million individuals thence producing 1.4 million files each year to insurers. These documents have been held for five years. A study revealed that these records provides a basis for verification of the claims so made.

EFFECTIVE COORDINATION BETWEEN SIUS AND INSURANCE COMPANIES

Special Investigation units are established by the Companies as their investigative equivalents to the national institutes (like the Insurance Crime Prevention Institute). It originated in Massachusetts and is now a major global network. It involves recruitment of skilled and trained personnel to counter the developing trends in insurance fraud. These special investigative teams have proved to be an asset for the US insurance system. Around the same time, though collaborating with national authorities, it still operates an informal national network.

FRANCE

The country of France, since a considerable period of time has clearly surpassed its counterparts in controlling fraud control, and has moved faster and further than any European nation in tackling this issue. One major reason behind this success is that the state has actively been involved in the tackling of such frauds. A context reminiscent of this can be seen in the instance of the Anglo Saxons, where the state was pervasively involved in regulating each and every aspect of the economy and the society, and particularly, the different industries functioning therein. Similarly, in France, four of the five largest insurance companies have been nationalised, and their leaders are appointed political officials. More importantly, the state takes upon itself the responsibility of ensuring that sensitive industries such

as insurance and banking are run successfully and soundly. While ensuring the same, they take care that public interest is unconditionally upheld with regard to the same. The law that regulates the Insurance Sector in France is the French Insurance Code (FEC), which was passed in the year 1978. Furthermore, the code has been subjected to various different amendments over the years. The amending provisions of the EU Directive[38] on Insurance Distribution which was enforced on 1st October, 2018 were infused into the FEC on 16th May, 2018, and accordingly by a decree which was given on 1st June, 2018.[39] This transposition brought about by this amending ordnance mandated certain principles to be followed by parties while engaging in the distributing of insurances. The ordnance mandated that the entities and individuals engaging in insurance practice must take all care to *"act in a professional, impartial, and honest manner, and in the best interests of the insured."* An analysis of the legal regime governing and regulating cases of insurance fraud and the present trends in France prevailing with regard to the former can be made out from a bare perusal of the following.

THE APPOINTMENT OF A DEDICATED LIAISON OFFICER AND THE CREATION OF A LIAISON GROUP OF INSURANCE COMPANIES TO CONTROL FRAUD

Ever since the month of March'88, a police commissioner has been appointed as a liaison officer, who is primarily based at the *Assemblée Plénières des Sociétésd' Assurance Contrel' Incendie et les Risques Divers* (APSAIRD), or the Plenary Meeting of Insurance Companies Against Fire and Miscellaneous Risks, which stands for the central investigative agency.[40] The duty of this commissioner is to ensure that all insurance fraud cases are vehemently dealt with at every point they surface, and that local officers do not relegate such cases to lower priority. To sum up the aforementioned

[38] Council Directive 2016/97, (L 521-1) 1 (EC).

[39] Louis Cornut-Gentille, Pauline Arroyo, *Insurance and reinsurance in France; an overview*, Thomson Reuters: Practical Law (Oct. 29, 2020, 10:11 PM IST), https://uk.practicallaw.thomsonreuters.com/9-501-3248?transitionType=Default&contextData=(sc.Default)&firstPage=true.

[40] Michael Clarke, *The Control of Insurance Fraud*, 30 Brit. J. Crim. 11 (1990).

functions, their job is to that there is an unhindered cooperation between the insurers and the police in handling cases of fraud. In 1985, a liaison group comprising of all insurance companies, namely *Groupe de liaison contre la fraude à l'assurance* (GLAFA), which means the Insurance Fraud Liaison Group was established to control instances of insurance fraud. This body in turn, acts for the sector that deals with fire and general risks, i.e., the APSAIRD.

ESTABLISHMENT OF A REGISTRY OF FRAUDS

Another notable measure undertaken by the GLAFA is the establishment of the registry of frauds in the year 1981, which was classified and separated into two constituents each, for accidents in general, and fire accidents in specific. Subsequent to the setting up of the registry, an investigative service was set up under the same, and made accessible to insurance companies for enhanced investigative procedures undertaken to combat insurance fraud. This service also maintained an investigator network, with hundred investigators serving. All of the investigators had previously served in the police force, and most of them were private investigators as well. They are primarily involved in the production of reports that positively contributes towards the prosecution of cases of insurance fraud.

INTEGRATION OF EXISTING REGISTRATIONS INTO A NATIONALISED SYSTEM

After the setting up of the registry, a programme was constituted to amalgamate the existing collective set of registers into a system at the national level, and to incorporate the same into the internal controls and records that insurance companies keep. This elaborate task of a technological, administrative, and a political nature has been entrusted with the *Comité pour la Productivitéen Assurance* (CAPA) or the Insurance Productivity Committee, which has the vast support of insurance companies and the government itself. This programme has the capability to enable a rapid exchange of information between collective bodies and various

insurance companies, so as to increase the proper utilization of the data pertaining to the insurance beneficiaries being stored in the registry.

ISSUES IN THE RURAL SECTOR

There has been a problem that has persisted in rural France since a considerable period of time. Many French country castles and houses, more preferably known as chateaux, which have been under the ownership of families for various generations have been at a major risk of fires and arson, considering the high maintenance costs that such opulent homes come with, which the owners of these houses can afford no longer. Insurers in France have made the procedure of claim stricter when it comes to such chateaux, but with smaller houses, they have modified certain policies to ensure that the insured value which the owners will receive is closer to the real estimated value of the smaller buildings in their broken-down state. This problem also persists with regard to animals, crops, and agricultural buildings.

VI. CHALLENGES TO BE ADDRESSED WITH REGARD TO THE BRINGING ABOUT OF A FRAUD CONTROL ACT

Insurance fraud is an outcome of opportunity and motivation behind committing such fraud. It puts an enormous strain on the economy and are expected to increase in the foreseeable future. It is amongst the costliest issues faced by the industry and has attracted attention of regulators as well as the legislators. It is one of the most challenging concerns facing the industry and has drawn the attention of both the regulators and policymakers. In view of the number of insurance frauds since the economic crisis, regulators are of the opinion that they should take tougher stand in order to curb the same. Controlling an insurance fraud entails a range of complications and challenges within its scope. These challenges include detection of the fraud at the exact stage, ascertaining proof of insurance fraud, overcoming the issue of kickbacks in the healthcare industry and many more.

UNCOVERING FRAUD AT THE EXACT STAGE

Firstly, detecting the stage at which insurance fraud took place. Insurance fraud is not self- evident.[41]All the transactions taking place in the industry are now automated. The fraudsters too use latest technology while committing such variety of frauds. One of the most daunting problem, however, is the working mechanism and the increased use of influential information and communication technologies in the industry. These technologies facilitate technical consistency but they do not provide any security for the transaction taking place. Fraud has to be promptly detected in order to be addressed. In order to detect the fraud in less time, the Fraud control regime has to be strategized and upgraded with both communication and information technologies so as to create an apprehension of being caught in the mind of the fraudster.

PROVIDING LEGAL EVIDENCE ABOUT THE OCCURRENCE OF THE FRAUD

Secondly, Insurance fraud requires proof. Simply suspecting a fraud in not enough to prove the same. In most of the cases insurance frauds are not recorded due to lack of evidence. Where evidence of misappropriation is exposed, the instinct of the insurers is to protect their rights and those of respectable insured people by opposing the allegation and denying further protection. The call for prosecution by the authorities is reserved for more blatant cases since it requires a significant degree of justification. In order to opt for a legal course of action against the fraudster, one has to be prepared with proof beyond reasonable doubt and high standard legal evidence.[42]

COUNTERACTING KICKBACK SCHEMES

Thirdly, the issue of kickbacks. The kickbacks schemes offer a huge enticement to the fraudsters to exploit the entire decision-making process of

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[41] *Supra* note 10.
[42] *Id.*

a medical practitioner.[43] Kickbacks have led to insufficient medical treatment, including unnecessary hospitalization, surgical supplies as well tests. In addition to the kickback schemes, theft of insureds identification has also become prominent in the industry. The personal health information of the insureds are also being stolen by the fraudsters in order to either sell it or use them to make false claims. The lack of regulation and complex structure have contributed to extensive misconduct and abuse of regulations in the industry.

DUE DILIGENCE

Lastly, Insurance fraud requires proper due diligence and expert scrutiny**.** It means that verifying the submitted documents at the time of entering into the contract is not enough. Reviewing and processing large volume of data remains a significant obstacle for the Insurance companies. Furthermore, Insurance fraud is never static rather it is driven by the intricacies and emerging opportunities in the business environment. It is easier for high-level fraudster to detect and invest on the latest opportunities. Therefore, a proper due diligence of the information provided both at the transaction level as well as at the time of the claim has to be done rigorously in order to prevent emerging uncertain perils. Merely ignoring an investigation due to low claim amount is a major mistake as it creates opportunities for the experienced crooks to exploit the system. A regular investigation (both civil and criminal) by the regulator with imposing heavy penalties on brokers and companies on the grounds of failure to thoroughly and reliably disclose details is needed.

VII. CONCLUSION: THE PATH AHEAD

Today, as the insurance industry in our nation constantly works towards the reduction of expenses and costs, one major area on which it focusses upon extensively is to reduce further losses incurred as a result of insurance fraud. This can be accomplished by resorting to means like establishing active

[43] Nicole Forbes Stowell, Carl Pacini et al., *Investigating Healthcare Fraud: Its scope, applicable laws and Regulations*, 11 Wm. & Mary Bus. L. Rev. 479 (2020).

investigating units in every insurance company and setting up a registry of frauds apart from quite a few others measures, which can be derived from the positive example that the nations of France and the United States have set, as can be made out from the analysis. The road does not end at this point since, as emphasised upon earlier, there can be no prosecution for an offence, unless there is a preordained sanction authorizing the same, which is possible only by means of heralding a comprehensive Insurance Fraud Control Act in our nation. The insurance industry is considered to create an equilibrium between contingent gain and anticipative loss. Insurance companies offer a wide array of policies that rely exclusively on risk management in expectation of unpredictable damages, but this timely, regular provision of such benefits to the people of our nation may get thwarted to a considerable extent due to elements of fraud, until and unless the needful is done. The persisting fight to subdue healthcare fraud is essential for the Indian Society. Each and every rupee that is recovered or saved from fraud can be utilized to afford people more opportunities for better healthcare and insurance services. Despite the statutory frame being absent with regard to insurance frauds in India, the courts have always strived to provide aggrieved insurers and beneficiaries with equitable relief in certain appropriate cases, but the heralding of a Fraud Control Act would be helpful and beneficial to everyone.

'BANKING' IN THE NAME OF 'FAITH': A LEGAL PERSPECTIVE OF ISLAMIC BANKING IN INDIA

Abhishek Gupta*

I. INTRODUCTION

IN INDIA, banking laws are applicable to all classes of persons uniformly. Notwithstanding a few beneficial provisions permitted under the legal framework, banking services are generally open and accessible to all without any distinction. Thus, while providing their services, banks and financial institutions cannot ordinarily discriminate between persons or class of persons.[1] Having said that, in India, the demand for introducing Islamic banking has been raised from several quarters in the past. Whether as a tool of financial inclusion, or an alternate approach to micro-financing, or for its commercial and investment utility, the potential of Islamic banking in India has been the subject-matter of public discourse since 2000s. The expert committees such as Raghuram Rajan committee (2007),[2] RBI's Deepak Mohanty committee (2015)[3] and Report of RBI's Central Board (2016)[4] recognised the problem of voluntary financial exclusion among Muslims in India due to the absence of interest-free banking products, and recommended introduction of 'interest-free' or Islamic banks as a possible solution.

The legal issues in the introduction of Islamic banking emerges from the potential conflict between the 'religious' principles and 'secular' banking

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regulations in India. The question is specific whether a banking system based on religious principles (Islam) would conflict with the provisions of the constitution and the ordinary legal framework; or whether State instrumentalities performing purely commercial activities, which are expected to maintain religious-neutrality, could regulate or offer Islamic banking services.

Till date, the RBI and Central Govt. have maintained a hands-off approach to the question of introducing Islamic banking in India, arguing its non-feasibility of in the present legal setup. The problem seems to be located in the existing statutory and regulatory framework which governs the present banking system in India. The primary legislation – the Banking Regulation Act, 1949 (hereinafter, BR Act) was enacted at a time when the concept of Islamic banking was relatively unknown. Hence, it's natural that a broad legal and policy framework designed to suit conventional banking business, didn't take into account the Islamic model of financing. In light of the issues raised, it's pertinent to analyse the existing constitutional, statutory and regulatory framework of banking in India to assess the legal practicability of Islamic banking, and draw potential legal and policy implications involved in the process.

II. WHAT IS ISLAMIC BANKING?

Islamic banking is a byproduct of Islamic economics. Thus, the principles of Islamic economics, which have shaped the Islamic commercial law, also applies to the banking business organized under the principles of Islam. In otherwords, financial transactions entered by the Islamic banks are subject to same rules and regulations which are applicable to any other commercial

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[1] In LIC of India v. Consumer Education & Research Centre, AIR 1995 SC 1811, the SC struck down a life insurance scheme introduced by the LIC (a public-sector company) solely for the benefit of the persons employed in government or semi-government services, or of reputed commercial firms.

[2] Raghuramrajan, a hundred small steps: report of the committee on financial sector reforms72 (2009).

[3] Deepak mohanty, Reserve Bank of India, *Report of the Committee on medium term path on financial inclusion*40-44 (2015).

[4] Reserve bank of India, *Report of the Central Board of Directors on the working of the reserve bank of India* 2015-16 71 (2016).

transactions under an Islamic system. Islamic banking may be defined as "an organised institutional framework designed to spread the application of the Islamic banking concept by establishing banks and investment organisations throughout the world, operating in accordance with Islamic economic doctrines".[5]A more exhaustive definition was provided by the Malaysian Central bank:[6]

> "Islamic banking refers to a system of banking that complies with Islamic law also known as *Shariah* law. The underlying principles that govern Islamic banking are mutual risk and profit sharing between parties, the assurance of fairness for all and that transactions are based on an underlying business activity or asset...These principles are supported by Islamic banking's core values whereby activities that cultivate entrepreneurship, trade and commerce and bring societal development or benefit's" encouraged. Activities that involve interest (*riba*), gambling (*maisir*) and speculative trading (*gharar*) are prohibited."

Following principles have been recognised as fundamental tenets of modern Islamic banking.

1. Principle of *riba* (Interest/usury) prohibition– 'Interest-free banking'.
2. Principle of risk-sharing – 'Participatory banking'.
3. Principle of *Gharar* – Prohibition on uncertain transactions.
4. Principle of *Mayasir* & *Haram*–Prohibition on wagering & other prohibited investments.

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[5] Abhishek Gupta, *Embracing Islamic Banking in India: Impediments and Solutions*,2 JAMIA L. J. 47, 48 (2017).

[6] *Bank Negara Malaysia*, http://www.bnm.gov.my/index.php?ch=fs_mfs&pg=fs_mfs_bank (last visited Oct. 9, 2020).

III. ISLAMIC' BANKING & 'NON-RELIGIOUS' INDIA'S BANKING FRAMEWORK: CONSTITUTIONAL PERSPECTIVES

On a *prima facie* consideration, 'Islamic' banking would appear contrary to the principle of equality enshrined under article 14 of the constitution r/w article 15, which forbids discrimination on the basis of 'religion'. Such a challenge would form a strong legal basis for the judiciary to strike down any law which introduces Islamic banking for the sole access of the Muslims. Thus, the introduction of Islamic banking or Islamic banking regulations may not pass constitutional muster, if the objective is exclusionary in nature and without any reasonable classification. The prefixing of the terms like 'Islamic' or '*Shariah*', creates an assumption about the non-accessibility of such type of banking to non-Muslims – which is not correct. The experiences from across the world have shown that Islamic banking is open to all persons irrespective of their religion. Notwithstanding the fact that Muslims are the major consumers of Shariah-compliant banking, non-Muslims are free to access such banks and avail their services.

Islamic banking is an economic concept which conforms to certain principles of Islamic law (*Shariah*) and doesn't prohibit any non-Muslim from accessing its products and services. For example, the *halal* certification of food products in India cannot be called as violative of article 14 or 15, merely because it provides certification of food products in accordance with the Islamic dietary code, since the certification is not restricting other communities from consuming such products, but is merely assuring Muslims that the relevant food conforms to their religious dietary standards. Thus, the introduction of Islamic banking, unless introduced with specific exclusionary provisions, would not be violative of article 14 and 15 of the constitution.[7]

[7] *Supra* note 1 at 1822.

STATE INSTRUMENTALITIES OFFERING ISLAMIC FINANCE – KERALA HC JUDGMENT SHOWS THE WAY

The Kerala HC in the case of *Dr. Subhramanium Swamy* v. *State of Kerala*,[8] grappled with these issues and pronounced a landmark judgment which sought to harmonize Islamic financial activities with the concept of secularism. The brief facts and contentions of the case were – on October 14, 2009 the Government of Kerala took an in-principle decision to promote Islamic financial services as an alternative route of attracting investments. The Government of Kerala announced that the Kerala State Industrial Development Corporation (KSIDC) would contribute 11% equity to a proposed *Shariah*- compliant NBFC. As a result, on November 30, 2009 Al-Barakah Financial Services Ltd. was incorporated, with an 11% equity from KSIDC. This was challenged in the Kerala HC.[9]

The main contention of the petitioner was that the decision of the Kerala Government and the KSIDC to contribute equity in Al-Barakah Financial Services Ltd. was violative of State's constitutional obligation as a secular entity and specifically article 27.[10] Whereas, the State respondents argued that the objective behind the impugned decision was to attract utilised funds and investments from Gulf countries – thus, purely to derive 'commercial benefit'.[11] Defending its decision to participate in a *Shariah*- compliant financial activity, the State respondents pleaded that as long as the company operated in compliance with the existing laws and regulations, mere adherence to the principles of *Shariah* would not make the business inconsistent with the constitutional doctrine of secularism.[12] In its judgment dated February 3, 2011, the HC dismissed the writ and ruled that it had no objection to KSIDC carrying on a business that was *Shariah*- compliant, in addition to fulfilling with the laws of the country – thereby upholding the Kerala Government's decision.

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[8] Dr. Subhramanium Swamy v. State of Kerala, (2011) SCCOnline Ker. 3692.
[9] W.P. (C) 35180 of 2009 by Dr. Subhramaniam Swamy and W.P. (C) 10662 of 2010 by R.V. Babu.
[10] *Supra* note 8.
[11] *Id.*
[12] *Id.*

The court observed that the constitution recognises the freedom of religion, by protecting the essential religious practices on the one hand, and giving the State authority to regulate the secular aspects of religion (including economic, financial and political activities).[13] However, the court concluded that unlike the U.S. constitution and the Western concept of secularism, Indian secularism doesn't subscribe to the doctrine of 'wall of separation' between the State and religion. The court while referring to various constitutional provisions and judicial pronouncements, buttressed the point that interaction between the State and religion was inevitable in certain areas and to suggest a blanket ban on State's association with religious denomination was not correct.[14] Whereas, while delineating upon the limits to the State's authority to enter into commercial transactions with a religious denomination, the court referred to the wide executive power of the State under article 298 to carry on any trade, business, or make contracts for any purpose. The court ruled that in view of the generality of article 298, imposition of fetters on the State to engage in commercial activities even with a religious denomination, on the ground that it would be violative of the preambular declaration of secularism and republicanism would be 'illogical' and 'unwarranted'.[15]

The court also said that although the company claimed to follow the principles of Islamic law (in addition to the State laws and regulations) while carrying its business, its aim was not to spread religion, and the state's participation in it was based on purely commercial reasoning.[16] The court went to say that denying the State and its instrumentalities from participating in a commercial activity on the ground that the business is carried in accordance with the principles of Islam, may amount to discrimination on religious grounds.[17]

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[13] See, INDIA CONST. art. 25, art. 26. Also see, 'essential practices test' laid down by the SC in Commr. HRE, Madras v. Sri Lakshmindra, AIR 1954 SC 282, 290 (*Shirur Mutt* case).
[14] *Supra* note 8. Also see, St. Stephen's Collegev.University of Delhi, (1992) 1 SCC 558, wherein Justice K. Jagannatha commented that "minorities cannot be treated in a religious-neutral way".
[15] *Id.*
[16] *Id.*
[17] *Id.*

IV. STATUTORY ISSUES IN INTRODUCING ISLAMIC BANKING

CLASSIFYING ISLAMIC BANKING AS 'BANKING' UNDER BR ACT

The preliminary question which arises before the introduction of Islamic banking in India is – whether 'Islamic banks' fall under the definition of 'banks', or whether 'Islamic banking' qualifies as banking business, under the present statutory framework. As per the BR Act, a 'banking company' is a "company which transacts the business of banking in India".[18]However, the explanation clause to section 5 (c), specifically excludes a manufacturing or trading company which accepts deposits from public to finance its own business, from being regarded as a banking company under the BR Act. Thus, the statutory meaning attributed to 'banking' must be examined to ascertain the legal contours of banking business in India. The statutory definition of 'banking' derives its essence from the common law, which placed acceptance of deposits for lending as the primary function of a bank.[19] The BR Act defines 'banking' as:[20]

> "...the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, or otherwise."

Although section 5 (b) doesn't lay down a definition *per se*, it codifies the core functions a bank. The function of 'accepting deposits for lending' has been recognised as the principal function of a bank, by the SC in *ICICI Bank Limited* v. *Official Liquidator of APS Star Industries Ltd.*[21] On a bare perusal, it becomes clear that the definition doesn't explicitly prohibit Islamic banking business. The wording of the provision is wide enough to incorporate the essential functionalities of a typical commercial Islamic

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[18] Banking Regulation Act, 1949, § 5 (b), No. 10 Acts of Parliament, 1949.
[19] See, Re Shield's Estate, Governor and Co. of Bank of Ireland, [1901] 1 IR 172; State Savings Bank of Victoria Commissioners v. Permewan Wright and Co Ltd. [1915] 19 CLR 457.
[20] *Supra* note 18, § 5 (c).
[21] ICICI Bank Limited v. Official Liquidator of APS Star Industries Ltd., (2010) 10 SCC 1 (para. 12).

bank. For instance, a commercial Islamic bank is also engaged in the business of mobilising and accepting deposits from public, and using such deposits for making investments. However, the peculiar nature of financial intermediation in Islamic banks raises two issues where certain aspects of Islamic banking would potentially conflict with the definition of 'banking' provided in section 5 (b).

The first problem is with respect to investment deposits (*mudharabah* deposits), where depositor's capital is not guaranteed but subject to profit or loss. Due to the risk-sharing nature of such deposits, an Islamic bank may face difficulty in repaying the depositors in full. Thus, to accommodate investment deposits, either such deposits would require to be classified as 'investments' and treated as a separate banking activity; or since section 5 (b) recognises 'investment' as a lawful channel of deploying public deposits, an explanatory amendment recognising return of deposits subject to 'profit or loss' would conveniently accommodate investment deposits.

The second problem would emerge from the sale-based nature of financing used in Islamic banking. In Islamic banking, the bank accepting public deposits is not engaged in lending in a conventional sense, but essentially undertakes trade financing. In other words, money accepted as deposits would also be used for trading activities viz. purchasing goods/properties in the name of customer and selling/leasing it to the customer, the use of such deposits for such purpose would fall outside the scope of 'lending and investments' used in context of banking business. Thus, in the absence of proper legal authorisation, Islamic banks would face difficulty in using public deposits for the sale and purchase of goods/properties for the purpose of financing.

SWEEPING AMBIT OF SECTION 6, BR ACT – FACILITATOR FOR ISLAMIC BANKING

Apart from the core business of banking (accepting deposits for lending), the banks may also undertake a number of other forms of business. The sub-

clause (a) to (o), section 6 (1) of the BR Act, enable the banks to carry out 13 broad kinds of business in addition to banking. The entries in the sub-clauses are wide enough to include a number of businesses performed by any commercial bank. The scope of section 6 (1), BR Act was explained by the SC in *ICICI Bank* case:[22]

> "...in addition to the business of banking, a banking company may engage in any one or more of the forms of business enumerated in Clauses (a) to (o). It covers borrowing, lending, advancing of money; acquiring and holding and dealing with property (security) or right, title and interest therein; selling, improving leasing or turning into account or otherwise dealing with such security; doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company and any other form of business which the Central Government may notify..."

Since a large part of Islamic banking is engaged in dealing with property (acquiring, selling, leasing, improving, disposal etc.) or right, title and interest therein; or acting as agents, section 6 (1) authorises such type of businesses to be undertaken by banks. Furthermore, sub-clause (o) authorises the Central Government to notify a specific form of business which the banking companies may undertake. Thus, certain products used in Islamic banking business (such as *mudarabah* deposits) could be introduced by way of a gazette notification u/s 6 (1) (o). Besides, section 6 and its ensuing clauses are not restrictive but enabling in nature, and the banks are authorised to carry diverse businesses, in addition to deposit-taking and lending business. Giving credence to this argument, the SC in *ICICI Bank* case prescribed 2 conditions for determining whether an activity proposed to be undertaken by a bank is permissible or not:[23]

1. The relevant business activity need not be a deposit-taking or lending activity prescribed u/s 5 (b) of the BR Act; and

[22] *Supra* note 21.
[23] *Supra* note 21.

2. The relevant business activity must not fall within the prohibitions imposed u/s 8 and 9 of the BR Act.

The Islamic banks or 'windows' could well satisfy the first condition. But the second condition relating to prohibition u/s 8 and 9 are discussed as under.

PROHIBITION UNDER SECTION 8, BR ACT

Section 8, BR Act specifically prohibits a banking company from engaging in trading activities which involves selling, buying or bartering of goods. The essential ingredients of section 8 are:

1. "Non-engagement with buying, selling or bartering of goods except in connection with the realisation of security given to or held;"

2. "Non-engagement with any trade, or buy, sell or barter goods for others otherwise than in connection with bills of exchange received for collection or negotiation or with such of its business as is referred to section 6 (1) (*i*)."

The prohibition contained in section 8 also overrides any contract and other forms of businesses permissible to banks, u/s 6 (1) sub-clause (a) to (n), if they have trading component. Since, Islamic banks use financial instruments (*murabaha*, *musharakah, ijarah*, *istisna*, *bai salaam* etc.) which necessarily involves direct selling and buying of goods as a key component, the trading prohibition poses a major legal and operational challenge to the introduction of Islamic banking in India.

Against this background, the *ICICI Bank* judgment becomes crucial, since the issue in the instant case was whether banks were permitted to engage in the trading of NPAs. In the absence of any explicit provision dealing with NPA trade, it was contended that the said activity was hit by the trading prohibition inflicted by section 8. However, the SC rejecting the contention, held that trading in NPAs was not violative of the BR Act. The SC while upholding the NPA trading by banks, took note of the RBI regulations which

authorised such activities u/s 21 and 35A, BR Act, in spite of the fact that there was no amendment in the BR Act permitting such activities. Thus, the RBI holds crucial regulatory powers and authority to determine the permissibility and limits of other forms of business which the banks may undertake. The SC's reasoning and RBI's authority could also be extended to enable Islamic financial instruments to be used by the existing commercial banks (hereinafter CBs) through 'Islamic windows', or by full-fledged Islamic banks.

Furthermore, *proviso* to section 8 exempts businesses notified u/s 6 (1) clause (o). This means that any lawful business notified by the Central Govt. u/s section 6 (1) clause (o) shall not be prohibited from carrying out trading activities. Thus, a Central govt. notification for allowing Islamic banking or any specific activity of Islamic banking, will not attract the prohibition laid down u/s 8 of the BR Act. However, such an approach will require elaborate prudential norms to be set out for such an arrangement. Besides, the fetters imposed by section 8, doesn't apply to certain public sector banks.[24] Section 51, of the BR Act severely restricts the application of BR Act, including prohibition contained in section 8, on the SBI and nationalised banks. Thus, the SBI and nationalised banks are free to offer Islamic banking products which have trading component, without attracting any challenge from the BR Act. Hence, a cumulative effect of section 51 and 6 (1) (o), BR Act, removes any statutory impediment for the public sector banks, if Islamic instruments used for trade financing activities, are notified by the Central govt. as a permissible. However, private sector and foreign banks would continue to be governed by the mandate of section 8, unless authorised by the RBI or the Central Govt.

Besides, the intention behind section 8 was primarily to prohibit a banker from engaging in buying, selling or bartering of goods as distinct business undertaking.[25] Therefore, the prohibition was not specifically intended to be

[24] M.L. Tannan, *Tannan's Banking Law* 38 (Mandira Mitra ed., 1st ed. 2015).

[25] See, VipinWarrier, *Inaccessibility to faith-based Banking – Denial of a Constitutional Privilege??* (Aug. 25, 2014, 9:10 PM), https://www.livelaw.in/inaccessibility-faith-based-banking-denial-constitutional-privilege/.

applied on a transaction where trading of goods was carried to facilitate the business of banking conducted in accordance with the principles of Islamic law.[26]In other words, the trading component involved in Islamic financing is merely incidental to facilitate the banking business conducted in a manner which is consistent with the principles of Islamic law.

PROHIBITION UNDER SECTION 9, BR ACT

There are certain activities in Islamic banking which involves dealing in immovable property i.e. real-estate trading and financing. The financial instruments such as *musharakah*, *murabaha*, or *ijarah* etc. are commonly used by Islamic banks to trade and finance real-estate projects and provide home loans to their customers. The Islamic law on banking requires the bank to directly engage in the sale and purchase of an immovable property, in order to justify its profit mark-up. Thus, under Islamic financing, bank purchases the relevant property on behalf of its customer. While at the same time, keeps the title of such property and assume risks associated with it, till the principal amount is paid. The assumption of risk from owning an immovable property justifies the bank to earn profits from the transaction. This conflicts with section 9 of the BR Act.

Section 9 specifically prohibits a bank from holding any immovable property except for its own use. Similar provision can also be found in section 34 (6), SBI Act.[27] Section 9 in addition to the prohibition, directs the banks to dispose-off any immoveable property within 7 years of its acquisition. The prohibition on banks imposed u/s 9, also overrides section 6 of the BR Act. Thus, even Central Govt. can't notify trading in immovable property by banks, as a form of business u/s 6 (1) (o). But the stringency of section 9 is relaxed by its *proviso* which grants a period of 7 years to the banks to deal or trade in immovable property for facilitating its disposal expendable by RBI for a period not exceeding 5 years.[28] Thus, RBI may give exemption to

[26] *Id.*
[27] The State Bank of India Act, 1955, § 34 (6), No.23, Acts of Parliament, 1955.
[28] *Supra* note 18, § 9 (Proviso).

Islamic banks by using the proviso to section 9, BR Act. However, the exemption in such cases may not be for the bank as such, but restricted to the extent that the same is required for the purpose of engaging in the business specified. Moreover, the period of holding immovable property for the purpose of financing, can't be ordinarily extended beyond 12 years, and the *proviso* is not a general rule but an extraordinary power with the RBI to be used sparingly. In spite of the technical possibility of using the*proviso* to accommodate certain products of Islamic banking, it's not a long-term solution, and would require an amendment in the BR Act.

INTEREST-BASED RETURNS ON BANK'S ADVANCES

Section 21, BR Act confers RBI with vast regulatory powers to determine the policy on advances (loans, financing) made by banks. In order to serve the public interest, and the interest of depositors and banking policy,[29] the RBI has been authorised to give specific directions to banks on which includes policy in relation to the rate of interest. On a bare perusal of section 21, it doesn't pose any direct statutory challenge to Islamic banking or its financing model. The actual conflict arises from the exercise of RBI's special regulatory power which are binding on the banks.[30] In exercise of its power u/s 21, the RBI's has issued master directions on March 26, 2016, putting statutory obligation on all CBs to charge interest on advances.[31] Thus, by virtue of this direction, the RBI doesn't allow banks to take risk on their advances while financing business activities – banks are only allowed to get interest-based returns. Whereas, prohibition on *riba*, and risk-sharing financing in Islamic banking requires banks to take risk positions while financing business activities and earn profit-based returns on their advances. This conflict makes the operation of Islamic financing incompatible with the statutory and regulatory framework of banking system of India.

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[29] *Supra* note 18, § 21 (1).
[30] *Id.*, § 21 (3). The directions issued by RBI u/s 21 are statutory circulars and binding on all banking companies. Y Jameela Beevi v. State Bank of Travancore, 1991 (1) Bank CLR 677.
[31] Reserve Bank of India (Interest Rate on Advances) Directions, 2016, § 4 (a).

Notwithstanding, the discretionary nature of RBI's power to prescribe interest rates, section 21 r/w RBI's 2016 directions underscores the policy framework of banking in India, where 'interest' occupies a pivotal position. Unlike non-applicability of section 8 and 9, the provision and directions laid down u/s 21 are applicable and binding on the PSBs.[32] Moreover, the judiciary has also upheld the RBI's power to direct banks to charge interest on their loans and other financial accommodations.[33] Thus, accommodating Islamic banking would not only require legislative amendments, but also a policy shift within RBI and the Central Government.

CENTRAL GOVERNMENT'S AND RBI POWER IN INTRODUCING ISLAMIC BANKING

Another exceptional power given to the Central Government *vis-à-vis.* banking regulation is u/s 53 (1) BR Act, which empowers it to exempt any banking company or institution, or any class of banks from the purview of any or all provisions of the BR Act, either generally or specific period. The power conferred can be exercised by issuing a notification – but such power is not unfettered. The Central Government's authority to u/s 53, is to be exercised upon a recommendation from the RBI.[34] Moreover, a copy of the notification proposed to be issued u/s 53 (1) must be tabled before both the Houses of Parliament (while they are in session) for consideration.[35] The law further mandates a period of 30 days be given to each House of Parliament to consider the proposed notification. While considering the draft notification, the Houses may suggest modification or disapprove the draft, which in either cases shall be binding upon the Central Government. It's only after receiving approval from both the Houses, the notification u/s 53 (1) can be issued by the Central Government.

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[32] *See*, Indian Bank, Tiruvannamalai v. V.A. BalasubraminiaGurukul, AIR 1982 Mad. 296.

[33] "Venkiteswara Rice Mill v. Union Bank of India, (1988) 63 Comp. Cas. 483, Bank of India v. KarnamRanga Rao, AIR 1986 Kant. 242, Thampan v. Dhanzlakshmi Bank Ltd., 1989 (2) K.L.T. 840, Y. JameetaBeevel v. State Bank of Travancore, 1991 (1) Bank C.L.R. 677 pp. 679 (Ker.), Debasis Pal Choudhari v. Allahabad Bank, 1991 (1) Cal. L.T. 10."

[34] *Supra* note 18, § 53 (1).

[35] *Id.*, § 53 (2).

It could be argued that the extraordinary power could be used by the Central Govt. and RBI to introduce Islamic banking in India, whereby the conflicting provisions of the BR Act are made inapplicable to an existing banking company. This, in theory, would enable the exempted bank to offer Islamic financial products through 'Islamic window'. However, the power is extraordinary and involves a collective action of the Central Govt., RBI and the Union Parliament to use such provision to facilitate Islamic banking. Furthermore, the provision may not be useful for introducing full-fledged Islamic banks in India, since notification u/s 53 (1) can be only be issued in relation to a 'banking company' defined u/s 5 (c), BR Act. Therefore, in light of the existing statutory definition, the Islamic banks may not qualify as banks – thereby leaving only 'Islamic windows' as a feasible model of Islamic banking.

V. REGULATING ISLAMIC BANKS: REGULATORY QUAGMIRES CASH RESERVE RATIO (CRR) RELATED ISSUES

Section 18, BR Act and section 42, RBI Act requires the scheduled CBs to maintain a minimum daily balance in the form of cash reserves with the RBI. The said balance is calculated and notified by the RBI as a fixed percentage of bank's net timed and demand liabilities. Islamic deposits products like *Wakala*, *Al-Wadiah* and *Qard* would qualify as liabilities for the regulatory compliance of CRR. Since, with effect from March 31, 2007, RBI doesn't pay any interest to banks for keeping their CRR balance with it. The same arrangement would apply to Islamic banks, without violating any principles of Islamic law. But a regulatory challenge may come from the non-maintenance of CRR. If an Islamic bank fails to maintain the CRR, u/s 18 (1A), BR Act and section 42 (3), RBI Act, it will be liable to pay "penal interest" for such default. The payment of 'penal interest' would be incompatible with the principles of Islamic law. Nevertheless, this problem can be avoided in case of Islamic windows within conventional banks. In such a case, CRR balance may be set for the bank as a whole.

The imposition of penal interest is an exceptional provision which is activated only in case of default, the scheduled CBs generally take extreme precaution in maintaining their CRR balance. Moreover, in case of Islamic banks the conflict would arise on *ex-post facto* basis – after the bank has defaulted. Thus, the law on CRR would not ordinarily conflict with the introduction and operationalisation of Islamic banks. Besides, the RBI has the power to condone the defaulting bank from paying penal interest.[36]Also, the RBI has the discretion to exempt any bank from the CRR requirement either wholly or partially.[37]

STATUTORY LIQUIDITY RATIO (SLR) RELATED ISSUES

The RBI in exercise of its power u/s 24, BR Act mandates all scheduled CBs to maintain a fixed percentage of their deposit liabilities as liquid assets. Islamic deposits products like *wakala*, *al-wadiah* and *qard* would qualify as liabilities for ensuring SLR compliance. However, the problem is likely to arise in case of investment in SLR securities which in India are essentially interest-based. The CBs in India rely upon Government securities to ensure liquidity in their systems and maintain their SLR. These securities which are considered to be the safest investment option, are interest-based. Although, under the Government Securities Act, 2006, the Government securities doesn't mandatorily require a security to bear an interest component. But in the absence of specially designed *Shariah*-compliant money market, Islamic banks may face considerable difficulty in maintaining the SLR. Therefore, it's important that *Shariah*-compliant securities instruments are also developed while introducing Islamic banking.

Furthermore, as is the case in CRR, if a banking company fails to maintain the requisite SLR, it's liable to pay 'penal interest' for such default.[38] This again would be incompatible with the principles of Islamic law. But on the issue of levying penal interest on the defaulting bank, RBI has the discretion

[36] *Supra* note 18, §18 (1B).
[37] *Id.*, § 18 (IC).
[38] *Supra* note 11, § 24 (4) and (5).

to not demand such interest. Yet, this issue can be resolved in case of Islamic windows. In such a case, SLR could be set in relation to the liabilities of the bank as a whole, and adequate measures can be taken by the bank to segregate its interest-based funds with the operation of Islamic windows.

INTEREST-BEARING FRAMEWORK OF DEPOSITS

In India, deposits are classified into 3 different types: Fixed (term), Savings, and Current. Except current deposits, other deposits held by CBs are interest-bearing. In other words, banks are by law required to pay interest to their depositors. Based on the existing classification and definition of 'deposits', the 'savings deposits' and 'fixed deposits', which are commonly used by retail customers, would be in direct conflict with the principles of Islamic law – since Islamic banks are prohibited from the receipt or payment of interest (*riba*). However, Islamic deposit concepts of *wadiah* and *qard* would fit well within the definition 'current deposits'. Since, they are non-interest-bearing, India can also adopt them without any regulatory encumbrance. Thus, the existing current deposit framework could be used for mobilising deposits from willing customers, provided that the deposits are invested in *Shariah*-compliant businesses.

DEPOSIT INSURANCE ISSUES

Deposit insurance scheme is a beneficial provision which provides insurance cover to all kinds of deposits held by a depositor, under any type of accounts (current, savings or fixed etc.) in a bank, in case of its collapse. All banking companies are mandated under the DICGC Act to register themselves with the DIC,[39] and each depositor in a bank is insured upto a maximum of 5 lakh for his/her deposits held on the date of liquidation/cancellation of bank's license, or amalgamation.[40] Thus, deposit insurance is a safety net to protect depositor's interest and savings. In case, Islamic banks are opened in India, keeping in mind the greater interest of the depositors, the deposit insurance

[39] Deposit Insurance and Credit Guarantee Corporation Act, 1961, § 10, 11, 11A, 12, No. 47, Acts of Parliament, 1961,
[40] *Id.*, § 16.

facility will have to extended to them also. The Islamic deposits based on *wadiah* and *qard* can be covered under the deposit insurance framework.

However, the problem would arise in respect of IAHs, where capital is not guaranteed and returns are not fixed. To begin with, the risk-based nature of investment deposits makes them incompatible with the existing framework of deposits. In the absence of their legal recognition, the IAHs of Islamic banks may not be termed as 'depositors' in the first place which could exclude them from the purview of DICGC Act. Therefore, suitable amendments in section 5 (b), BR Act and regulatory definition of 'deposits', would have to be made to accommodate investment deposits and IAHs. Once recognised as deposits, the IAHs could be extended deposit insurance on the value of the investment deposits on the day of bank's closure. Moreover, while recognising investment deposits and IAH, customers must be made aware about the risk-sharing aspect of their investment and the non-guaranteed nature of returns.

ISSUES IN SHARIAH GOVERNANCE

To ensure regulatory oversight and transparent reporting, the extant norms and guidelines issued by the RBI and Central Govt. on corporate governance of banks would have to be applied to Islamic banks also. However, the problem may arise with respect to *Shariah* supervision and governance of bank's operations and offerings. Unlike Malaysia which has dedicated authority to ensure *Shariah* governance and dedicated SSBs in Islamic banks, India being a secular country has obvious limitations. The existence of a National *Shariah* regulator in a secular country is unheard of – for instance, U.K., Singapore, U.S.A. and Hong Kong which have functioning Islamic banking systems in their jurisdictions, don't have a *Shariah* regulator. Besides, in a democracy governed by rule of law, State's interaction with religion should not be stretched to the extent of prescribing or enforcing religious guidance.[41]

[41] Aernout J. Nieuwenhuis, *State and Religion, A Multidimensional Relationship: Some Comparative Law Remarks*, 10 (1) *INT. J. OF CONS. L.153,*162 (2012).

In India, interpretation of religious texts by the State has invited backlash from the religious communities in the past.[42] Thus, the question of RBI regulating *Shariah* related matters of Islamic banking has certain problems. Firstly, RBI is India's central bank with an objective of securing India's monetary stability.[43] In pursuit of its statutory objective, RBI has been vested with vast regulatory powers to direct the 'monetary policy framework' for the benefit of country as a whole.[44] A perusal of RBI's functions makes it amply clear that it's a professional regulator and supervisor of the financial system – dealing with pure financial and economic matters. Thus, interpreting Islamic law and ensuring *Shariah* governance is neither its mandate nor its area of expertise. Secondly, interfering with the issue of *Shariah*-compliance by banks might lead RBI to lay down specific norms relating to the intricacies of *Shariah*-compliant transactions, which would invariably involve the invocation of *Qur'anic* text and its interpretation. This might affect the integrity of RBI as a religion-neutral, professional regulator, and its involvement in the matters of interpreting Islamic law might be seen as undue State interference in the matters of religion.

Besides, establishment of a dedicated *Shariah* regulator is also a matter of choice with the respective country. Since the practise of having a central *Shariah* regulator is not consistent globally, there is no obligation to create such authority in India. The U.K. has also refrained from constituting any such authority, and has left the matter of *Shariah*-compliance to banks. The U.K. regulators have maintained an arms-length distance on the issue of *Shariah* governance, and are only concerned with the compliance of the State regulations. Similarly, the RBI should be left with the task of ensuring oversight and compliance with the statutory law and prudential norms, instead of making authoritative rulings on Islamic law. Hence, it would be

[42] For instance, the SC decision in Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556and SC's interpretation of *Qur'anic* verses was heavily criticised by various Muslim organisations. The backlash from the community forced the Rajiv Gandhi-led Govt. to pass Muslim Women (Protection of Rights on Divorce) Act, which diluted the SC's judgment and restored the Muslim personal law.

[43] The Reserve Bank of India Act, 1934, Preamble, No. 2, Acts of Parliament, 1934.

[44] *Id.*

better if the issue of *Shariah* governance and supervision is left to the respective banks offering *Shariah*-compliant financial products. In such a scenario, banks will have to bear risks associated with *Shariah* non-compliance.

VI. CONCLUSION

The present legal regime of banking in India reflects the evolving nature of banking in India. In retrospection, the banking system has shown high-level of innovation and adaptability in embracing novel financial products and services which offer affordable banking services to consumers. The introduction of specially designed products keeping in mind the sensitivities of relevant demographic sector – such as BPL, farmers, women, and MSMEs etc. underscores the fact that India has not been wary of using new and innovative legal and regulatory means to provide 'appropriate' banking services to the population. Islamic banking offers yet another opportunity to adopt an alternate banking model which operates on the principles of Islam. Whether it's for addressing faith-based financial exclusion or offering alternate micro-finance opportunities or exploring additional avenues of investments, the experts and data suggests immense commercial utility for Islamic banking in India. If 'religion' can act as a facilitator for channelizing savings and investments from people into the mainstream banking, then such out-of-the-box solutions needs to be considered seriously. Moreover, the recognition of Hindu Undivided Family (HUF) for the purpose of tax rebates, lend credence to the point that financial arrangements have to be structured around the needs of communities. Hence, the same analogy could also be extended to the expectations of Muslims for having interest-free Islamic banking.

Notwithstanding India's potential as a market for Islamic banking, there are grave challenges and threats surrounding it. But, the judicial dictum in *Subramaniam Swamy* and *ICICI Bank* case, makes an enabling case for Islamic banking. However, the conclusion arrived also point towards India's general policy approach which places heavy reliance on interest-based

system of returns and interest-bearing monetary system. Moreover, the BR Act and other applicable laws were enacted at a time when Islamic banking was unheard of. But the legal impediments identified by the study are not unsurmountable. As opposed to general perception, that the introduction of Islamic banking would require a new statutory enactment is not entirely correct. In the ultimate analysis it was found that the BR Act has sufficient flexibility to accommodate certain elements of Islamic banking, with relevant notifications from the Central Government and RBI. However, this would require substantial 'political will' on the part of the Government and RBI, since the issue of Islamic banking has been grappled with political opposition due to its 'religiosity' in a conventionally non-religious framework.

JURISPRUDENTIAL ANALYSIS OF GOOD SAMARITAN LAWS IN INDIA

Anusha G Rao*

ABSTRACT

The Good Samaritan laws are concerned with giving or failure to give aid during emergency situations, coupled with the sensitive relationship between law and morality. Owing to Indian moral values and culture along with Bible and Christianity, this article may be seen discussing two important, although related topics, i.e., the legal theory or jurisprudential aspect of Good Samaritan laws and the criminal and civil liabilities imposed on the same. The article studies the relationship between rights and duties of the bystander and the road accident victims in various circumstances i.e., when the imperilled person is in physical danger, when he has responsibilities towards his family or society, when the bystander has intervened or intermeddled or interloped or when there is a negative effect on the act performed by the bystander under emergency situations, among others. This paper also studies the feasibility of imposition of criminal liability on bystanders under the Indian law, through a comparative analysis of the Criminal Code of Germany. The paper also establishes the moral imperative ground on which the Good Samaritan laws can be legalised, penalised and criminalised. Certain social, economic, legal and moral recommendations are proposed to the existing guidelines

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laid down by the Supreme Court in the case of Save Life Foundation Vs Union of India.

Keywords*: Good Samaritan laws; Criminal Code of Germany; bystander; road accident victim; civil and criminal liability; Save Life Foundation Vs Union of India.*

I. INTRODUCTION

A Good Samaritan is an individual who is generous enough to help those in distress, according to the parable of Good Samaritan in the Bible.[1] This paper deals with the background of the Good Samaritan laws and its moral imperative to study the same. India has already witnessed about twenty thousand hit and run cases in 2015, accounting to 11.4 percent of the accidents in India, and only recently has there been laws in the form of guidelines, to protect good samaritans.[2] While there are criticisms flowing from different parts of the country regarding a lack of codification and imposition of 'duty to rescue', like the rest of the Civil Law Countries, one fails to understand that there is no jurisprudential backing or legal theory to penalise a Bad Samaritan. Can the law impose duty to rescue on bystanders? If yes, then, on who does such a duty of rescue rely on? Does a road accident victim have a right to insist on bystanders saving him from peril? Under what circumstances and on who can the law establish a right-duty relationship, in order to penalise the omission of duty?

The much needed answers to the above questions are acknowledged in the paper. This paper limits itself to the road accident victims, bad levitism and contractual relationship between the intended parties in India, with respect to the laws of civil law countries, especially Germany. The paper also serves as a feasibility exercise to provide an insight to the practical and statutory application of the Samaritan laws in India. This research becomes necessary

[1] H.M Malm, *Liberalism, Bad Samaritan and Legal Paternalism,* 106 Ucp Ethics, 04, 04-31 (1995).

[2] Gaurav VivekBhatnagar, *SC guidelines now protect Good Samaritans who help road accident victims, The Wire* (Mar. 30, 2016) https://thewire.in/26680/sc-guidelines-now-protect-good-samaritans-who-help-road-accident-victims.

on the ground that there exists a fragile link between morality and law, which needs to be addressed by the judiciary. With the judiciary laying down guidelines to penalise sexual harassment in work place even with the lack of executive order in place and directions regarding the adoption of minor children by foreigners suggested by the Supreme Court, to the recent decriminalisation of homosexuality, uplifting privacy and constitutional morality, there has been a constant progress in the Indian laws relating to various arenas. Thus, it also becomes a necessary responsibility on the judiciary and legislature to address the issue of Good and Bad Samaritanism, their duties and rights and a Central legislation in this regard.

II. MORAL IMPERATIVE

The concept of Good Samaritanism which is that of offering aid or failing to provide aid to those persons in peril, establishes a coherent relationship between morality and law, which is particularly sensitive.[3] The Civil law countries, particularly France and Germany amongst others, have made it a statutory requirement to provide aid to the imperilled persons, subject to specific conditions and these countries broadly fall under the traditional Roman doctrine of 'negotiorumgestis'- intervention with another's affairs.[4] Oliver Wendell Holmes, thus states that:

"Though it is perfectly fine for a man to not help his neighbour when his property is getting destroyed, yet, if he once intervenes or intermeddles, he no longer has the same freedom. For example, a carpenter need not go to work upon another man's house at all, however if he accepts and thus intermeddles, then he is obligated and is dutiful towards the latter. He simply cannot stop at his will and leave the roof unattended and open to weather. The immediate damage associated with the omission may have been due to natural forces; however, one cannot forget the fact that there still

[3] A.D Woozely, *Duty to Rescue: Some Thoughts on Criminal Liability,* 69va.l.rev., 1273, 1273-1300 (1983).
[4] Encyclopedia, BRITANNICA, https:// www.britannica.com/topic/negotiorum-gestio.

exists a connection with the previous dealings, wherein there exists a course of action and conduct, which has caused the damage."[5]

Common Law countries have been reluctant to impose such a responsibility on individuals, simply because, the willingness to help a person in peril should be left as a matter of Individual moral freedom.[6] India also has no such law, except recently the Supreme Court had approved and laid bystander protection guidelines, through the Save Life foundation case and the same has been codified[7]. The Supreme Court bench comprising of V. Gopala Gowda and Arun Mishra, directed the centre to frame legislation, comprising of all the guidelines and recommendations on protection of bystanders from legal hassles and intimidation and harassment by the police.[8] When one tries to think of a way to impose a legal duty on a third party, without there being a concrete established relationship between the parties, the normalcy is to establish a special relationship, without there being a general duty. The special relationship is between physicians, for example is to render aid to those individuals in peril. Special skill set and training is required to render aid in emergency situations.[9] Failure to render help, on part of the physicians results in a civil liability and/or criminal liability in certain cases. However, an attempt to provide treatment with standard care and good faith would not be charged with criminal or civil liability. The Consumer Protection, 1986 in India, has extensively dealt with medical negligence, establishing a special relationship between patients and hospitals and also trying to save those doctors who have acted on due care and good faith. In this regard, the Supreme Court of India, in the Santra Case, pointed out that, while the liability in civil cases, depend on the amount of damages incurred, in criminal cases, the degree of negligence and due standard of care is the factor determining the liability.[10]

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[5] 145,OLIVER WENDELL HOLMES, THE COMMON LAW. BOSTON, Little, Brown & Co. (1963).
[6] *Supra* note 4.
[7] *Supra* note 3.
[8] Savelife foundation v. Union of India, 7 SCC 194 (2016)
[9] H.M Malm, *Bad Samaritan Laws: Harm, Help, or Hype?* ,19 Law & Philosophy, 707, 707-750 (2000).
[10] KKSR Murthy, *Medical Negligence and the law*, 4 Indian Journalof Medical Ethics (2007).

The Good Samaritan Laws provide legal protection to those rescue volunteers who render aid to imperilled persons in emergency situations, without imposing legal liability on them.[11] This serves as a way to motivate and encourage bystanders to render aid to victims, without a worry of getting into litigation hassle. The Parable of Good Samaritan has been subject to comments and discussion and the same can be observed in general moral traditions of our culture. The law does not deal with purely moral obligations.[12] For example, a man who sees a drunkard, along with a child walking on a railway track can refrain himself from helping, though he is obligated to render aid on humanitarian grounds. Though the position of the same has been changing in the torts along with a few exceptions to the right-duty relationship the situation of criminal law has remained the same. A duty to render aid also arises from contractual relationships, for example, between employees and employers.

Bentham, in his *'Introduction to the Principles of Morals and Legislation',* questioned as to why is there not a duty on every man, to save another from mischief, when it can be done without prejudicing himself? Undoubtedly, he did not receive any satisfactory answer for his question.[13] However, Bentham did not provide any legal backing, nor did he make it clear why the law should interfere in such cases. According to J.S Mill, the duty to rescue becomes important in the sense that, refraining from doing so, would cause harm to another.[14] However, Lord Macaulay did not agree with the same. He had an issue with the practicability aspect of imposing duty, though, he does not deny that harm maybe caused due to omissions. Macaulay, therefore, proposed that those omissions which cause indescribable attempt to harm or harm itself can be punishable on the grounds that, the act was illegal.[15] In other words, only when there is an already existing legal duty to render aid should the failure to forbear be wrongful.

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[11] Henry H. et.al, *Lawmen,Medicine Men and Good Samaritans,* 52 ABA J., 223, 223-227 (1996).
[12] *Id.*
[13] Hanoch Dagan, *InDefense of the Good Samaritan*, 97 mich. L. Rev. 1152, 1152 -1200 (1999).
[14] John Kleinig,,*Good Samaritanism,* 5 Philosophy & Public Affairs, 382, 382-407 (1967).
[15] *Id.*

III. PRAGMATIC ISSUES

This section deals with the concept of 'duty to rescue' in the German law and its criminalisation with respect to the Indian law and cases. It also discusses the circumstances under which the criminal liability can be imposed are- when the bystander has a guilty mind or shows recklessness or intervenes and intermeddles with the affairs of the imperilled person or acts on misfeasance or nonfeasance. This section also manifests the general implications on criminalisation of Good Samaritan laws in the common law where law not only protects the interests of the bystanders who render aid to the road accident victims, but also sees to it that no harm is occurred to the imperilled person, than he has already undergone, due to the acts of the bystander

A few arguments and counter-arguments are also addressed along with case studies. Section 323C of the German Criminal Code deals with omission to act upon easy rescue i.e., whosoever does not render aid during accidents or a common danger or such emergency situations, although it is necessary and can be expected from him in such circumstances, without any substantial danger upon himself and without any violation of other such important duties shall be liable to imprisonment not exceeding one year or a fine.[16] The important arguments and counter-arguments under this circumstance, is that there is no criminalisation for a failed attempt to rescue. For example, an old man is bleeding profusely on a main road, and a bystander comes to his rescue, by calling an ambulance and providing first aid. However, the imperilled person dies on the way to the hospital. This attempt, though is a failure, cannot impose criminal liability on the bystander. Much consideration is to be given to the costs of each of the parties. These costs depend upon the imminence and magnitude of danger, the imperilled person goes through, as well as the consideration of risk and safety of the bystander.[17] While, not offering assistance to an imperilled person who is

[16] The Geman Code of Criminal Procedure § 323C, Germany (1987).
[17] Kemp J. Kemp, *The duty to rescue-compulsion or laissez faire?,* 18 CILJSA, 163, 163-186 (1985).

danger and also who has his family to provide for, is a liability, it is not a statutory requirement to render aid by prejudicing his safety.[18] The law also does not encourage its citizens to abstain from performing their duties, while providing assistance. It is to be noted that the duty to rescue is imposed on all such persons who are in proximity to the scene. While there exists a duty on a person who is standing across a signal to render aid to an imperilled individual, the criminal liability and general duty is stringent upon a person who is standing in a bus stop, next to the victim.

Lord Macaulay terms 'homicide by omission' as illogical and impractical, because an individual cannot be penalised for failure to render aid during a mass destruction by fire. There simply does not exist any duty on such a bystander and law thus, cannot act on moral obligations and instinctive feeling in order to criminalise such an act.[19] Thus, in India's rights based society, withholding of a positive act, cannot be termed as Bad Samaritanism, without there being a negative effect to such an act or omission and hence, the law cannot burden its citizens with a responsibility to save another. When Sukhdev Prasad, a casual driver with Air India, and his friend were met with an accident and hit by BEST bus in Mumbai in 2013, it was broad daylight. They were crying out for help, but none came to their rescue, due to the fear of legal hassles and police interrogation.[20] However, the Supreme Court in 2016, accepted and laid down bystander protection guidelines, where police interrogation is done only once, to avoid intimidation or fear, and that anonymity can be maintained during medical treatment. It is to be noted there exists a duty on the doctors to provide first aid to the imperilled person immediately. The hospital need not wait until an accident case is registered with the police. It becomes the legal duty of doctors to render aid to individuals in emergency situations, so as to save their lives. This is due to a special relationship existing between particular

[18] A.W Rudzinski, *The Failure to Rescue: A comparative study*, 52 Colum.L.Rev, 631, 631-647 (1952).
[19] *Supra* note 14.
[20] Rahul Mohan Sharma, *There were 7 hit-and-run cases every hour in India in 2015 and yet bystanders often don't step in to help the victims*, SCROLL. IN (Aug. 5, 2016), https://scroll.in/article/813185/there-were-7-hit-and-run-cases-every-hour-in-india-in-2015.

individuals, such as the doctors and patients, lawyers and clients, mother and daughter etc. Though, failure to render medical aid by physicians and doctors is criminalised in India, yet, except an a moral imperative and an obligation, a duty cannot be imposed on all individuals without there being a subsequent right, or voluntary assumption of duty, as in the case of a lifeguard or an established relationship, between an employee and employer.

IV. RIGHT-DUTY RELATIONSHIP

Law consists of rules and regulations regulating human conduct and that the administration of justice is concerned with enforcing rights and duties created by such regulations.[21] The conception of a legal right is accordingly significant in legal theory and its practical application. According to Salmond, a wrong is an act contrary to the rule of right and justice. In the modern terminology, the term has acquired the sense of harm or damage associated with it. These wrongs can be moral or legal.[22] While, not saving a pregnant woman from drowning, might be a moral wrong, it is not essentially a legal wrong, simply because, such an obligation for omission cannot be imposed on each and every individual. However, even though there is no legal duty imposed on individuals, when harm or damage is caused by them, through their act or omission, then they would be liable for the same.[23] For example, when a man who raped a woman saw her falling off a cliff and did not make an attempt to save her, then he would be liable for both her rape and her murder.[24]

In India, as per the Supreme Court approved guidelines, when a bystander, on his instinctive feeling, renders help to a road accident victim, he will not be forced to reveal his identity, nor will he face police interrogation or legal

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[21] P.J Fitzgerald, *Salmond On Jurisprudence*, 215-233 (Universal Law Publishing co. New Delhi, 12 ed., 1996)

[22] Sara Rosenbaum et al., *State laws extending comprehensive legal liability protections for professional health-care volunteers during public health emergencies,* 123 Public Health Reports, 238, 238-241(1974).

[23] *Supra* note 22.

[24] Dr.Avtarsingh&Dr.Harpreet Kaur, *Introduction to Jurisprudence*139-150, (LexisNexis 4 ed.2013).

hassles. The act done by an individual as his moral obligation will be credited, however, he is not forced to perform the act, simply because he does not owe anyone, nor does he have a duty to do so. According to Salmond, a duty is an act which one ought to do. However, not all acts which a man ought to do are a duty. He may owe his duty towards his master, by virtue of the latter's position.[25] A special relationship between a child and its mother, or a lawyer and his client, may also be treated as duties owing to one another. It is to be established that, not all obligations are legal duties. While saving a child from falling into fire maybe a moral obligation, yet, it is not a legal duty to do so, since there exists no relationship between these parties, nor is there a corresponding right. This is one of the main reasons, why India does not make it a legal duty on a bystander to render aid to a victim. Every right has a corresponding legal duty. Rights are concerned with interests and have indeed been defined as interests protected by rules of right, which is by moral or legal rules.[26] Yet, rights and interests are not the same. An individual may have an interest to protect his name and reputation. However, a right would mean that a third party, ought not to take away his interest. In context of Good Samaritan laws, an intermeddler or interloper would have a duty towards a road accident victim, since he has assumed voluntary duty.[27] In simple words, the imperilled person has the right to be saved by the bystander, if the latter intervenes or intermeddles.

Thus, Indian Journal of Surgery conducted a survey in India, in 2013, which showed that 80 percent of victims do not receive medical emergency care within the Golden hour of the accident. And, the Law commission of India reported that at least 50% of the fatalities can be prevented, if medical care and first aid is provided to the victims within the first hour of the accident.[28] The Supreme Court, taking into account the Save life foundation studies, which show that three out of four people hesitated to help road accident victims due to the fear of legal hassles, hence laid down guidelines to protect

[25] *Supra* note *22*.
[26] Theodore M. Benditt, *Liability for failing to rescue,* 1 Law AndPhilosohy, 391, 391-418 (1982).
[27] Dawson, *NegotiorumGestio: The Altruistic Intermeddler* ,74 Harv. L. Rev 817 (1961).
[28] *Supra* note 20.

bystanders who render aid to the victims on a moral imperative.[29] This is the extent to which the Indian judiciary and legislature has come up with, on Good Samaritan Laws.

India follows rights based regime, unlike Germany, where a voluntary agent-principal relationship is codified in the civil code, imposing a liability on bystanders who fail to render aid to the imperilled persons under situations of easy rescue.[30] When a bystander voluntarily assumes a duty to render aid, then he becomes an agent of the imperilled, who in turn is the principal. Hence, there exists a legal duty on him to save the victim, or he becomes liable to pay compensation for the failure to rescue. This type of relationship is necessary to be established, especially in tort law, in order to impose liability on omission. Indian law does not impose this kind of an obligation and a legal duty, since it becomes difficult to establish right-duty relationship among these parties. However, as a moral imperative, the law can impose an obligation on bystanders under situation of easy rescue, to render aid to the road accident victims. Easy rescue is subjected to the proximity, risk factors and cost consideration of both parties. It is thus proposed to treat this kind of a duty as an exception to the existing right-duty relationship regime. The Right to Education, for example is an exception to the rule of right-duty, where a legal duty is imposed on the private schools in India to offer 25 percent of the seats for children under weaker and disadvantaged sections of the society.[31] Though a duty can be imposed only on an established relationship, RTE is an exception to the same. A similar exception is the imposition of duty on Companies with a net worth of five hundred crore or more, under the Companies Act, 2013, to contribute towards the Social development and upgradation.[32] When the theory of rights and duties of Salmond is considered, there is no social responsibility on companies to render aid, due to the lack of an established relationship between the parties.

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[29] *Supra* note 8.
[30] Michael Davis, *How much punishment does a bad Samaritan Deserve?* ,15 Law and Philosophy, 93, 93-116 (1996).
[31] MHRD, *Right to Education*, India, (Feb. 11, 2019, 2:55p.m), http://mhrd.gov.in/rte.
[32] Companies Act, 2013, §135, No. 18, Act of Parliament, 2013.

However, this is to be treated as an exception to the aforesaid mention rules. Thus, it is proposed to introduce such an exception in India, towards Good Samaritan Laws, as a civil duty.

V. CONCLUSION

The relationship between law and morality, though fragile and sensitive, holds great value. Ramayana and Mahabharata have instilled values of 'duty' among the Indian minds. Hence, it becomes easier to impose such a duty on the Hindu majoritarian society. It is therefore recommended that when a bystander causes harm or damage to the road accident victim through his actions, as a negative effect, then he should be penalised for the same. When he has a guilty mind or is reckless and negligent in his acts, then he should be held liable to the extent of which the harm is caused. Section 357 of the Criminal Procedure Code, 1973 grants power to the courts to award compensation to the victims or persons affected by the offence.[33] However, the accused, in such circumstance, should have been convicted. This can also apply to the Good Samaritan laws, when a bystander fails to render help due to his guilty conscience or assumes voluntary duty and intermeddles with the affairs of the imperilled person and then fails to perform his duty, due to misfeasance, nonfeasance or recklessness. This type of a legislation, would penalise a guilty or a negligent bystander and in turn award compensation to the victim i.e., the imperilled individual or the road accident victim. It is also proposed to introduce compulsory first aid and Cardiopulmonary Resuscitation (CPR) training to all drivers in India who wish to acquire a driver's license, simply because, about 80% of the victims of road accidents, do not get medical care in the crucial one hour of the accident and thus, this type of an obligation would save lives of many. Another recommendation the author would give, is the about the monetary or non-monetary appreciation to those bystanders who voluntarily render aid to the road accident victims, identifying their heroism and bravery. It is indeed difficult to establish a relationship between the bystander and the imperilled person, in a rights'

[33] Criminal Procedure Code, 1973, § 357, Act of Parliament 1973.

based society such as India, in order to impose a legal duty on the former to save a person and thus, identification of the person failing to render aid and the mechanism of awarding compensation becomes burdensome on the State. However, Criminal liability can be imposed in India, on those bystanders acting recklessly and negligently, in turn causing harm. All in all, India needs a new regime of duty based legislations, to avoid the sickening cases and examples of calloused refusal of help to persons in peril, and the author believes that the recommendations provided are the first step towards a change.

MEDIATING SPORTS DISPUTES: OPENING NEW WINDOWS OF LEGAL OPPORTUNITIES

Dr. Bishwa Kallyan Dash*

ABSTRACT:

Sports dispute settlement have taken a huge momentum through mediation to resolve multilateral conflicts in the field of sports at this present time. Despite the fact that, when sports disputes are being tried as a means of settlement of disputes, it shows multi-faceted results which is one of the key elements of decision making process for going into mediation as a recourse or not. In mediation: an impartial third party—a trained mediator—works to try to help disputants find common ground and end their impasse which when approximated with the economic front of sports, it becomes all the more a welcoming step for taking recourse of. This paper looks into the possible measures of taking mediation as a means of sports dispute settlement providing an early remedy before ditching into and entrenched grievances.

Keywords: *Mediation, Arbitration, Court of Arbitration for Sports, Limitation on Sports mediation etc.*

I. INTRODUCTION

Whenever sports are talked of, the involvement of human being goes without saying. From the beginning of human progress, sports have developed from a

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method for individual enjoyment to a worldwide industry encompassing over 3% of the world distribution of the Internet and different types of media, and the sports area is developing at a higher speed. An industry of billions of dollars with a comprehensive overall presence will undoubtedly develop its disputes and differences. This has brought about the advancement and improvement of sports law. [1]

Sport or Sports are acknowledged as exercises situated in actual physicality or true agility. The significant rivalries and competitions, for example, the Olympic Games conceding just games meeting this definition and different associations.[2] Be that as it may, extra seriousness yet non-physical exercises guarantee support as psyche sports. The International Olympic Committee (through ARISF) recognizes both chess and bridge as genuine games, and Sport Accord, the worldwide or an international games federation association, recognizes five games that aren't physical, even though restricts the number of brain games which can be conceded as sports. Sports are typically administered by many rules or customs, which ensure good rivalry and permit consistent mediation of the victor.

Wherever there are couple of people coming co-operatively and engage in some kind of activity, certainly there will be some kind of dispute and in today's world sports is not just a source of entertainment but also it is a profession, so to dissolve that dispute proper mechanism needs to be there. Arbitration and mediation are to be considered as best mechanism for solving the dispute in a profession likes sport.[3]

Professional sport has its own rules and regulations, and first, it demands excellence. Mediations in sport are nothing different than other matters. Sports mediators need to comprehend the sporting world. Some of the mediation attributes give a solution for a considerable lot of the issues tormenting players and organization in the present market.[4] Mediation offers

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[1] MukulMudgal, *Law and Sports in India: Development Issues and Challenges*, Lexis Nexis India; 1st ed. (2010).
[2] *Id.*
[3] Anujaya Krishna, *Sports Law*, Universal Publishers, 1st Ed. (2014).
[4] *Id.*

fast, practical methods for resolving any dispute. Its classified nature would advance open correspondence between the parties, which would moderate, if not improve, their working connections. Differences and conflicts are typical. When something is inescapable, there should be an arrangement to manage it. At the point when a conflict emerges, there is a danger that it will deteriorate. On the off chance that such a threat can sensibly be envisioned, at that point, a course of action should set up to resolve it. Mediation is less upsetting for parties than cases brought in the court or in arbitration.[5]

II. NECESSITY AND AIM OF MEDIATION IN SPORTS

TRADITIONAL WAY

The basic method to resolve any dispute which is contract-based is by presenting the contradiction or disagreement to either tribunal, for example, the Court of Arbitration for Sport, or to interior committees of nationwide and global organizations, for example, the FIFA Dispute Resolution Chamber/FIFA Players' Status Committee or to public courts in sports. Any methods can be time taking and costly. It is in the considering a legitimate concern for all participants, clubs and competitors and athletes, specifically, that conflict and disputes are comprehended rapidly and cost-effectively.[6]

Individuals who are in a conflict circumstance now and again take a position and attempt to prompt the opposite side that their own position is worthy. In such a circumstance, when emotion is high, the party don't hear each other and quickly attempt to counter the other party's contention. The chances that the parties get an answer or a solution for their contention. If the dispute is not resolved quickly, it will be referred to a third party who will conclude who is right and who isn't and force a solution. This arrangement and procedure are costly and frequently time taking[7]and even the outcome doesn't give the result they truly needed.[8]

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[5] *Id.*

[6] Travis Bell, *Mediation in Sports Disputes*, (July 2012), can be accessed at http://www.mediate.com/articles/BellT1.cfm.

[7] *Id.*

[8] Neil Goodrum, *Mediation In Sports Disputes: Lessons From The UK*, 04 July 2013,can be accessed at http://www.lawinsport.com/articles/regulation-a-governance/item/mediation-in-sports-disputes-lessons-from-the-uk.

REQUIREMENT

The objective of mediation is to answer or a solution for the dispute that fulfills the two parties. The main factor is that the parties themselves will discover this solution, instead of going to a mediator, who, on a fundamental level, encourages the communication between parties.[9] He can't decide. Their position is to manage the parties through the process of mediation to find a balanced result.[10] Increasingly, a precious and commercial industry built nearly sports activities. Therefore, disputed issues that arise can be varied and complicated. As there is the development of the commercial sector near sports activities, so the issues between parties can be tricky and various. Whether it's player's agreement, sponsorships, broadcasting, and many other things in sports in any conflict, there are legal as well as commercial and personal issues at stake.[11]

Progressively there is a valuable and business industry constructed almost sports exercises, consequently contested issues that emerge can be changed and convoluted. Regardless of whether to do with player's agreements, shifted sponsorship bargains, development work, broadcasting, the post-Olympic utilization of arena or one of the numerous different parts of game, in any squabble there are legitimate, business and regularly private matters in danger.

There can be a wrong observation that mediation is a delicate decision and that genuine business people don't have to intervene. The perception and observation of certain parties to a question is: "we know how to bargain, and we don't need someone to help us do that" and combined along with "if we can't do a deal on these terms, we will see you in court!" Taking help of a third parties who is experts for the discourse isn't an affirmation of being a helpless arbitrator, yet rather an affirmation that changing the dynamic of

[9] Mohammad Naseem, *Sports Law in India* , Kluwer Law International (December 12, 2011).
[10] *Id.*
[11] *Id.*

the conversation in this manner improves the possibilities of getting a reasonable arrangement and can negotiate.[12]

Any individual who has been to mediation ought to recognize that the conversation is energetic and more vibrant. Throughout the members get a clearer thought of where their own advantages lie and the qualities and shortcomings of the case. The party members have command over the conversation with regards to a private meeting as opposed to the test of the court where control has passed to the adjudicator or also judge.[13]

III. DISPUTES IN SPORTS AND THEIR SETTLEMENT: ALTERNATIVE DISPUTE MECHANISM

The concept of mediation received legislative acknowledgment in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are duty bound to mediate in and promote the settlement of disputes.

The idea of mediation got authoritative affirmation in India without precedent for the Industrial Disputes Act, 1947. The conciliators delegated and appointed under Section 4 of the Act are - "*charged with the duty of mediating in and promoting the settlement of Industrial disputes.*"

In 1879, arbitration was acknowledged as a dispute resolution process and prescribed in Civil Procedure Code, 1908. Later there was an amendment act of 1999 in the Civil procedure code that inserted Section 89, which provided reference of cases pending in courts to Alternative Dispute resolution, which also included mediation. It was effective from July 2002.

COURT OF ARBITRATION FOR SPORT

There is the court of arbitration for sports to resolve all ranges and types of disputes relating to the sport. In the code of sports arbitration Article, R27

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[12] *Mediation Training Manual of India*, Supreme Court of India, available at http://supremecourtofindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf.

[13] *Id.*

specifies that the court has authority and power to rule on disputes related to sport. Two classes are distinguished: conflict arising from all lawful relation between parties decided to invoke CAS arbitration and mediation.[14] For instances – matter of civil liability, players contracts or sponsorship and many more.

Conflicts emerging from last even choices made by the courts or tribunals of sports organization when their guidelines or agreement given for CAS jurisdiction.[15] Instance like punishing issue or choices regarding the selection and admissibility of athletes. Parties who are involved in disputes regarding sport have three methods of settling them:

- Appeal to the inner authorities or organization made by the federation concerned.
- Additionally, take the conflict to the respective courts.
- Go to individual arbitration or mediation.[16]

The rules and guidelines of sports organizations cannot prohibit an appeal or an application of a player or a member to external legal authorities. It is void when such provisions expect to remove the jurisdiction of the courts.[17]But they can also submit in their guidelines of parties engaged in dispute and conflict to go and get every internal solution and remedy and apply their application procedure before going to the court.[18]

THE CODE OF SPORTS-RELATED ARBITRATION

The new Code of sports-related arbitration, 1994 has administered the association and arbitration or mediation methodology and CAS process.

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[14] Richard H. McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror,* 20 Marq. Sports L. Rev. 305 (2010).
[15] *Id.*
[16] Hilary Findlay and Marcus F. Mazzucco, *The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport* System, 2000.
[17] Baker v. Jones [1954] 2 All ER 553.
[18] Scott v. Avery [1856] 5 HL Cas 811.

These two divisions of Article 69 – the bodies' statute is working for resolving conflict and the procedural rules.[19]

The Code accommodates process which are:

1. The regular arbitration processes
2. The appeal processes
3. The consultation process which permits games entities to requestopinion from CAS
4. The mediation process, 1999

The International Council of Arbitration for Sport stepped up and presented these regulations along with the arbitration. As they give certainty and take care of fair play and the knowledge, they are made to determine sport. CAS dispute resolution gets delighted from all the advantages a lot of mediation for the most part and the particular benefits of sports mediation.[20]

AIM OF MEDIATION: WORLD PERSPECTIVE

For what reason is mediation appropriate for sports? Maybe because there isn't just a single winner, and no loser It is a competitive activity, and players and coaches don't like to lose the game; however, parties can be a winner in mediation as it provides a solution for both parties to dispute.[21]

S. Gardiner stated another fundamental reason to use mediation in sport disputes to protect the relationship, whether personal or business. [22] "*The sports world is a small one – everyone seems to know somebody – and relationships, and indeed, reputations, are therefore more important and worth preserving"*. It also permits *"legal disputes to be resolved within the family of sport"*. Conflict in sports surely negatively affect fans and team

[19] Articles R27 to R69.
[20] Jai Prakash Meena, *Court of Arbitration for Sports*, available at http://www.legallyindia.com/easyblog/court-of-arbitration-for-sports-html .
[21] *Id.*
[22] Sports Law, Routledge 2006, p. 251.

motivation and self-esteem. Mediation is commended for its capacity to advance the 'spirit of understanding and fair play'.

In article 1 of the CAS Mediation Rules, the mediation is stated as: *"a non-binding and informal procedure, based on a mediation agreement in which each party undertakes to attempt in good faith to negotiate with the other party, and with the assistance of a CAS mediator, to settle a sports-related dispute."* CAS mediation accepted every feature of regular mediation as dispute resolution. It might be given for the settlement of sports disputes, not including for "disputes related to disciplinary matters as well as doping issues."[23]

For the world greatest sports which also include the EURO 2012, the Court of Arbitration for Sport Ad Hoc Division is perceived. It continues in accordance with the unusual Arbitration Rules for the UEFA Euro 2012 Final Round.[24] The same technique will be made for the Olympic Games in London. The primarily extraordinary thing about the CAS Ad Hoc Division, is the timing of the technique and process. Every single conflict should be understood within 48 hours of the application made. While arbitration remains the key strategy to settle sports dispute, mediation is additionally observed as a part of the CAS framework. There are many types of ADR like Arbitration, negotiation, settlement, mediation and many more. Mediation is comparatively new in India as an alternative method. [25]

IV. MEDIATION IN SPORTS: EFFECTIVENESS AND FUTURE DEVELOPMENTS

For mediation its usually take 43 days and is faster and quicker than arbitration as dispute resolution with 16 persons with more understanding and experience regarding conflicts in dispute in various countries (Mediator, lawyers, representative of sports organization, etc.) regarding to a study

[23] *Id.*
[24] Chawla S.K.,*Law Of Arbitration And Conciliation- Practice And Procedure*; Eastern Law House Pvt.Ltd,; Reprint (2000).
[25] *Id.*

performed by the European Union[26] and conducting qualitative interviews by Volker Hesse.[27] Most of the interviewees were on the side of mediation for legally conflict regarding contract (dispute on transfer between two clubs, agreement between manager and club or player).[28]

More than half of the views regarding employment-related conflicts and dispute mediation was chosen. But in FIFA, rules deal in a particular way regarding football employment disputes. There is an unfair breach of an employment contract that disciplinary sanctions for a club, player, or both are taken, and even other sporting dispute mediation is not suitable for such conflicts.[29]

Arbitration and mediation as dispute resolution are a private matter between parties, so it's tough to get data on success rates. The report of based on a study (2008) by the Swiss Association of Mediation – the success rate of mediation is above 70%.[30] Even others reported that the rate related to the success of mediation is between 70% to 90%, and it also depends on the area where it is beneficial.[31] There is always a case where one party to the dispute does not agree to the decision and is not satisfied, so they decide to appeal, so due to this time frame of dispute increases. There are high chances when the party agrees that when both parties work together, the outcome is decided by the judge or mediator, or arbitrator.[32]

V. Hesse conducted a study regarding sports, and it involved lawyers, mediators, observers, and many more in around 117 mediation

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[26] Kwatra G.K.,*Arbitration & Alternative Dispute Resolution With International Business Disputes*, Universal Law Publication Co. (2008).

[27] *Is mediation a suitable to resolve sports related disputes,* http://www.lawinsport.com/articles/item/is-mediation-a-suitable-to-resolve-sports-related-disputes.

[28] *Id.*

[29] *Id.*

[30] David Lanz, Martin Wählisch, Lars Kirchhoff, Matthias Siegfried, IFP *Mediation Cluster Evaluating Peace Mediation*, November 2008, available at http://www.oecd.org/derec/ec/Swiss%20Peace%20-%20evaluating%20peace%20negotiations.pdf.

[31] 5 Markanda P.C, *Law Relating To Arbitration And Conciliation*, Nagpur; Wadhwa and Company, (2003).

[32] *Id.*

process.[33]Approximately 69 of the mediation processes were successful, and the success rate was more than 65%. Even after a failed procedure, the parties can appeal in court or a tribunal or sports committee. Mediation helps to narrow down the problem of parties.[34]

FUTURE DEVELOPMENTS IN MEDIATION

One of the benefits of mediation is the cost viability contrasted with different ways to solve the dispute. For instance, litigation requires the plaintiff and respondent to experience a prearranged method, which involves the use of expenses at each stage. In mediation, parties can decide their strategies and process.[35]

In the online method of resolving the dispute, parties meet each other in online forums with the mediator. Now, it is also possible, and it also decreases expenditure, especially when the parties are international, mainly in a conflict in sports. It also has a drawback as they can't meet physically, so the discussion element is less online.

LIMITATIONS OF MEDIATION

Regarding financial matters in dispute, there might be the risk that parties settle the dispute but fall short to follow it afterward. It must be mentioned that a settlement deed is a contract between parties to the disagreement allowing them to build according to their suitability with its terms. Furthermore, settlement arrangements finished up by the dispute resolution method may have positive implementation prospects relying upon the jurisdiction.

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[33] Patil, B.S,*The Law Of Arbitration And Conciliation*, Pune, India, Case Law Supplement (4th ed. 2003).
[34] Singh, Dr.Avtar,*Law of ArbitrationAnd Conciliation (Including ADR Systems)*; Eastern Book Company, Lucknow(7th ed. 2006).
[35] *Id.*

V. CONCLUSION

There are numerous viewpoints to any debate and a wide range of methods for determining contrasts. Inescapably, individuals in a discussion will first take a gander which they accept are qualified for and how they will get it. It will appear to think about an outsider, for example, a judge, who can force an answer, yet it is seldom as basic as that. Indeed, where a plan of action to the court can also be the arbitration tribunal has been examined, and transactions began, there is an opportunity to arrange. It can be possible by immediate talks, and this is a system for dispute resolution that habitually delivers a determination. At the point when this kind of arrangement appears to be inappropriate or unrealistic to be successful or has separated, there is an option for getting through the gridlock without must be the subject of an answer forced by the court and tribunal that will without a doubt be unacceptable for no less than one gathering, which it needn't be.

Provided by the broad degree for question in-game, a more prominent utilization of intervention here would be industrially worthwhile. Settlement rates are accounted for from various sources as being in the abundance of 70%, on the off chance that 100 game cases went to intervention and 75 settled, the sparing to the business is liable to be significantly more than the extra expenses of interceding unsuccessfully in the other 25 cases. This would bring about a net limiting to the part. As opposed to being a delicate alternative, deciding to intervene is overcome and bodes well. Gatherings to games question frequently search for a speedy, classified, and practical determination.

Intercession is equipped for addressing these needs, having the capacity to diminish the average time and expenses of the system to the banquet of all partners, including competitors, clubs, and alliances. Given that those included in the question of the game are better educated about intervention, that intercession procurements are incorporated in regulations of national and worldwide leagues, and that intercession provisions are contained in gets, this creator accepts we will see intervention being utilized even more frequently as an instrument of option debate determination.

ANNIHILATION OF THE RELATIONSHIP BETWEEN THE BANKER AND CUSTOMER THROUGH THE OPERATION OF LAW

Nishtha Kheria*
Varun Vikas Srivastav**

ABSTRACT

The banker- customer relationship can be easily determined at a particular period which can have a lot of consequences related to the law for both the parties who are in a contractual relationship. It is not important to see the duration of the relationship rather if there is one single transaction then the relationship can arise. It is very essential to state the conditions in which the relationship between the banker and customer will be terminated. This peculiar legal relationship explains the behavior of the bank, in any case, is scrutinized and if there is any kind of deficiency then it can be detected easily. Through this research paper, it will be clear about the various major decisions which are related to the legal remedies which can be provided to the banking customers and the steps which the judicial system is taking for the conceptualization of the relationship between the banker and the customer.

Keywords: *Consequences, Contractual, Transaction, Relationship, Deficiency*

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I. INTRODUCTION

If we look at the contemporary world then we will realize that the banking customers are experiencing a lot of problems by the bankers due to which there is a need for the customers to take various legal remedies so that they can take the compensation and the damages which are occurring on them due to the bogus services which are granted by the bankers. The various legal remedies which are provided to the banking customers are in the form of some important acts such as the consumer protection act 1986 and the banking ombudsman scheme 1995.

The consumer protection act 1986 was passed so that the interest of customers can be protected and so that the consumer councils could be formed as well as other authorities who are essential to be formed to settle the disputes which arise within the consumers. This act contains the provisions which are in the addition and do not derogate any other law.

The banking ombudsman scheme 1995 was introduced by the reserve bank of India so that it could provide the redressal to whatever grievances arose in the services of the bank, loans, and advances as well as other matters. The reserve bank of India introduced this scheme through the exercise of his powers bestowed over them under Section 35A of the banking regulation act 1949 because they found it necessary for the interest of the public and the banking policy. All the banks must comply which the directions.

In this world which is governed by the markets and the trade as well as commerce, the banks have received unprecedented importance[1]. The banks have now become the curator of the monetary economies throughout the world. Through many years the banks have developed a lot and have evolved from the rudimentary forms and converted itself according to the present-day system[2]. Now the banks are known to be the backbone of the industries.

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[1] 1 L.C. Goyle, *Law of Banking and Bankers*,(Eastern Law House Private Ltd., Calcutta 1995), pg.468.

[2] 4 S.N Gupta, *Banking Law in Theory and Practice*, Universal Law Publishing Co. Pvt. Ltd (2017).

It is very important to analyze the definitions of banks, bankers, and customers so that it will be easy to understand the duty of the banker. The main function of the bankers of the ancient world was to do the money changing. The economy of our country in the ancient times was not at all developed because most of these money lenders were agriculturist so a relationship which was totaling descriptive never existed. The bankers and customers even did not have any duties to follow or perform. But in today's world, the bank sector has grown a lot in the fields of money lending as well as the fiscal services.[3]

The relationships of the parties cannot be defined easily because of the multifarious functions which are performed by the banks in the present times. The nature of the transactions will define the relationship between the parties. The relationship between the banker and the customer is based on contracts but still, it has to follow various statutory provisions.[4]

BANKER/ BANK

A banker refers to a person who is acting to be a banker in any post office savings bank.[5] The banker is an individual, partnership whose main business is banking i.e. the receipt of the money in any current or the deposits account and even the payment of the cheques which are drawn and the collection of the cheques which are paid by the consumer.[6] A banker is a person who will honor the cheques which are drawn upon him in the ordinary course of the business.[7] Bank refers to a place where the money is laid up so that it can be called occasionally and the banker refers to a person who traffics that money.[8]

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[3] *Supra* note 2.
[4] *Supra* note 1.
[5] Negotiable Instrument Act,1881, § 3, No. 26, Acts of parliament, 1881.
[6] 3 Halsbury's Laws of England, 31 London, Butterworths,1973.
[7] 17 Dr. Hart H.L., *The Law of Banking*, 41-56 (4th ed. 1954).
[8] Samuel Johnson, *Dr. Johnson's Dictionary*, □consortium, Great Britain,15 April 1755.

CUSTOMER

The term customer is not defined in any of the statutes.[9] But a customer refers to a person who has an account opened in a bank irrespective of the duration of the relationship.[10] The Kerala high court in the judgment of the Central Bank of India Limited, Bombay vs Gopinath Nair[11] had stated the same thing. This meaning of customer will even include in the meaning of the bank. For receiving the status of a customer, they must have an account in the bank.

The reserve bank of India has introduced various guidelines which are particularly for the identification of the customers such as the know your customer (KYC) so that the frauds which are related to the finance etc. can be controlled. The RBI has issued a circular which is under section 35A of the banking regulation act 1949.[12]

BANKING

The most important element in the definition of banking is the acceptance of deposits. According to the definition of Halsbury's Laws of the England[13] banking refers to "an individual, partnership or corporation, who's sole or pre-dominating business is banking, that is, the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer".

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[9] Supporting the view expressed by Dr. Hart, the Kerala High Court in Central Bank of India Ltd., Bombay v. Gopinathan Nair and others (AIR. 1979 Kerala 74) observed: "so far as banking transactions are concerned, a customer is one whose money has been accepted on the understanding that the bank will honour transactions up to the amount standing to his credit, irrespective of his connections being of short or of long standing"

[10] Taxation Commissioners v. English, Scottish and Australian Bank Ltd (1920) A.C. 683 UKPC.

[11] This appears to be the correct and acceptable exposition of law since the 'Duration theory' (requiring a course or habit of dealing with the bank) has now been discarded by Courts universally. A wider definition describing the customer as 'any person having a dealing with a bank' may be useful for many purposes, but the context of acceptance of deposits, it is obviously irrelevant.

[12] Financial Services Management Act, § 138(7), (Britain).

[13] *Supra* note 5.

In the Indian law of the banking regulation act the terms bank, banker, customer, and banking are defined.[14] This act even describes that no other person other than the banking company, SBI, RBI, and any other banking institution, firm, or the person who was notified by the central government should accept the deposits by the public which can be withdrawn by the cheque.[15]

According to this act, the bank has the right to engage in any activity even other than banking but they cannot engage in any commercial activity because it is nowhere included in the act.[16]

In the case of Mahalaxmi Bank Ltd. vs the registrar of companies west Bengal[17], the Calcutta high court had held that through the definition of banking it is clear that it is an essential characteristic of banking that the receiving of money on the deposits from the customers and even honoring them. If the bank does not exercise its duties of granting loans, receive deposits from the public which need to be repaid then the bank cannot be called the banking company according to the act. The lending of money is only a phase of the banking business it is not considered to be the main phase.[18]

In the case of bank nationalization[19], the supreme court of India had questioned that whether the term "banking business" refers to only the business which can be expressed under section 5(b) of the banking regulation act and it even does not include the term business under section 6(1) and even the four types of the nonbanking business.

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[14] Banking Regulation Act, 1949, §5(b),No. 10,Act of Parliament, 1949.
[15] *Id.*, § 4(A).
[16] *Id.*, § 6(1).
[17] Bank of Commerce Ltd., v. KunjaBehariKar, AIR 1961 Cal 666, AIR 1944 F.C.2.
[18] *Id.* in this connection, it may be noted that the E.C. approach to banking business is to consider the function of granting credits also, as an equally important and essential ingredients as deposits taking from the public. See. Art.I of both, the 1st and 2nd Banking Directives of the European Community. The Indian Parliament, however, followed the English approach.
[19] R.C. Cooper v. Union of India. AIR 1970 SC 564.

Therefore, in short, the banking is considered to be a business which includes the receiving of the deposits which are payable on the demands and whose sole intention is to circulate in the form of the money, collecting notes or drafts, the buying, and selling of the bills of exchange, negotiating of loans and they deal in the negotiable securities. There is no mandate to exercise these functions.[20]

RELATIONSHIP

After understanding the definition of the banker, customer, and banking next, we will discuss the various aspects which are related to the banker-customer relationship. It is very important to have a piece of theoretical and practical knowledge about this aspect. Because of this relationship the rights and the liabilities of the parties can be determined in the legal form. Such a relationship cannot be determined in general form because this relationship depends upon the services which are provided by the banker.

For having a relationship between the banker and customer there is a need to have a mutual intention of the parties that they want to open a bank account.[21] Such a relationship cannot emerge if both parties do not agree or have an intention to enter. The relationship comes into effect from the moment the customer does the first payment to the banker for the opening of the account.[22]

If we discuss the basic services which are provided for the acceptance of the deposits then there are four types of relationships which are existing between the banker and the customer:

- *The bailor and the bailee.*
- *The trustee and the beneficiary*

[20] *Id.*, at. 590.
[21] Robinson v. Midland Bank Ltd. (1925) 41 TLR 402.
[22] Lord Davey in G.N. Railway v. London & County Bank (1901) ALL ER REP 1004(HL).

- *The principal and agent*
- *The debtor and creditor*

The obligation of the relationship depends totally upon the nature of the relationship which exists between the two.[23]

THE RELATIONSHIP BETWEEN THE BAILOR AND BAILEE

When there is a situation where the customer hands over its valuable goods to the bank for safe custody then the relationship between the bank and the customer is referred to as the bailor and bailee which is governed by the Indian contract act.[24] The process or the term bailment refers to when a person delivers its goods who is known as bailor to other person known as bailee for the safe custody of the goods for a contract and when the purpose gets accomplished then the goods need to be returned to the bailor or the bailee must dispose of the goods according to the directions which are provided by the bailor. It is different from the term agency because the bailee does not represent the bailor.[25]

For the bailment, money is never considered to be the actual subject matter rather it can be if the actual coins are being delivered which needs to be returned. In the past, the deposits which were made to the goldsmiths were considered to be of this nature and the goldsmith had to use the money then it was considered that this transaction is not a bailment.[26] The bailee does not exercise with the leave of the bailor which is covered under the contract then the bailor has no powers to form any contracts on the bailor which is on the behalf of the bailor and he cannot even make the bailor liable for any of the acts which he performs as a bailee.[27]

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[23] Herbert P.Sheldon, C.B. Drover, R.W.B.Bosley, *Practice and Law of Banking*,162, (10th ed. London, Macdonald & Evans Ltd. 1972).
[24] The Indian Contract Act, 1872, § 148, No. 9, Acts of parliament, 1872.
[25] 30 HLI, *Halsbury's Laws of India(Banking and Finance)*, (LexisNexis,2017).
[26] 1 S.N. Gupta, *The Banking Law in Theory and Practice*, 1-25, (3rd ed. New Delhi, Universal Law Publishing Co.,1999).
[27] United Corporation Bank v.Hem Chandra Sarkar (1990) 3 SCC 389.

When the process of bailment takes place from a contract which is governed by the Indian contract act 1872 then there is a possibility of bailment and there can be a relationship of a bailee in respect of particular property without the presence of any enforceable contract and presence of consent for such relationship to arise and the finder of goods can be considered to be a bailee in some of the special circumstances.

The banker who does the advancement of money for the security of railway receipts which are sent to him for the money collection then, in this case, he does not become the bailee of the goods which form the topic for the receipts, where the banker has the possession of the goods there is an obligation on the banker to take care of those goods. In situations where the bank maintains the vault for the safe deposits and then, in turn, accepts the property and the valuables from the customers for keeping them safe then in that condition the bank is in the position of the bailee. The bailee must show that they are taking proper care of the goods which are in its custody.[28]

The banker as the bailee has the right to contract himself out from the duty of taking care of the goods which were imposed upon him under the Indian contract act 1872 and can therefore avoid taking any responsibility of any kind of loss or destruction which is caused to the goods bailed even after the bank has taken the proper care if the goods according to the terms which are mentioned in the Indian contract act section 152.[29] The bank bailee may or may not repudiate the liability in the negligence which is related to the damages and the loss which is caused to the goods which are placed in the custody.[30] If the subject matter of the goods bailed is itself lost then it will be a prima facie evidence of the negligence which is caused by the bailee and can therefore lead to a rebuttable presumption.[31] If the bank then proves that

[28] State of Bombay v. Memon Muhammed Haji Hasan (1967) 3 SCR 938.
[29] Bombay Steam Navigation Co. Ltd., v. VasudevBabu Rao AIR 1928 Bom.5.
[30] Vijaya Bank v. United Corporation Bank AIR 1991 (Ker) 209.
[31] K. Chellappan Pillai v. Canara Bank (1971) 71 Com. cas.584; Cochin Porttrust v. Associated Cotton Traders Ltd., AIR 1983, (Ker) 154;Jagadish Chandra Trikha v. Punjab National Bank (2000) 100 Com. cas.839 (Del).

they have taken proper care of the goods and wasn't negligent then the bank will not be held liable.[32]

THE RELATIONSHIP BETWEEN THE TRUSTEE AND THE BENEFICIARY

There are situations where the banker can become the trustee of the funds which are provided by the customer to them. So, these types of relationships are formed when the banker receives the money of his customer which is not for deposits rather it is for some other purpose. These situations come up when the customers provide some particular instructions or directions to the banker to engage them in a particular transaction on the behalf of the former. If the relationship is considered to be one of trustee and the banker would then be barred from the usage of the amounts which are deposited by him.[33]

In the case of the New Bank of India Ltd vs Peary Lal[34], it was held that the customer who is making the payment to the bank with giving proper instructions for the transmission of a particular amount of money to another branch. Then after some time a moratorium for imposed and the bank was barred from making any payments. The court then held that the transaction made was for the entrustment of the amount of money to the bank for making a transmission. If no further instructions are provided then the bank does not cease to be a trustee and if the instruction is not given then the bank can hold the amounts which are transmitted on the behalf of the plaintiff as a trustee.

When in any case the bank is appointed to be the receiver by the court then the bank has the chance to become a trustee for the money which he received and the money will continue to stay as the property of the party who had deposited the amount in the bank.

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[32] Dena Bank v. Glorphic James (1994) BC 240(Ker) DV.
[33] The Indian Trust Act, 1882, § 19 &20, No. 2, Act of Parliament, 1882.
[34] AIR 1962 SC 1003.

From this case, it is clear that the fiduciary duties are implicit when the concept of trust arises and it can even compel the banker to make the entire disclosure of the profits and will be able to gain full consent from the beneficiaries which are the part of the business. If there is a breach in any fiduciary duty then there are high legal consequences to it and if the trustee beneficiary characterization is adopted then the whole of the banking business can be finished which happened in the case of the bailor bailee characterization.[35]

THE RELATIONSHIP BETWEEN THE PRINCIPAL AND AGENT

When the bank is providing its services of remittance of the money, collecting the cheques, paying the telephone bills, etc. of their customers then in such cases the bank acts as the agent of the customer and in such situations, the rights and the obligations of the bank towards its customers will be very different. The rights and duties of the banker and the customer are mentioned along with the special provisions about the principal and agent in the Indian contract act.

The boundations over a banker:

- For conducting the business of the customer or the principal which should be done according to the directions provided by the principal and if there are no directions then it will follow the prevailing custom at the place of the transaction at a particular time.[36]

- They have to conduct the business of agency with making use of the skills which are within the people who are engaged in the business.[37]

[35] A breach of fiduciary duty can lead to an injunction, damages, or to the fiduciary having to account for any profits made in addition to the criminal sanctions for breach of trust.
[36] Indian Contract Act 1872,§ 212, No. 9, Acts of Parliament, 1872.
[37] *Id.*

After all these boundations the banker or agent must make the compensation according to the consequences of the neglect or misconduct which is liable for conducting the business even after the directions given by the principal.[38]

In the case of Bharat Bank Ltd v MS Kashyap Industries[39], a company in Kanpur had ordered for some cloth made of silk which should be of special quality and color for this the plaintiff had sent a DD trough the Bharath bank Delhi branch and had provided with the instructions that the draft should be presented within 10 days of the date of receipt. The bank had then presented the draft according to the instructions but then the company refused to accept it and said that it was a ground of overcharging by the plaintiff. Then the plaintiff had instructed the bank that they should deduct the overcharge and then present the draft. Due to this, the bank had taken a lot of time to present it, and then it was refused by the company. The bank had provided with the credit to the plaintiff for the receipt of the draft and then they had debited it to the account which was then covered by the draft of the dishonored cheque. The plaintiff then sued the bank based on the recovery of the price of silk.[40]

On this, the trial court stated that on the grounds of negligence the plaintiff should be provided with the full amount of money as it was stated in the draft.[41] When the appeal was filed stating the explanation about the delay done by the bank in the presenting of the draft the high court had said that the plaintiff can only claim for the damages which are incurred because of the negligence of the defendant in the presenting of the drafts and not the price which was dispatched to the third party.[42] The bank acts on the

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[38] Punjab National Bank Ltd., v. Dewan Chand AIR 1931 Lah. 302. Punjab National Bank Ltd., v. RBL Benarsi Das and Co. AIR 1960 Punj. 590 Bank of India v. Official Liquidator AIR 1950 Bom.376. First National Bank Ltd., v. Industrial Oil Com.AIR 1962. Punj. 170 First National Bank Ltd., v. Pioneer Commercial Bank. AIR 1951 Cal.34 Indian Bank v. Aluminium Industries Ltd., (1990) CCV 69 Ker 427. Keshari Chand v. Shillong Banking Corporation Ltd., AIR 1965 SC. 1711.

[39] AIR 1958 J&K25.

[40] Central Bank of India Ltd., v. Ram Sarup Khanna AIR 1956 Punj. 78.

[41] *See*, The Indian Contract Act, 1872, § 211-218, No. 9, Acts of Parliament, 1872.

[42] Ross Cranston, EmiliosAvgouleas, Kristin van Zwieten, Theodor van Sante,*'Principles of Banking Law'*, 520, Oxford, Clarendon Press, 1997.

instructions provided by the customer related to the negotiable instrument and had entered into a contract with the third party then the customer will withdraw the directions and can revoke the transactions.

If the bank is providing the services to deposit the bills of the customers then they will be held liable for any kind of damages or the loss which is incurred due to the customer because of the time they took in depositing the amount in the bank. Therefore, it is evident that the agent in many aspects in the position of the trustee.[43]

DEBTOR-CREDITOR RELATIONSHIP

When the customer deposits the monetary fund in the bank then the connection between the banker towards his customer is mainly termed as debtor and creditor. It has been said that the money that is deposited in the bank is feasible to cause misapprehension. In reality, what happens is that the money isn't deposited in the bank but it is lent to the banker, and to all those bankers that engage to do is to clear the debt by paying over an equivalent amount when they are called upon. But in reality, the contract dominates the law that is related to the deposit of customer's money in a bank.[44]

The contract of debt that is stated as to be on the legal basis with relevance to the relationship among the banker and the customer is, however, not similar to an ordinary commercial debt or a debt, simple and pure. Accordingly, the general debtor-creditor law cannot apply without the necessary alterations, in the case where the debt is owed by a banker to his customer. The most significant distinction between a banker's debt and an ordinary debt is all about their general rules i.e., the debtors have to pay back or repay the sum to his creditor that involves the duty of seeking him out and terminating the

[43] Rajanayagam, M.J.L.*"Marking or Certification of a cheque by the drawee bank — The legal consequences."* Malaya Law Review 12, no. 2 (1970): 298-307. Accessed October 5, 2020. http://www.jstor.org/stable/24862628.

[44] Sir Ross Cranston, EmiliosAvgouleas, Kristin van Zwieten, Christopher Hare, and Theodor van Sante, *Principle of banking law***,** 632, February 2018.

payments, doesn't apply to banker debtors.[45] This fundamental rule is described by the maxim that is "the Debtor must seek the creditor". The matter is essential because of the legal outcomes that may arise out of it. For, if we state that the rule applies to all the bankers as well then it will follow that the banker would be in an extended state of default and that the customer would be designated to sue the person for the repayment of the balance of the persons account without calling the person to pay.[46]

Promptly, when the money is being deposited by a customer in the bank then the interconnection relationship is being formed between the customer and the bank. Hence, the bank is not liable to keep the money in the form it was given to it but they are responsible to use it in a way it considers constructive to them. The Bank is only liable to repay the amount total when the customers want or demand the same. In other terms, when the banker accepts deposits from the public then the money received is for all the purposes, the money of the banker. They are empowered to do with it as they please and were guilty of no breach of trust in employing it. Furthermore, they are not answerable to the administration, the person puts it into jeopardy or even if the person involves in hazardous speculation, and in that case, the person is not bound to keep it or deal with it as the property as his principle. But the person is liable to the amount if the person is contracted, having received the money and has to repay to the customer when the customer asked or demand for it, the sum equivalent to that amount should be paid into his hand with the prescribed interest if any.

The maxim put down in all the cases as mentioned above is that the banker is empowered to exercise the money without being called upon to consider for such a user, his only responsibility is to return the amount following the terms granted between the person and the customer. It is inquisitive to perceive that the law, as asserted in those terms in the old and well-known

[45] *Chorley* and *SmartLeading Cases* in the *Law* of *Banking*, (6th *ed. Law* of *Banking)*, 11th *edition* (Butterworths, *London*, 1996)*p. 110*. [6] [*1921*] *3 K.B. 110.*
[46] *Id.*

judgment of the House of Lords in Folly v. Hills[47] has never been challenged by any of these succeeding decisions.

But the bank is not obligated to execute the payment to the customer elsewhere from the department in which the statement is managed as though the branches of a bank are agencies of one principal. They are discrete, for the mortgage of customer's cheques. In the Joachim son case, it was conclusively held that it was certainly a term of the agreement among the parties that the bank was not accountable to pay the customer the full expense of his balance until he asked payment from the bank at the branch at which the prevailing account is grasped. This is the authorization for the proposal that the credit balance on a current with a bank is obligatory to the customer solely at the branch where the account is maintained.

From this, it certainly comprehends that the purpose of action, in the matter of refusal to pay, can occur only at the concerned branch of the bank and that the law administering the contract among the banker and the customer will be the law of the place where the branch at which the deposit is obligatory is located. This practice is appropriate irrespective of whether the account is current or savings account. It is further unnecessary if the deposit is performed through another branch of the bank or another bank. Furthermore, the requirement to make the payment should be executed by the customer following the prerequisites of the Negotiable Instruments Act and the banking methodology.

In the Case, *Delhi Cloth & General Mills Co. Ltd. v. Harnam Singh*[48] court mentioned – "in banking transactions, the subsequent rules are now settled: (i) the responsibility of a bank to pay the cheques of a customer rests fundamentally on the branch at which he holds his accounts and the bank can justly refuse to cash a cheque at any distinct branch. (ii) a customer must request payment at the branch where his current account is kept before he has a purpose of action toward the bank.

[47] Lord Chorley. *'Law of Banking'*, 31 (6th ed. London. Sweet and Maxwell 1974).
[48] AIR 1955 SC 590.

The rule is the equivalent of whether the account is a current account or whether it is a state of deposit." English Courts hold that the situs of the debt is at the position where the current account is maintained and where the demand must be executed. Therefore, it can be observed from the preceding considerations that the law had alternated among these four impressions before it eventually settled on the last of them, i.e. the debtor-creditor relation.

Ultimately, the duration of limitation of 3 years relevant to ordinary debts does not apply to the money deposited in a bank. The term of limitation will commence running in the matter of debt as soon as it becomes due.[49] In the occurrence of a deposit performed with the bank, the duration of limitation commences from the time, the amount is commanded by the customer from the bank.[50]

II. CESSATION OF BANKER- CUSTOMER RELATIONSHIP

The decision of whether the banker- customer connection is in an occurrence at a distinct period has significant legal importance for both parties to that contractual relationship.[51] As duration is not of the nature of the relationship, even a particular transaction can give acceleration to it.[52] It is accordingly essential to circumscribe the contingencies under which the banker-customer connection may be terminated. *In tradition, it arrives at an end in one or another of the subsequent ways;*

1. *by mutual agreement among the parties,*
2. *by unilateral action on the part of one of the other of the parties, and*
3. *by enforcement of the law.*

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[49] The India Limitation Act 1963, Art. 44, No. 36, Act of Parliament, 1963.

[50] *Id.*

[51] For eg., a banker who wrongly judges the relationship to be at an end and fails to honour a customer's cheques is exposed to the possibility of substantial damages and sometimes, even for defamation

[52] Commissioner of Taxation v. English, Scottish and Australian Bank Ltd., (1920) AC 683. See further, Central Bank of India Ltd. Bombay v. Gopinathan Nair and others, AIR 1979 Kerala 74.

Termination of the banker-customer connection by process of law may happen in the subsequent steps, viz,

1. *death of the customer,*
2. *mental incapacity of the customer,*
3. *the bankruptcy of the customer,*
4. *winding up of a company customer,*
5. *winding up of a bank, and*
6. *the outbreak of war.*

Since comprehensive research on this point is irrelevant as far as our theme is concerned, it is withdrawn from the distant discussion.[53]

III. CONCLUSION

From the preceding analysis, it is manifest that, for legal persistence, the receiving of securities by a bank from the public is considered as borrowing by the bank. But as a debtor, the bank is not similar to other commercial debtors; It has specific perquisites and is charged with contractual, statutory, and customary responsibilities. It is concerning this unique legal relationship that the behavior of the bank in any distinct case is examined and any insufficiency in service is identified.

[53] N. Krishna Kumar,*Termination of the Banker-customer Relationship by Operation of Law*, Journal of Banking & Insurance Law. 2020; 3(1): 25–37p. June 2020. Available at: http://lawjournals.stmjournals.in/index.php/jbil/article/view/551. Date accessed: 05 Oct. 2020.

ELEMENTS OF EFFECTIVE INSIDER TRADING REGULATIONS: A COMPARATIVE ANALYSIS OF INDIA AND U.S.A.

Dr. Pranav Saraswat*

ABSTRACT

Insider Trading Regulations are not much a talk of past in India as India is a developing country so laws of India are continuously get amended. Now India follows SEBI (Insider Trading Regulation), 2015. Countries like U.S.A. have these laws from a long time and by getting motivated from U.S.A. securities several other countries followed the path and made Insider Regulation for their own countries. Companies in India are also allowed to have their own Insider Regulation which needs to be in harmonization with the Insider Trading Regulation. By looking at all this scenario a need was felt for this scenario to examine and analyse.

This study covers the comparative analysis of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 and the Insider Trading Regulation of U.S.A. It also discusses the problems and issues in implementation of Insider regulations in India and probable solutions through US laws.

***Keywords*:** *Insider Trading, SEBI, SEC*

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I. INTRODUCTION

In simple words, Insider trading can be defined as trading done by any person who has access to some material information which is not available to the public at large and on the basis of that information, he tries to gain profit in shorter or longer run. Legality of Insider trading depends on at what point of time the trading has been done.[1]

The hypothetical examples for Insider trading can be of a director who has prior insider knowledge that his company is going to merge with another company, this knowledge is not available in the pubic dynamic and before this information goes in public, the director trade in the securities to gain profit from the trading.[2] Insider trading can be of both natures i.e. legal and illegal. If the connected person goes through proper channel of sharing all details and take approval from appropriate authorities then it would be legal but if that trading happens without going through proper channel then that would be considered as illegal. Some examples of Indian case are Martha Stewart Case, Reliance Industries Case and Joseph Nacchio case etc. Some of the cases will be dealt in the length in the paper.

While dealing with this paper, one question which comes to mind is that what is the need of this regulation. Rules and regulations are made according to the needs of the society. To fulfil the need and demand of financial system there is need of making financial regulations. According to Herring and Santomero, there are basically four things which are necessary for making of any financial regulations which are:

(i) Safeguarding the system against systematic risk;

(ii) Protecting consumers against opportunities behaviour by suppliers of financial services;

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[1] https://insidertrading.procon.org/view.resource.php?resourceID=002391 (last visited Jul 7, 2020).

[2] *Insider Information - Overview, Insider Trading, and Example*, Corporate Finance Institute (2019), https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/insider-information/ (last visited Jul 7, 2020).

(iii) Enhancing the efficiency of the financial system and

(iv) Achieving a range of social objectives (such as increasing home ownership or channelling resources to particular sectors of the economy or population).[3]

There are a few reasons which should be considered while dealing with the concept of "Confidential Information", which are as follows:

(i) The person who possess that information has unfair and secret advantage over the other people who doesn't have it;

(ii) This can be breach of fiduciary duty as there is relationship of trust and confidence between the parties;

(iii) The people who had already invested money or are interested, it can make disruptive relationship with them;

(iv) It can give rise to conflict of interest between company's interest and insider's interest.

In preserving market integrity and ensuring fairness to all shareholders, Insider Trading plays a very important role. The regulation of Insider has been amended a lot of time to fulfil the requirements of current financial market. To prove that there is insider trading happened, only thing required to prove is whether that person has the possession of insider trading and now the insider has to prove the contrary part. To get away from the offence of 'Insider Trading' the defence which can be taken by the insider is the 'trading plan'.[4]

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[3] *SEBI (Prohibition of Insider Trading) Regulations, 2015*(Issued on 15 Jan 2015), SEBI, https://www.sebi.gov.in/legal/regulations/jan-2015/sebi-prohibition-of-insider-trading-regulations-2015-issued-on-15-jan-2015-_28884.html (last visited Jul 7, 2020).

[4] *Supra* Note 4.

This regulation is applicable on all the securities and the entities which are listed on stock exchange and also on the proposed entities.[5]

The concept of Insider Trading starts with U.S.A., which was the first country to start any regulation with this nature.

II. INSIDER TRADING REGULATION IN INDIA

The history of stock exchanges in India is almost 144 years old but history of Insider trading regulations in India is only 27 years old.[6] The *Thomas Committee Report* cited instances of key persons of a company possessing strategic information regarding economic conditions of the company viz. the size of the dividends to be declared, or of the issue of bonus shares or the awaiting conclusion of a favourable contract prior to public disclosure.[7]

The first effort in direction of curbing Insider Trading was made in the form of the Companies Act of 1956. Wherein, the Section 307 provided for maintenance of a register by the companies to record the directors' shareholdings in the company.[8] The section 308 prescribed the duty of the directors and persons deemed to be the directors to make disclosure of their shareholdings in the company.[9] Despite the recommendations of the *Thomas Committee, no specific laws were passed to curb the practice of Insider Trading* was a major deterrent.

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[5] *The Long and Short of Insider Trading Regulation in India*, https://www1.nseindia.com/research/content/res_QB13.pdf (last visited Jul 7, 2020).

[6] *Snapshot on Insider Trading*, TaxGuru, https://taxguru.in/sebi/snapshot-insider-trading.html (last visited Jul 7, 2020).

[7] *BSE (formerly Bombay Stock Exchange) | Live Stock Market updates for S&P BSE SENSEX, Stock Price, Company News & Results*, https://www.bseindia.com/ (last visited Jul 7, 2020).

[8] *Chapter 3 Historical Development Of Laws On Insider ...*, , http://shodhganga.inflibnet.ac.in/bitstream/10603/13173/11/11_chapter%203.pdf (last visited Jul 7, 2020).

[9] *Companies Act, 1956 (Section 303 to 674), Latest Laws*, https://www.latestlaws.com/bare-acts/central-acts-rules/corporate-laws/companies-act-2013-2/companies-act-1956-2nd-page/ (last visited Jul 7, 2020).

In 1979, a high powered committee was constituted (i.e. Sachar Committee) for reviewing of the Companies Act, 1956 and the MRTP Act, 1969[10]. Sachar Committee recognized the need for amendment of the Companies Act, 1956 as some employees having company's key information could misuse it and manipulate stock prices. The Committee made two-fold recommendations – first one was related to full disclosure of transactions by those who have the sensitive information and second was related to prohibition of transactions by such persons during certain specified period. All public companies were required to maintain a register disclosing dealings in shares of the company by the above persons including dealings by their spouses and dependent children and also of those persons who are in full time employment of the company and drawing a minimum salary of three thousand rupees per month.[11] The Committee also recommended amendments to section 307[12] and 308[13] of the Companies Act, 1956. The committee also suggested that the accountability for the profits made by insider trading should lie on the insider.

In May 1984, the Government of India constituted a High-powered Committee (Patel Committee), to make a comprehensive review of the functioning of the stock exchanges and to make recommendations in the matter.

The recommendations of the various committees and the needs of rapidly advancing securities market gave way to the formulation of a comprehensive legislation known as the "Security and Exchange Board of India (Insider Trading) Regulations Act, 1992 which prohibited the fraudulent practice of Insider Trading. The SEBI Act, 1992 contained the provisions to punish the

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[10] *Section 309 in The Companies Act, 1956 - Indian Kanoon*, https://indiankanoon.org/doc/784001/ (last visited Jul 7, 2020).

[11] Guest, company secretarial practice - The Institute of Company Secretaries ... mafiadoc.com, https://mafiadoc.com/company-secretarial-practice-the-institute-of-company-secretaries-_5a2311231723dd22f10429ca.html (last visited Jul 7, 2020).

[12] *Implementation OfSachar Committee Recommendations*, http://www.minorityaffairs.gov.in/sites/default/files/Sachar-Committee-Status_0.pdf (last visited Jul 7, 2020).

[13] *Section 307 in The Companies Act, 1956*, https://indiankanoon.org/doc/1028417/ (last visited Jul 7, 2020).

person convicted of Insider Trading.[14] The Security and Exchange Board of India was given a regulatory role for curbing the practice of Insider Trading.[15]

However various loopholes in SEBI (Insider Trading) Regulations Act, 1992 were revealed in the cases of *Hindustan Lever Ltd. v. SEBI*[16] and *Rakesh Agarwal v. SEBI*[17] *Hence* "Security and Exchange Board of India (Insider Trading) Regulations Act, 1992 was subsequently amended in 2002 to plug certain and came to be known as SEBI ([Prohibition of] Insider Trading) Regulations, 1992 and which prohibited fraudulent practice and a person involved in insider trading to be held guilty for such malpractice.[18] The provisions[19] clearly states that no insider shall—

- *either on his own behalf or on behalf of any other person, deal in securities of a company listed on any stock exchange when in possession of any unpublished price sensitive information; or,*

- *communicate or*[20] *counsel or procure directly or indirectly any unpublished price sensitive information to any person who while in possession of such unpublished price sensitive information shall not deal in securities.*[21]

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[14] Companies Act, 1956, TMI - Tax Management India. Com, https://www.taxmanagementindia.com/visitor/acts_rules_provisions.asp?ID=436 (last visited Jul 7, 2020)

[15] 26 U.S. Code § 24 - Child tax credit, Legal Information Institute, https://www.law.cornell.edu/uscode/text/26/24 (last visited Jul 7, 2020).

[16] The Securities And Exchange Board Of India Act, 1992, No. 15, https://www.sebi.gov.in/acts/act15ac.pdf (last visited Jul 7, 2020).

[17] Journal of Legal Studies and Research, Anticipative And Statistical Analysis Of Insider Trading " The Law Brigade Publishers The Law Brigade Publishers (2019), http://thelawbrigade.com/company-law/anticipative-and-statistical-analysis-of-insider-trading/ (last visited Jul 7, 2020).

[18] Journal of Legal Studies and Research, Anticipative And Statistical Analysis Of Insider Trading " The Law Brigade Publishers The Law Brigade Publishers (2019), https://thelawbrigade.com/company-law/anticipative-and-statistical-analysis-of-insider-trading/ (last visited Jul 7, 2020).

[19] Hariharan, *The Know-All of Insider Trading – Decades of Corruptive Prevention Academike(2015)*, https://www.lawctopus.com/academike/know-insider-trading-decades-corruptive-prevention/ (last visited Jul 7, 2020).

[20] *SEBI (Prohibition of Insider Trading) Regulations, 2015*(Issued on 15 Jan 2015), SEBI, https://www.sebi.gov.in/legal/regulations/jan-2015/sebi-prohibition-of-insider-trading-regulations-2015-issued-on-15-jan-2015-_28884.html (last visited Jul 7, 2020).

[21] Securities And Exchange Board Of India, https://www.sebi.gov.in/acts/insideregu.pdf (last visited Jul 7, 2020).

Provided that, nothing contained above shall be applicable to any communication required in the ordinary course of business or profession or employment or under any law.[22]

The provision also states that no company shall deal in the securities of another company or associate of that other company while in possession of any unpublished price sensitive information.[23] Any insider who deals in securities in contravention of the provisions of regulation 3 or 3A shall be guilty of insider trading.[24] The power of investigation vests with the Board, which can elect one or a number of members to look into the book of accounts and take *suo moto* cognizance of any complaint received on behalf of or against an insider.[25] All listed companies and organizations associated with securities market, including other intermediaries were mandated to frame a code of internal procedures and conduct in correspondence to the *Model Code*.[26]

After a decade of existence of the Securities and Exchange (Prohibition of Insider Trading) Regulations, 1992, on 15 January, 2015 SEBI notified another improved regulation, the Securities and Exchange (Prohibition of Insider Trading) Regulations, 2015. The new regulations have tried to address the problem of insider trading comprehensively. In these regulations the definition of a connected person[27] has been expanded and clarified. In widened the definition of insiders and included within its ambit the persons who don't even occupy a position in the company, but may be involved in a contractual capacity with the company and are in touch with the company

[22] *Id.*
[23] *Securities And Exchange Board Of India*, https://www.sebi.gov.in/acts/insideregu.pdf (last visited Jul 7, 2020).
[24] *Securities And Exchange Board Of India*, https://www.sebi.gov.in/acts/insideregu.pdf (last visited Jul 7, 2020).
[25] Legal Service India, *Prohibition of Insider Trading Regulations, 2015*, http://www.legalservicesindia.com/article/2028/Prohibition-of-Insider-Trading-Regulations,-2015.html (last visited Jul 7, 2020).
[26] Securities And Exchange Board Of India, https://www.sebi.gov.in/acts/insideregu.pdf (last visited Jul 7, 2020).
[27] *Securities Market Regulations: Lessons from US and Indian Experience*, ResearchGate, https://www.researchgate.net/publication/228209974_Securities_Market_Regulations_Lessons_from_US_and_Indian_Experience (last visited Jul 7, 2020).

and its employees. They are in a position wherein they are aware of the operations of the company. Such a relationship should involve sharing of price sensitive information.

The 2015 regulations also introduced the concept of Trading Plans[28], which ensures the compliance by insiders with the access to UPSI. According to the 2015 regulations:

> *"An insider shall be entitled to formulate a trading plan and present it to the compliance officer for approval and public disclosure pursuant to which trades may be carried out on his behalf in accordance with such plan".*[29]

"OFFENCES" UNDER INSIDER TRADING REGULATION, 2015

There are basically two kinds of offences which are described as follows:

(I) The person who has trading information passes that information to some other person except in situation of "in furtherance of legitimate purposes, performance of duties or discharge of legal obligations" and in described as "Communication Offence";

(ii) The person who has possession of Unpublished Price Sensitive Information uses this information for trading purpose which is described as "Trading Offence".[30]

India follows "parity of information" approach. As per this approach, what matters is that the person has the information and the way by that person got that information (by legal or illegal means) doesn't possess much value. This

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[28] *Prohibition Of Insider Trading Regulations, 2015*, https://www.sujlonropes.com/pdfs/5)Code-of-Conduct-to-Regulate-Monitior-and-Report-Trading-by-Insiders.pdf (last visited Jul 7, 2020).

[29] Legal Service India, *Prohibition of Insider Trading Regulations, 2015*, http://www.legalservicesindia.com/article/2028/Prohibition-of-Insider-Trading-Regulations,-2015.html (last visited Jul 7, 2020).

[30] *SEBI (Prohibition of Insider Trading) Regulations, 2015* (Issued on 15 Jan 2015), SEBI, https://www.sebi.gov.in/legal/regulations/jan-2015/sebi-prohibition-of-insider-trading-regulations-2015-issued-on-15-jan-2015-_28884.html (last visited Jul 7, 2020).

approach is quite contrary to how it is followed in U.S.A. In U.S.A., it matters that how the person got hold on that information and whether he is breaking any fiduciary duty which he owes towards company, shareholders or the investors. The 1992 regulation says that the person must have been traded on the basis of information which he possess but later on many amendments came and after the only thing to prove is that the person has the information and it doesn't need to prove that he has traded on basis of that information because it is already assumed that he must have used that information.[31]

II. INSIDER TRADING REGIME IN US

The U.S.A. is one of the most developed Capitalistic economies. The regulations for fair trade practices are extremely important in any capitalistic nation. The history of insider trading in U.S.A. is nearly as old as history of Share markets. In 1789, William Duer became the first person in the history of U.S. to use the insider information and involved in speculative trading and thus initiate the 1792 market crash.[32]

In the year 1909, the U.S.A. Supreme Court in the verdict of case of Strong v. Repide[33] established a rule that the director of a company must either disclose the inside information or abstain from trading. Even though the Supreme Court moved in direction of fair disclosure but it did not define the word 'Insider'.[34]

In 1929, a boom period started in the New York Stock Exchange. But later that year the prices of stocks fell and selling of shares started, which continued for next three years. With a sign of no recovery various factories were shut down and Banks had to call in for loans and it lead to the onset of the great depression.

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[31] *Supra* 8.
[32] *Id.*
[33] *William Duer: America's First Wall Street Villain*, Historical Horizons (2015), https://historicalhorizons.org/2015/05/15/william-duer-americas-first-wall-street-villain/ (last visited Jul 7, 2020).
[34] Strong v. Repide, 213 U.S. 419 (1909), Justia Law, https://supreme.justia.com/cases/federal/us/ 213/419/ (last visited Jul 7, 2020).

The U.S. history of Insider trading was deeply impacted by the Stock market crash of 1929. In the year 1933, the Securities Exchange Act, 1933 was passed. The main goals of this legislations were

1) to make financial statements more transparent so as to ensure that investors can make informed decisions related to investments;

2) to curb fraudulent activities in securities market by establishing laws against it. The legislation addressed the need for better disclosure by requiring companies to register with the Securities and Exchange Commission.[35]

Another step was taken on the after math of the stock market crash was the passing of

Glass-Steagall Act on June 16, 1933. This Act aimed at separation of investment activities from commercial banking. It recognised that the improper banking activity was main culprit of the financial crash. It also recognised that commercial banks took on too much risk with depositors' money.[36]

In 1934 the Congress passed a landmark Act viz. Securities Exchange Act of 1934 wherein Congress created the Securities and Exchange Commission (SEC). The Act also gave authority over all aspects of securities market to the SEC. The Securities Exchange Act of 1934 prohibits certain types of conduct in the markets. The Act also provides the Commission with disciplinary powers in order to curb any fraudulent activities in the Securities Industries.[37] These provisions[38] proved to be the base for various disciplinary actions against fraudulent insider trading. The Securities Exchange Act was

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[35] *Timeline: A History of Insider Trading*, The New York Times (2016), https://www.nytimes.com/interactive/2016/12/06/business/dealbook/insider-trading-timeline.html (last visited Jul 7, 2020).

[36] Will Kenton, *Securities Act of 1933,* Investopedia (2020), https://www.investopedia.com/terms/s/zsecuritiesact1933.asp (last visited Jul 7, 2020).

[37] Ben Jones, *UncategorizedThe Housing Bubble Blog (2020)*, http://housingbubble.blog/?cat=1 (last visited Jul 7, 2020).

[38] *Fast Answers, SEC Emblem (2013)*, https://www.sec.gov/answers/about-lawsshtml.html (last visited Jul 7, 2020).

different from the 1933 Act as it focussed on secondary market, where securities and bonds were purchased and sold.

The Rule 10b-5 of The Securities Exchange Act of 1934, focuses on insider trading. The rule states, *"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,*

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security".[39]

In subsequent years the scope of The Rule 10b-5 of the Securities Exchange Act of 1934 was widened further for example in 1958 tipping was considered violation to rule 10b-5. Rule 10b5-2 (introduced in 1942) of the Act concerns the "misappropriation theory," which can be explained as below:

"Misappropriation theory is based on the doctrine that a person who uses confidential information in a wrongful manner to buy or sell securities is guilty of securities fraud. Such a misappropriation is in violation of a duty owed to the person who provided the information or who is the information source"[40]

[39] *Liability for Insider Trading Under Rule 10b5*, The Business Professor (2020), https://thebusinessprofessor.com/lesson/liability-for-insider-trading-under-rule-10b5/ (last visited Jul 7, 2020).

[40] *Federal Securities Law: Insider Trading*, https://fas.org/sgp/crs/misc/RS21127.pdf (last visited Jul 7, 2020).

Finally in 1984 Insider Trading Sanctions Act was passed by the Congress. The act amended the Securities Exchange Act of 1934 and proved to be a leap towards setting up laws to curtail Insider Trading. The act provided that, if the commission was of the belief that any person having any material non public information buys or sells a security, the commission may move the U.S. District court against it. The highest value of penalty was upto three times of profit gained or loss avoided.

On 17 November 1988 another act viz. Insider Trading and Securities Fraud Enforcement Act was passed that expanded Insider Trading Penalties in order to control persons who fail to take steps to prevent insider trading. The act, among other things, also established a private right of action for buyers or sellers of securities against the inside trader if they traded contemporaneously with the insider.[41] This act expanded the scope of SEC to prevent and curtail the illegal practice of Insider Trading.

SEC on Aug. 15, 2000 adopted Fair Disclosure, Regulation FD regulation. *"It provides that, when an issuer or any person acting on behalf of the issuer discloses material nonpublic information to certain enumerated persons (typically securities market professionals and holders of the securities), it must disclose that information to the public. The timing of the required disclosure depends upon various factors which are discussed in the rule."*[42]

> *"Until 2012, tippees could be liable for insider trading so long as they knew that the information on which they were trading had been obtained in breach of a duty. In 2012, a decision by the United States Court of Appeals for the Second Circuit in SEC v. Obus arguably expanded tipper/tippee liability—at least in SEC civil enforcement actions—to encompass cases where neither the tipper nor tippee had actual knowledge that the inside information was disclosed in breach*

[41] Inc. US Legal, Misappropriation Theory Law and Legal Definition Misappropriation Theory Law and Legal Definition | USLegal, Inc., https://definitions.uslegal.com/m/misappropriation-theory/ (last visited Jul 7, 2020).

[42] *Federal Securities Law: Insider Trading*, https://fas.org/sgp/crs/misc/RS21127.pdf (last visited Jul 7, 2020).

> *of a duty. Rather, a tipper's liability could flow from recklessly disregarding the nature of the confidential or nonpublic information, and a tippee's liability could arise in cases where the sophisticated investor tippee should have known that the information was likely disclosed in violation of a duty of confidentiality"*[43].

Another Act passed by the congress, Stop Trading on Congressional Knowledge (STOCK) Act, 2012 made it clear that even the use of congressional, non public knowledge should not be used for personal gains. It acknowledged that Congress members had access to non public information which they can use to achieve gains.

In recent years, the SEC and the Courts have expanded the definitions related to Insider trading further, and insider trading may include anyone if the SEC believes that he obtained non public, inside information which may be used to obtain profits

PRESENT SCENARIO OF INSIDER TRADING IN US

Until 2014, there was an increasing trend of penalising and punishing the persons involved in Insider training and it seemed that the market was moving towards the unbiased trade practices. However after the ground breaking Newman Decision[44] wherein the United States Court of Appeals overturned the conviction of hedge fund managers who were charged with benefitting and profiting on information passed through a chain of tippees. The appeal court found that there was insufficient evidence that the defendants knew that the tippers were being benefitted, which is a requirement to prove the violation. Further the judges also described what constitutes the benefit necessary to show insider trading. *Friendship alone is insufficient "in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential,*

[43] Historical Timeline, ProConorg Headlines, https://insidertrading.procon.org/view.resource.php?zresourceID=002391 (last visited Jul 7, 2020).

[44] *Insider Trading - 2018 Annual Review*, Morrison & Foerster, https://www.mofo.com/resources/insights/190118-insider-trading-2018.html (last visited Jul 7, 2020).

and represents at least a potential gain of a pecuniary or similarly valuable nature."[45] Before the Newman decision the familial relationship was consider sufficient to proof of gaining benefit. The Newman decision resulted in various insider trading convictions being overturned.

Initially (roughly before 2014) there was a clear pattern that showed that the defendants who chose to cooperate in Insider Trading cases benefitted by getting a reduced prison sentence or by receiving a sentence of probation in contrast to the non cooperating defendants who were convicted in cases of insider trading. However this changed in 2014 when some defendants could prevail against the Department of Justice and Securities Exchange Commission in contested matters and the Newman decision[46] led to the reversal of many prior government victories.

In spite of various regulations and court holdings to curtail Insider Trading, it still exists in the U.S. markets. Under Section 10 (b) of the Exchange Act 1934 the goal to provide equal opportunity to the ordinary investors at par with the market professionals, by allowing access to non-publicinformation did not survive. *Although Congress clearly intended the federal securities acts to extend greater investor protection than state law, the Supreme Court's foremost reliance on state law premised on concepts of fiduciary duty slights that congressional objective.*[47] As Justice Blackmun (in Chiarella v. United States[48]) opined:

> *"By its narrow construction of § 10(b) and Rule 10b-5, the Court places the federal securities laws in the rearguard of this movement, a position opposite to the expectations of Congress at the time the securities laws were enacted . . ."*[49]

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[45] *In the United States Court of Appeals*, https://www.defenselitigationinsider.com/files/2016/12/United-States-v.-Newman.pdf (last visited Jul 7, 2020).

[46] Peter J. Henning, *Supreme Court Could Redefine Insider Trading Law,* The New York Times (2016), https://www.nytimes.com/2016/08/02/business/dealbook/supreme-court-could-rewrite-insider-trading-law.html (last visited Jul 7, 2020).

[47] In the United States Court of Appeals, https://www.defenselitigationinsider.com/files/2016/12/United-States-v.-Newman.pdf (last visited Jul 7, 2020).

[48] *Minority Shareholders in the Finnish System of Corporate Corporate Governance*, ResearchGate, https://www.researchgate.net/publication/24123539_Minority_Shareholders_in_the_Finnish_System_of_Corporate_Corporate_Governance (last visited Jul 7, 2020).

[49] Chiarella v. United States, 445 U.S. 222 (1980), Justia Law, https://supreme.justia.com/cases/federal/us/445/222/ (last visited Jul 7, 2020).

Another issue that has arisen is that no regulations or Acts have been passed to curtail 'Abstaining from trading' on basis of insider information. Abstaining from.[50] For example, an insider who was planning to sell stocks but decides to abstain from doing so after receiving a positive inside information thereby preventing a potential buyer from getting a better deal in the stocks purchase. In a sense, the insider's abstention made him benefit from the inside information and hence the potential benefit gets transferred to himself consistently. However it is extremely difficult to prosecute insiders for *not* trading.[51]

III. PROBLEM FACED DURING THE IMPLEMENTATION OF INSIDER TRADING REGULATIONS IN INDIA AND AVAILABLE US LAWS IN THE CONTEXT

Securities market has to face a lot of problems while dealing with Insider Trading Regulation. It is a matter of great concern that the amendments done by the SEBI are very less if we compare it with the issues which are raised by the Indian media. It is very hard to find that there has been any insider trading and if it is found then it is very difficult to prove that the same has been done. It can be seen easily from the year 1992 that there has been very less number of people who got punished. This regulation has been made so that there can be equal access to all the people who are interested in investing can come on equal footing and all have the same advantage. There were basically two kinds of results for the people who were guilty of Insider Trading: firstly, the result is suspension, prohibition or just the warning and secondly, there were consent orders which were issued by SEBI. In any of the cases, there was no conviction for the felony instead just the penalty is levied. So in short it can be said that if a person commits the offence of Insider Trading then it is very easy for him to not get convicted but the situation of western countries is a little different from those of India, as it can be

[50] H2O, Chiarella v. United States (U.S. 1980), https://h2o.law.harvard.edu/collages/17833 (last visited Jul 7, 2020).
[51] Jesse M. Fried, Insider Abstention SSRN (2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=330520 (last visited Jul 7, 2020).

explained through the conviction in case of Raj Rajaratnam and Rajat K. Gupta in United States. There are some issues which are in the need of proper addressing so that Insider Trading can be implemented in a better way. Some of the issues are as following[52]:

(i) There are four lacunas which need to be taken care while trying to prosecute any insider trader which are lack of contemporary, modern and technologically advanced monitoring and surveillance mechanism. But at the same time if we see SEC and the stock exchanges in USA then they follow very good quality of surveillance system. Fully automatic surveillance system provides the authorities edge over the other countries who does not possess such system[53];(ii) After finding out or at least having doubt on someone of the insider trading the most difficult phase is 'proving the offence' and usually telephone records and transcripts are the only things which shows the relation between the people who can be guilty of this offence. SEBI doesn't possess the power of tapping phone calls although after case of Raj Rajaratnam-Rajat Gupta, SEBI asked the government to have the power of recording phone calls but the government denied this request by giving the reason that it will be liable to misuse. UK Sinha, SEBI Chairman said, "*The SEBI does not have the power to tap phones. It can only request for call data records in suspicious cases. In India only a few economic agencies like the Central Board of Direct Taxes have the power to tap phones.*"[54] USA has this power of recording phone calls of people who are suspicious.

(iii) With the globalisation in the world, the crime has also been globalised but the Indian law is not made and has not been amended according to the needs of the crime which has been given the importance at the globalisation level. The reason behind the law applicable on foreign

[52] Roopanshi Sachar & Dr. M. Afzal Wani, *Regulation Of Insider Trading In India: Dissecting The Difficulties And Solutions Ahead* 4 (http://jcil.lsyndicate.com/wp-content/uploads/2017/01/Roopanshi-Dr.-Afzal.pdf).

[53] *Id.* at 5.

[54] *Id.* at 6.

boundaries is that the interest of resident and national investors can be protected. If there is an investigation going on in Indian case but the evidences to support the fact of being guilty are present in some other countries then India doesn't have proper law to seek international help or assistance. Although India have some bilateral agreements, including Mutual Legal Assistance Treaty (with 39 countries out of 196 countries) and Memorandum of Understanding (with 22 countries out of 196 countries) but it doesn't have agreements with majority of countries;[55]

(iv) The main occasion when there is increase in the offence of Insider Trading is when there is any merger, acquisition or takeover is about to happen. India doesn't any proper regulation to curb this kind of practice in such scenario but in USA Rule 14e-3 of Securities Exchange Rules, 1942, has typically made for this kind of situation;[56]

(v) As in other cases, there is a provision of civil action by the investors so their right can be protected as provided by Section 26 of SEBI Act, 1992 that no court can take cognizance... But if we see the scenario of USA then there are remedies available for private individuals which can be found under Rules 10b-5 and Rule 14e-3 of Securities Exchange Rules, 1942 and Section 16-b and Section 20-a of the Securities Exchange Act;[57]

(vi) SEBI can come up with the investigation only when there is violation of any regulation described in the Insider Trading regulation and another scenario can be only when the information came through any informant but nothing can't be done in the scenario when the step needs to be taken for the prevention of Insider Trading as there is no law regarding this;[58]

(vii) If there goes anything wrong in the case then there is no process or self-appraisal so the same mistake shouldn't be repeated in future but

[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*

this process has been followed USA. There was a report named "Investigation of failure of SEC to uncover Bernard Madoff's Ponzi scheme" which was published and highlights the issues and difficulties faced by SEC because of the Madoff was able to get acquitted without any charges;[59]

(viii) As provided by Section 11B(3) of SEBI Act, 1992, for any investigation to carry on SEBI only need an 'intermediary or any person associated with securities market in any manner' but the scenario is different in UK, under Section 177 (1) of the Financial Services Act, 1986, one or more competent inspectors can be appointed by Secretary of State;[60]

(ix) There has been consent mechanism provided by SEBI in circular no. EFD/ED/Cir-1/2007 dated 20th April, 2007 and the fine paid for the consent mechanism is very minimal as compared to the whole value of case;[61]

IV. COMPARATIVE ANALYSIS OFINSIDER TRADING REGIME IN INDIA AND US

CRIMINAL AND CIVIL LIABILITY

India and US have same kind of law in terms of applicability of statue as the same statue in applicable both on criminal and civil liability but the case is quite contrary in situation of U.K. Indian Insider regulation only deals with listed companies but this kind of criteria is not followed in other two countries. Indian law prescribes any person to be "connected person" when that person was connected with the company in any way six month prior to the event but this is not a case under U.K. law.[62]

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[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] 4 Kirthana Singh, *Insider Trading: Position in India vis a vis the UK and the US*, ISSN 2394-5044, http://jurip.org/wp-content/uploads/2018/05/Kirthana-Singh.pdf.

MENS REA

In UK, the motivation and mens rea is necessary to prove so that the person can be accused of Insider Trading but mens rea is not important according to Indian law. In US, 1934 Act says that wilful violation is necessary for him to held criminally liable under section 10(b) and of the securities crimes under Section 32(a) of 1934 Act.

CONTROL

Under US law, any person holding more than 10% voting share in any company is defined as **control** which is not a case in Indian Law.[63]

PARITY OF INFORMATION APPROACH

India's Insider Trading Regime has developed in a very contradictory manner in comparison to what we had earlier. For instance, according to 1992 Regulation, the trading should have been done on the basis of inside information but according to the new regulation it doesn't matter much on what basis the trading had happened but merely just the possession of insider information while trading is enough to prove that there has been Insider Trading. SAT have interpreted that if the insider has done trading while in possession of UPSI then it will be treated as the trading has been done "on the basis of" or have "used" the insider information. This scenario is quite different in USA as the most important thing that matters is whether there has been any breach of fiduciary duty. Fiduciary duty can be towards the company or the shareholders or towards the source through which the accused got the information.[64]

SURVEILLANCE SYSTEM

To catch any person who has done insider trading there is need of advancement in modern and technological advancement along with better

[63] *Id.*
[64] *Supra* note 8.

surveillance system. SEC and securities exchange in USA possess highly effective surveillance system contrary to what is present in India. SEBI doesn't have much technological expertise in this area. Although both SEC and SEBI have their own ways of automated surveillance system but SEC possess much more excellent system of surveillance so it gives them edge over others.[65]

PROVING THE OFFENCE

It is necessary to collect proper evidences to prove any offence and to collect evidence for this nature of offence there is need to enter the personal space of the offender like tapping the phone calls and have access to their mail Ids. In case of Rajat Gupta, it would not have been possible to prove the offence unless SEC did not have the power of tapping the phone calls as the offence got proved because of 18,000 wiretapped telephone records and e-mails. Till now, SEBI doesn't possess the power of tapping phone calls of people. The ground given by Government for not giving this power that this can be misused.[66]

LAW IN PARITY WITH FOREIGN LAWS

Due to globalisation the world has come together and with this even the link of offence can be found in other countries. If any foreign national commits any offence then Indian courts doesn't have power to investigate or impose penalty on him. There is no extra territorial application of Indian laws in foreign territory. But developed countries like USA have the clause in their regulation for extra territorial application. But there has been some cases where investigation have been started in other countries. This all happened because India have some bilateral agreements, Mutual Legal Assistance Treaty and Memorandum of Understanding. But this is not of much help because this doesn't cover most of the countries.[67]

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[65] *Supra* 57.
[66] *Supra* 57.
[67] *Supra* 57.

MERGER TAKEOVER AND ACQUISITION

Merger, takeover and acquisitions are considered as special events as there are high chances of Insider Trading at these kinds of events. Because of these events there are higher chances that the prices of shares changes drastically. Rule 14e-3 of Securities Exchange Rules, 1942 provides that any person who has any information related to merger or acquisition can't trade in their own company or Target Company directly or indirectly. This kind of provision doesn't exist in India.[68]

PRECAUTION V. INVESTIGATION

Under Insider Trading law, if any informant comes with any information of probability of Insider Trading in future then SEBI don't have any power to prevent it. The action can only be taken after the Insider Trading has been done and now the investigation can be started. But this is quite contrary to the US law.[69]

CIVIL REMEDIES

Under Indian Insider trading laws, there is no law for class action suit to protect the interest of investors. A private person can't file civil case in court to protect his interest. But in USA under Rules 10b-5 and Rule 14e-3 of Securities Exchange Rules, 1942 and Section 16-b and Section 20-a of the Securities Exchange Act, there are a lot of civil remedies so that it creates deterrence effect.[70]

PROCESS OF SELF APPRAISAL

In report of "Investigation of failure of SEC to uncover Bernard Madoff's Ponzi scheme", the deficiency of SEC has been described and how and why the accused was able to stay away from prosecution for a long time. This is

[68] *Supra* 57.
[69] *Supra* 57.
[70] *Supra* 57.

self appraisal process which is an important aspect but not applicable to SEBI so it happens that because of the same deficiencies SEBI is not able to prosecute Insider Traders.[71]

RESOURCES AND MAN POWER

SEBI has very less resources and man power as there are only 643 persons as employees in total who are responsible to detect any offence and take action against it but in USA, they have quite good human resources and have a very effective infrastructure. If there is lack of human resources in any country then it will be highly difficult to detect every crime and then take action against it.[72]

FUNCTIONS OF REGULATORY AUTHORITY

SEBI has three functions: *legislative (formulation of Regulation and circulars); executive (detection and investigation of alleged malpractices and misconduct) and judicial (passing of orders imposing fines, restraint, etc.)*[73]. SEBI being the single body performs all these functions but on the contrary SEC just detects and investigate the insider trading and then the case goes to the court and SEC just present their case. So SEC just has to detect the crime and performs no other function.[74]

[71] *Supra* 57.
[72] *Supra* 57.
[73] *Supra* 57.
[74] *Supra* 57.

COMPARATIVE ANALYSIS TABLE

Points of Difference	**India**	**US**
Mens Rea	Not necessary	Necessary
Insider/ Affiliate/ Control Person	No such criteria	an officer, director or owner of more than 10% of the voting stock in a company, or the immediate family of any of these persons
Parity of Information Approach	Trade must have been done "on the basis of" or have "used" UPSI, if in possession of UPSI.	See if there is any breach of duty
Surveillance system	Not so good	Very effective
Proving the offence	Don't have all the powers	Have numerous powers
Applicability to foreign land	Not applicable in most cases	Applicable
Merger, Takeover and Acquisition	No particular regulation	Rule 14e-3 of SER, 1942
Precautionary Powers	No such law exists	Have precautionary powers
Civil Remedies	Not available	Rules 10b-5 and Rule 14e 3 of Securities Exchange Rules, 1942 and Section 16-b and Section 20-a of the Securities Exchange Act

Self Appraisal	Not available	Available
Resources and man power	Very less human power and not at all effective resources	Human power in a good number and effective resources
Function of Regulatory Authority	Legislative, Executive and Judicial	Executive

V. CONCLUSION

Insider trading isn't only illegal but also ethically and morally wrong. It is also against the principle of fair market. Insiders have the information which gives him edge over the other market players and because of this he is in a position to exploit the stock market for his personal gain. Insiders breach the fiduciary duty as their breach the trust of shareholders, investors and the company. The current Insider Trading Regulation of India, 2015 doesn't cover all the aspects of legal problems which are described above in the paper, for instance, need of precautionary measures, better surveillance system and application of this regulation in foreign land etc. As we discussed about the Insider Trading Regime of USA so it has numerous powers and a much better surveillance system to tackle with the complex issues of Insider Trading.

ALTERNATIVE DISPUTE RESOLUTION FOR ENVIRONMENTAL DISPUTE RESOLUTION

Rudratiya Khare*

"The environmental problems of developing countries are not the side effects of excessive industrialization but reflect the inadequacy of development."

- Indira Gandhi

I. INTRODUCTION

The world stands still, horrified by the wrath of COVID-19, the global economy has been brought down to its knees. The predictions of economic loss at the global stage as a consequence of COVID-19 range as high as $8.8 Trillion[1] and it is undeniable that the road to recovery will not be a smooth one. Economic recovery will require the nations to make changes to the fundamental structure and functioning of the government so as to facilitate the growth of business. This is quintessential for the survival of human kind in the '*post COVID-19 world*'. This pandemic will hit the under developed and the developing countries harder due to their economies being less immune to such global shocks.

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[1] Cyn-Young Park and others, *Updated Assessment of the Potential Economic Impact of COVID-19*, ADB BRIEFS (May, 2020), http://dx.doi.org/10.22617/BRF200144-2.

India's economy is already infected by two deadly factors, namely, high pressure on resources and lack of adequate infrastructure for manufacturing sector and otherwise. On the one hand, India is a developing country, supporting more than 17% world population on 2.4% of land[2] culminating into higher pressure on environment and limited resources. On the other hand, excessive reliance on service industry, with the manufacturing and infrastructure taking a back seat, puts India's future on a precarious ground.[3] The indispensability of industries, infrastructure and other development projects has risen many fold in the wake of the global pandemic. This has resulted in a desperate and frantic push to boost India's infrastructure,[4] which has put a colossal burden on its already strained environmental resources and has pitted development and its pioneers in direct conflict with environmental protection and its advocates. The lack of environmental clearances for the development projects creates a structural bottleneck, while the protest by environmental activists poses a societal bottleneck in the development of infrastructure.

The constant tussle between development and environment, along with the myth that one has to come at the cost of another, has long overlooked the opportunities of collaboration and cooperation that may arise out of the infrastructure projects. Among other factors, the primary culprit of turning these opportunities into a turf war has been the increased interference of environmental litigation. This has been spurred by the populous matrimony of judicial and environmental activism and the offspring of this marriage has spelled doom for Indian industry and infrastructure. According to a 2017 survey, the value of the stalled projects in India is more than 13 trillion,[5] out

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[2] Suresh Kumar, *Land Accounting in India: Issues and Concerns*, United Nations(Dec. 2011), https://unstats.un.org/unsd/envaccounting/seeaLES/egm/LandAcctIndia.pdf.

[3] 1 Department of Economic Affairs, Ministry of Finance, Economic Survey 2019-20, chapter 1,(*Economic Surve*, 2020) .

[4] NITI Aayog, *Investment in Infrastructure: Strengthening PPP Policy* Framework, NITI Briefs (2019), https://niti.gov.in/sites/default/files/2019-07/NITI%20Brief5.pdf.

[5] Mahesh Vyas, *Implementation-Stalled Projects Inch Up*, CapEx Centre for Monitoring Indian Economy (Oct. 3, 2017),https://www.cmie.com/kommon/bin/sr.php?kall=warticle&dt=2017-10-03%2016:23:01&msec=266.

of which 30% have been stalled due to environmental and acquisition issues. The worst blow has been faced by the electricity and manufacturing sectors, which account for 39.04% and 25.59% of the stalled projects respectively.

Since there is a need to develop without compromising the environmental equilibrium, the need of the hour is to design a system of dispute resolution which strikes a balance between environment and development, not sacrificing one at the altar of the other. Alternative Dispute Resolution ("ADR") fits the bill perfectly, not only does it provide an opportunity to the stakeholders to engage in a meaningful dialogue, it facilitates coordination and cooperation to arrive at a win-win solution. This is not possible under litigation which is designed to separate the black from the white, disregarding the grey. This paper discusses the inadequacy of the traditional litigation system in dealing with such environmental disputes and purports to suggest a novel mechanism involving ADR for Environmental Dispute Resolution ("EDR").

II. BACKGROUND

India's development swings in the cradle of paradoxy; while government swings it one way to promote industrialization, thereby spurring growth and development; the existing dispute resolution mechanism swings it right back to stifle the very industry it was trying to promote in the first place. The current mechanism requires the victims or their representatives to approach the National Green Tribunal (NGT)[6], wherefrom the case may be appealed to the Supreme Court.[7] This procedure is not only time consuming and expensive but it also subdues the voice and the real interest of the victims, while sacrificing the confidentiality which is dear to the alleged offender to protect his goodwill. The extant structure is not designed to achieve/solve the underlying issues as it follows an accusatory approach rather than a conciliatory one. Moreover, it imposes an enormous burden on the judicial system which is already plagued by the ever piling mountain of pending

[6] National Green Tribunal Act, 2010, §14 , No. 19, Acts of Parliament.
[7] *Id* § 22.

cases. To put things in perspective, there are 59,867 cases pending in the Supreme Court, and 44.75 lakh cases in various high courts. At the district and subordinate court levels, the number of pending cases stand at a shocking 3.14 crore.[8]

UNSUITABILITY OF LITIGATION AND ITS CONSEQUENCES

The reasoning supporting the premise that litigation is unsuitable for resolving environmental issues is four pronged - *Firstly*, it has failed to satisfy the interests of the concerned parties; *Secondly*, the consequences of a long drawn litigation are more far reaching than has generally been perceived, such that it has become the primary agent of the economic breakdown; *Thirdly*, environmental litigation has been misused as a sword wielded to satisfy ulterior motives rather than a shield to protect the victims, which is what it was originally designed for; *Lastly*, it undermines the national interests and jeopardizes security and geopolitical position of the State.

According to a study conducted by the Ministry of Statistics and Programme, any project requiring the use of environmental resources and land acquisition involves five interested parties - the land loser, the government, the community (NGOs), environment (in conformation with new idea of personification of environment)[9] and the local leaders.[10] However, under the existing dispute resolution mechanism, most of the stakeholders end up losing one way or the other, thus rendering the entire process futile. While the migrants/ land losers are the real victims, their voices are overshadowed by the loud cries of the heavily funded NGOs or political parties, paying little regard to the needs of such workers and leaving them unaware of any advantage such projects may have in their lives. On the other hand, the business suffers gravely, suffocating under the ever-increasing burden of

[8] Roshni Sinha, *Pendency of cases in the Judiciary*, PRS LEGISLATIVE RESEARCH (July 25, 2018), https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/Vital%20Stats%20-%20Pendency%20and%20Vacancies%20-Roshni%20-%20250718For%20Upload.pdf.

[9] Salim v. State of Uttarakhand,2017 SCC Online Utt 367.

debts and mounting costs due to injunctions granted by the Tribunal and appellate Courts. One should not lose sight of the setbacks suffered by the government, which range widely from monetary loss over the projects to threatening the security of the State. This has resulted in the abysmal scenario wherein litigation has failed every party involved in the process.

The disastrous consequences of environmental litigation can be clubbed under two primary heads – economic and social. It is important to appreciate the chronology of events to fully fathom the extent of economic consequences. It has been observed that environmental litigation has resulted in increased number of stalled projects, both public and private.[11] Such stalls are a slow poison for our industries, as they have to bear the brunt of increased cost of construction material, piling interest rate on loans and the ever-fluctuating oil prices. The increased cost of construction, along with the money stuck in half-baked projects, results in the non-capacity of the developer to pay back debts to the banks, thereby increasing the Non-Performing Assets ("NPA") in the country.[12] Such NPAs compromise banks' ability to lend credit to the market, thereby increasing the interest rate, while also decreasing the flow of money in the economy,[13] conditions which are a precursor to economic slowdown; thus perpetuating a vicious cycle.

To be economically viable, the next step for the developer is to cut costs, which could either be accomplished by using cheap quality materials or by releasing labour from employment. While the prior would compromise the integrity of the built structure, the latter would result in an increase in

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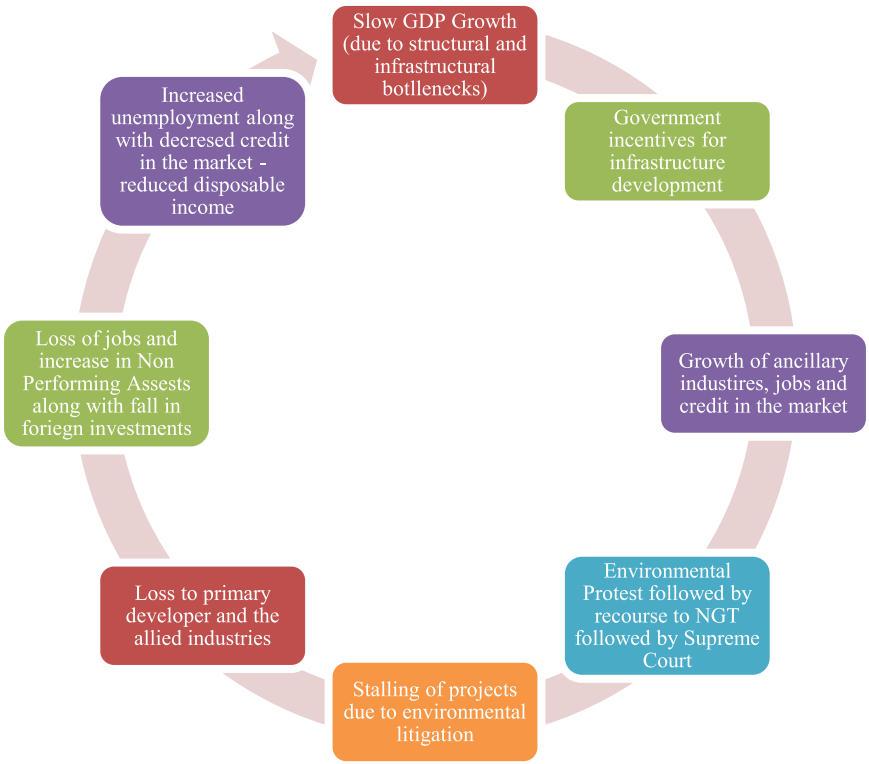
[10] Ministry of Statistics and Programme Implementation, *National Programme for Improving the Quality of Statistics in India*, Stakeholder Engagement Plan (Feb. 18, 2020) http://mospi.gov.in/sites/default/files/npiqsi/SEP_Final18feb2020.pdf.

[11] Rights and Resources Initiative and the Bharti Institute of Public Policy, *Land Disputes and Stalled Investments in India*, RRI Analyses (Nov. 16, 2016), http://rightsandresources.org/wp-content/uploads/2016/11/Land-Disputes-and-Stalled-Investments-in-India_November-2016.pdf.

[12] Department-Related Parliamentary Standing Committee Rajya Sabha On Transport, Tourism And Culture*, Infrastructure Lending in Road Sector* (Report No. 236, 2016).

[13] Shashidhar M. Lokare, *Re-emerging Stress in the Asset Quality of Indian Banks: Macro-Financial Linkages* ,RBI WORKING PAPER SERIES NO. 03(Feb. 2014), https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/WSN03070214F.PDF.

unemployment. The slowdown resulting from stalling of such projects also affects the entire supply chain i.e. it starts affecting the ancillary industries as well. These ancillary industries, in turn, release more workers from their employment to sustain economically thereby increasing the problem. It is no surprise that India's rank on the "ease of doing business" index,[14] though improving, has been shackled by the poor performance in the construction permit and enforcing contracts criteria.[15] These contribute towards decrease in the foreign investment in the country.[16]



[14] *Doing Business 2020*, WORLD BANK GROUP (2020), http://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf.

[15] Yogima Seth Sharma, *India jumps to 63rd position in World Bank's Ease of Doing Business 2020 report*, The Economic Times (Oct. 24, 2019) https://economictimes. indiatimes. com/news/economy/indicators/india-jumps-to-63rd-position-in-world-banks-doing-business-2020-report/articleshow/71731589.cms?from=mdr.

[16] *Id.*

The social consequences of the delayed and hindered implementation of such projects are also hard to disregard. While certain social consequences are apparent, such as the loss of prospective addition of infrastructure to the community including power stations, hospitals etc.; there are many more latent and way more potent ones; such as lower standard of living due to above explained rise in unemployment. Moreover, the cost of unemployment is partially borne by the government in supporting the life of unemployed labourers/workers; this entails an opportunity cost of development lost, due to deployment of funds in non-productive uses. Lastly, decrease in disposable income of the released labourers/workers also plagues the next generation as they are deprived of their fundamental right to education[17] due to the urgency of adding another earning member to the family, thus propagating the evil of child labour.

Environmental litigation has lost sight of the purpose of its inception, which was to protect the voiceless victims; it has rather evolved into a high-level turf war at the expense of victims' interest. It has resulted in a conflict between not only the judiciary and the executive[18] but also between the business houses, where resorting to environmental litigation seems to be the easiest way to stay an ongoing rival project. There are even reports of external funding of NGOs which have been actively raising voice against the essential infrastructural development by the government, while hiding behind the blinds of environmental activism; thereby persuading the government to regulate foreign contributions to NGOs working in India.[19]

Aggravating the problem further, India's image on the global platform also suffers a dent due to the delayed/non-implementation of the projects. India is notoriously infamous for slacking in the implementation of projects at the

[17] INDIA CONST. art. 21A.

[18] Narmada Bachao Andolan v. Union of India, (2000) 10 S.C.C. 664 (India); Sandeep Mittal v. Ministry of Environment, Forests & Climate Change &Ors., (O.A. No. 837/2018) (India); Lt. Col. (Retd.)Sarvadaman Singh Oberoi v. State of Haryana &Ors., (O.A. No. 407/2017) (India).

[19] Ministry of Home Affairs Government of India, *Order No. II/21022/58(370)/2018-FCRA(MU)* (Dec. 29, 2018).

world stage;[20] a careful observation would reveal that environmental litigation has had its part to play. Projects have been stalled for the want of environmental clearance and acquisition of land. In some instances, such as Bangladesh-Bhutan-India-Nepal Initiative[21] and India-Myanmar-Thailand highway[22], India has faced the embarrassment of being the only non-performing party, while the other States have executed their end of the projects.[23] This not only stains India's international standing but also compromises its geopolitical objectives. It has lent India the image of an unreliable and an inefficient partner, preventing the foreign powers from reposing their trust in India.

III. ADR - THE SUITABLE OPTION

ADR refers to any means of settling disputes outside of the courtroom; it is a process in which a neutral third party, typically a mediator or arbitrator, facilitates the disputing parties in reaching a mutually acceptable agreement.[24] ADR covers within its ambit negotiation, conciliation, mediation, and arbitration. As burgeoning court queues, rising costs of litigation and time delays continue to plague litigants; ADR takes the center stage as a more economically viable and an amicable option for the resolution of disputes.[25]

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[20] Lok Sabha Unstarred Question No.1565 answered on Dec. 19, 2018, https://www.mea.gov.in/lok-sabha.htmdtl/30790/QUESTION+NO1565+PROJECTS+ IN+FOREIGN+COUNTRIES.

[21] Samir Saran, *For BIMSTEC to Work, Fix BBIN First*, OBSERVER RESEARCH FOUNDATION (Aug. 30, 2018), https://www.orfonline.org/expert-speak/43735-for-bimstec-to-work-fix-bbin-first/.

[22] NareshBana and K. Yhome, *The Road to Mekong : the India-Myanmar-Thailand Trilateral Highway Project*, OBSERVER RESEARCH FOUNDATION (Feb. 2017), https://www.orfonline.org/wp-content/uploads/2017/02/ORF_Issue_Brief_ 171_Trilateral.pdf.

[23] NiharNayak, *BBIN-MVA: Pushing Regional Integration through Sub-regional Cooperation,* INSTITUTE FOR DEFENCE STUDIES AND ANALYSIS (June 19, 2015),https://idsa.in/idsacomments/BBIN-MVAPushingRegionalIntegration_nnayak_190615.

[24] Katie Shonk, *Familiarize Yourself with Mediation, Arbitration, and a Hybrid Approach Using Alternative Dispute Resolution,* HARVARD LAW SCHOOL PROGRAM ON NEGOTIATION (May 26, 2020), https://www.pon.harvard.edu/daily/dispute-resolution/what-is-alternative-dispute-resolution/.

[25] Legal Information Institute, *Alternative Dispute Resolution*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/alternative_dispute_resolution.

Environmental issues are such that they should not entail a win-lose situation because its rights *v.* development, the society at large suffers when either side loses. Therefore, the resolution of such disputes requires a mechanism which can facilitate both the sides to arrive at a middle ground, rather maintain equilibrium between rights and development. We must not lose sight of the fact that at a certain level, both rights and development are co-dependent, such that one facilitates the other; while developed societies are in a better position to defend rights of the citizens, on the other hand only protection of rights leads to development, both at a personal level as well as at a societal level. Such win-win situation is possible only through a constructive dialogue with a binding agreement, which can only be provided under the ADR mechanism. The essential characteristics of ADR are such that they are tailor fitted for problems requiring the parties to reach a middle ground or a compromise. These characteristics[26] are - flexibility, confidentiality, freedom to select arbitrator/mediator, cost-effectiveness, speediness, party driven, more party autonomy and the finality of award.

ADR is more flexible than litigation as it is not bogged down by the shackles of the court procedure laid down in the statutes. This presents the parties with a unique opportunity to select what procedural and discovery rules will apply to their dispute (they can choose to apply relevant industry standards, domestic law, the law of a foreign country, etc.).[27] The freedom to select the arbitrator/mediator facilitates appointment of the experts in the field of dispute to share their valuable knowledge on the issue and to direct the parties to a course of mutual benefit. It is the specialization of the arbitrator/mediator in the area of dispute that enables speedier resolution of problems. Litigation is devoid of such benefits as the complex court procedure both delays the entire process and also requires appointment of a judge who understands the nuances of such a procedure.[28]

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[26] *ADR Advantages,* WORLD INTELLECTUAL PROPERTY ORGANIZATION, https://www.wipo.int/amc/en/center/advantages.html. (WIPO)

[27] Mark Albright, *The Advantages and Disadvantages of ADR,* ALBRIGHT, STODDARD, WARNICK& ALBRIGHT (Sept. 21, 2012) https://www.albrightstoddard.com/advantages-disadvantages-adr/.

[28] WIPO, *supra* note 26.

As has been discussed above, litigation has a huge economic cost on the economy as well as the parties; while the victims are not affluent enough to afford the proceedings, therefore represented by the NGOs, on the other hand money is of utmost importance to the developer involved. ADR presents a less expensive avenue due to its shorter duration, thereby reducing legal fees, and lesser procedural costs. Moreover, ADR is a party driven process i.e. parties get better and direct representation of their needs and interests, unlike under litigation where the counsel presents statute based legal arguments, pigeonholing the underlying issues in the words of law. The problem with litigation is best exemplified in the words of George Bernard Shaw-"the problem with communication is the illusion that is has occurred", as opposed to ADR where it actually happens.

Confidentiality is an inherent unique feature of ADR since the proceedings are private as opposed to open and published court proceedings. This allows parties to focus on the merits of the dispute without any concern about its public impact, and may be even more important in situations where commercial reputations and trade secrets are involved.[29] Lastly, the solutions arrived at through ADR tend to be more lasting as they are mutually agreed and not forced decisions of court, therefore execution is only the furtherance of the will of the parties, which make these solutions more efficient in the long run.

IV. ADR FOR EDR – SUCCESS STORIES

ADR has been successfully implemented in the United States of America as a mechanism for dispute resolution; after its initial success in resolving labour and international issues in the 1970s, it was applied to environment related matters.[30] Research conducted by U.S.'s Environment Protection Agency's ("EPA") Offsite Remediation Enforcement has revealed that ADR had occasioned lower cost, speedier dispute resolution, emphasis on problem

[29] *Id.*
[30] Neil G. Sipe and Bruce Stiftel, *Mediating Environmental Enforcement Disputes: How Well Does It Work?* 15 Environmental Impact Assessment Review 139-40 (1995).

solving rather than position and generation of better settlement options.[31] It must be appreciated that ADR has been successful because of its features that are missing in the litigation process such as greater understanding of opposing parties' interests and resolution of tough technical issues by involving experts.[32] Even in cases where the parties were unable to reach a resolution, the process facilitated better information exchange, clarification of issues and exploration of options that would not have been discovered otherwise.[33]

The results have been nothing short of astonishing, an initial study conducted in Florida on the mediated environment case ranging from air pollution to hazardous waste and groundwater contamination has revealed – 70% of the mediated cases were resolved, the participants were either "very" or "moderately" satisfied with the outcome and they saved $75,000 per party as compared to litigation.[34] More recent research has disclosed that the rate of resolution has increased to as high as 87% to 93%.[35] Mentioned below are some of the examples of successfully mediated environmental disputes in the U.S.A.

The State of Washington was facing a number of challenges associated with the permitting, design and construction of major transportation projects. The problems were two fold – first was the problem regarding procuring environmental clearances/permits and the delay caused thereby, while the other was related to the frustration of the tribes that their culture and the environment was not receiving due credit. The state legislature developed a new approach to solve this issue by identifying the stakeholders, streamlining the procurement of permits and by achieving better

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[31] Office of Site Remediation Enforcement US EPA, *Use of Alternative Dispute Resolution in Enforcement Action*, 26 Env't Rep. (BNA) 301-02 (1995).

[32] Rosemary O'Leary & Maja Husar, *What Environmental and Natural Resource Attorneys Really Think About ADR: A National Survey*, 16 NAT. RESOURCES & ENV'T 262 (2002).

[33] *Id.*

[34] Sipe and Stiftel, *supra* note 30.

[35] *Evaluating Environmental Conflict Resolution And Collaborative Problem Solving Processes*, US Institute for Environmental Conflict Resolution (2005) http://www.ecr.gov/multiagency/pdf/EvalPhaseFindings.pdf..

environmental outcomes in transportation projects.[36] The stakeholders were divided into sub-committees, which included consultants to enable decision-making. Involving stake holders in sub-committees allowed for different viewpoints to be presented on a particular issue. This helped in better decision-making and the committees were instrumental in solving problems arising henceforth. The Washington State Office of Regulatory Assistance has adopted these same products and processes as a model for all projects of state government.[37]

Similarly, the GE-Pittsfield case involved polychlorinated biphenyl ("PCB") contamination, this attracted public concern around four major issues which were resolved using ADR – first, GE's liability and responsibility for cleanup; second, input from the community on impacts of the cleanup process; third, the establishment of a panel of neutral experts for recommending future remediation; and finally, agreement to use ADR to resolve disputes that may come up during the implementation of the remediation plan. The community input helped in reaching a mutually agreeable solution facilitating both the community and the environment.[38]

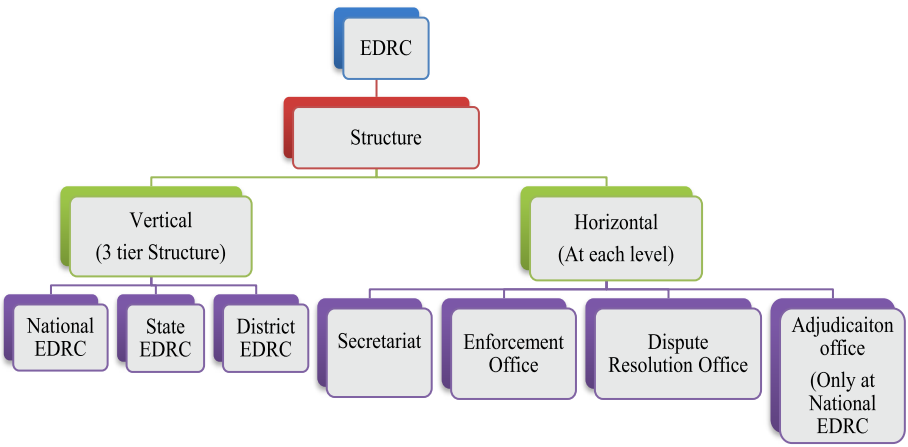
In California, the Dispute Resolution Service of the Federal Energy Regulatory Commission ("FERC") initiated a mediation process to re-license several hydroelectric facilities. This project involved two sets of disputes – first, maintenance of ecological balance as opposed to increasing hydro-power production; second, judicious use of water as opposed to municipal and agricultural use of water. In the past, such re-licensing had faced strong opposition, therefore the government decided to resort to ADR mechanism to satisfy all stakeholders. This allowed the licensee to file their proposed terms and conditions of the project without protest.[39]

[36] *Transportation Permit Efficiency and Accountability Committee*, State of Washington (2006) http://www.ecy.wa.gov/programs/sea/pac/tpeac/.
[37] *Id.*
[38] *Environmental Protection Agency*, http://www.epa.gov/region01/enforcement/adr/examples.html.
[39] Dan Swecker, *Applying Alternative Dispute Resolution to Environmental Problems,* MEDIATE.COM (July 2006), https://www.mediate.com/articles/sweckerD1.cfm?nl=108#:~:text=It%20is%20often%20a%20preliminary,choice%20for%20resolving%20future%20disputes.

V. PROPOSED MODEL FOR IMPLEMENTING ADR FOR EDR –ENVIRONMENTAL DISPUTE RESOLUTION COUNCIL

As has been discussed previously in the paper, the current mechanism mandates a dispute regarding environmental concerns to be raised at the NGT. This is followed by the time and resource consuming mechanism provided for in the NGT Act[40] and under the Constitution.[41] This paper proposes for the establishment of "Environmental Dispute Resolution Council" ("EDRC") exclusively to deal with cases involving environmental concerns pertaining to new infrastructural/commercial development projects. The dispute resolution mechanisms available under the ambit of EDRC will be mediation, negotiation, conciliation and arbitration.

STRUCTURE OF EDRC



The proposal entails establishment of a three-tier structure for efficient management of environmental disputes. Each tier shall comprise three arms – the Secretariat, the Enforcement Office and the Dispute Resolution Office ("DRO"), while the Adjudication Office shall exist only at the National EDRC level. The functions of each organ of the EDRC shall be as follows –

[40] NGT Act, *supra* note 6, § 22.
[41] INDIA CONST. art. 136.

1. Secretariat

- It shall assist in the day-to-day administration of the council;
- It shall be responsible for managing the logistics and the panel of arbitrators/mediators;
- It shall ensure the availability of mediators/arbitrators and fix the dates of sessions according to the availability of the parties and the arbitrators/mediators;
- It shall be the link between the parties and the EDRC for effective communication;
- It shall be responsible for receiving the complaints from the victims.

2. Enforcement Office

- It shall be responsible for the enforcement of the agreement reached at the end of the dispute resolution process;
- The Enforcement Office shall have the powers of a civil court to enable the execution of the agreement;
- This arm shall also be responsible for approaching the Supreme Court in the event of non-compliance by either party;
- It shall communicate the progress of execution of award to the Secretariat.

3. Dispute Resolution Office (DRO)

- This office shall be responsible for following and reporting the progress of the dispute resolution process to the Secretariat of the EDRC;
- It shall ensure that the agreement arrived at is free from any coercion; while the primary responsibility shall rest with the mediator/arbitrator,

the DRO shall be authorized to conduct further investigation and ensure that the interests/views of the weaker party are well represented;

- The above provision has been made specifically to cater to the uneven power/influence distribution in such cases; while the victims are generally poor/marginalized people, the other party is with deep pockets and sufficient pull.

4. Adjudication Office

- This office shall only be present at the National EDRC to provide a platform for any appeal that may arise from any settlement reached under dispute resolution process at any of the preceding levels;
- The resolution of such appeals shall be through arbitration;
- The acceptance of the appeal shall be at the discretion of the National EDRC;
- Appeals shall be made only under limited circumstances like – discovery of a new fact, fundamental change in circumstance etc.;
- A party shall not be allowed to appeal a mutually agreed settlement at a later stage for want of consent or unfair nature of the settlement (because of their prior consent);
- No further appeal shall be provided, except in the event of Supreme Court admitting an appeal on the grounds of malice or violation of natural justice.

MECHANISM

The mechanism under EDRC shall be a two-step process, while the first step shall be the institution of the suit under the relevant EDRC, wherein the dispute shall be resolved using either mediation or negotiation depending upon the suitability of the case; the second step shall be a "single appeal

system", wherein an appeal would lie to the National EDRC, the mechanism used here would be arbitration, and the award therefrom shall be final and binding. No appeals shall lie in the court of law unless it meets the criterion specified above. The jurisdiction under the first instance of suit institution shall be dependent upon two factors – *one*, the value and the importance of the projects for the public at large; *two*, the agency executing the said project (Centre, state or private developer). The jurisdictions under the above-mentioned system shall be as follows –

- A suit may lie in the District EDRC provided the project is being developed either by the local authorities or a private developer, affecting the people locally and for the benefit of the people of that particular area and valuation of such project shall not exceed 100 crore.

- A suit may lie in the State EDRC provided the project is being developed either by the state government or private developer, affecting the lives of the people of the state (or at least more than one district) or the valuation of such project shall be above 100 crore and less than 1000 crore. It shall include cases where the local authority is developing a project valued more than 100 crore.

- A suit may lie at the National EDRC provided that the project is being developed by the Central government and affects the lives of people from multiple cities or states; or the valuation of such project shall be above 1000 crore. Provided further that projects developed by the state governments the valuation of which is more than 1000 crore shall also be dealt by the National EDRC.

- In cases involving multiple states or joint development by the center and the state, the National EDRC shall have exclusive jurisdiction.

In the first instance, upon the institution of the suit at any level, it shall be resolved by either mediation or negotiation. This will facilitate the parties in reaching a mutually acceptable solution to the dispute. If the parties are not

able to reach an agreement, then such mediation or negotiation shall be followed by arbitration, such arbitral award shall be appealable, in certain situations, to the National EDRC. This way parties shall have an opportunity to resolve the dispute by mutual understanding and cooperation in the first instance. In the event where an appeal is made to the National EDRC, it shall be resolved by using arbitration followed by a binding award made by the panel of arbitrators.

SALIENT FEATURES OF THE MECHANISM

1. Institution of suit

- Suit can be instituted either by a party directly affected, the government or a representative (only if appointed by the affected party, not *suo motu*);
- In the event of third party representation (ex NGOs) of a victim, the arbitrators/mediators must first verify the veracity of such claim of representation;
- In the event of third party representation, a member representative of the affected community must be present at all sessions and must be briefed on the progress and status of the proceedings.

2. Legal Aid

- Free legal aid shall be available on demand of either party; this is in compliance of Directive Principles of State Policy under the Indian Constitution.[42] This shall ensure that no victim is left unaddressed and that the remedies are made more accessible;

[42] *Id* art. 39A.

- The parties must disclose at the initiation of the proceedings if they will need legal aid from the State.

3. Selection of Arbitrators/Mediators

- The arbitrators/mediators shall be selected from the panel sanctioned by Section 11 of the Indian Arbitration Act, 2019;
- In the event of the dispute being of a technical nature requiring specialized knowledge on a subject matter, it must be mandatory to have an expert on the panel;
- It shall be a mandatory requirement to add an environmental expert to the panel of arbitrators/mediators. Such arbitrator/mediator shall be appointed from among the list of environmental experts approved by the central government;
- In the event of a dispute arising in the appointment of the arbitrators/mediators, the decision of the EDRC based on the submissions of the parties shall be final and binding.

4. Powers of EDRC

- EDRC shall have the powers of a civil court in matters of evidence, witness, discovery etc.;
- The orders passed by the EDRC shall have the same force as that of an order passed by a civil court;
- The EDRC shall have the power to pass *ex-parte* orders if the victims/violators decide to or are unable to be present during the proceedings.

5. Reference to Impact Assessment Agency

- Any agreement reached shall be submitted for Environmental Impact Assessment, if so required under law;[43] According to the 2006

[43] Environment Impact Assessment Notification 2006 issued under Rule 5(3) of Environment (Protection) Rules 1986 (India).

amendment to the Environment Impact assessment notification backed by the Environment Protection Act, 1986 the projects have been classified under Category A (national level appraisal) and Category B (state level appraisal);[44]

- Impact Assessment Agency (IAA) and the Expert Appraisal Committee (EAC) assess Category A projects[45] while Category B projects are apprised at state level by State Level Environment Impact Assessment Authority (SEIAA) and State Level Expert Appraisal Committee (SEAC);[46]

6. Appeal mechanism

- Any suit filed in the district or the state EDRC shall be appealable to the National EDRC;

- An option shall be available to the parties to directly take the suit to the National EDRC provided that such matter is of urgent importance and needs to be decided by the National EDRC. In such instance, the acceptance of such suit shall be solely dependent on the satisfaction of the EDRC;

- Appeals shall be available on limited grounds including discovery of a new fact or a fact which was not in the knowledge of the parties at an earlier stage;

- An appeal shall have to be decided within a period of 60 days from the date of acceptance;

- Judicial courts shall not interfere with the orders of the council unless warranted by natural justice or malice.

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[44] *Id* para 2.
[45] *Id.*
[46] *Id* para 3.

7. Execution of the award

- The responsibility of the execution of the award shall solely rest on the execution arm of the EDRC. The execution arm shall be authorized to take actions against the non-complying party;
- Any complaint of non-execution shall be filed with the execution arm and the same shall be disposed off by it within 30 days of institution of the complaint;
- It shall be the duty of the execution arm to keep the EDRC apprised of the progress in the execution of the projects.

VI. CONCLUSION

"There is enough on earth for everybody's need, But not for everybody's greed"

-Mahatma Gandhi

India should continue to progress on the path shown by the father of the nation and strive to maintain the equilibrium between development and environment. Environment and development are both essential for the survival of human kind. One does not always have to be sacrificed for the other; it is on us to find a middle path. In these times of economic uncertainty, it is of paramount importance to support the industries; this requires that business shall be made more facilitative, accessible and hassle free to promote further development. At the same time, we cannot lose sight of the importance of preserving our environment for the posterity. ADR presents a unique opportunity to solve the problem of delay and stalling of the projects in the infrastructure and construction sector, without compromising on the rights of the environment and people affected. This industry is so critical that its fall will result in a domino effect, destroying with it the ancillary industries (cement, iron, power etc.) and result in the unemployment of millions of workers and their fall could break the back of

the Indian economy. Through ADR for EDR, the nation will not only be facilitating the industry but also ensuring that projects, which are environmentally viable, are implemented. This also furthers the human rights and interests of the victims, which often gets lost in the procedural and substantive nuances of law.

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