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Editor's Note

Law is a social science and a social engineering devise for the promotion of orderly progress and therefore a cross section of ideas helps us grow in the discipline. A law journal is an effort in that direction as it communicates views, in the form of scholarly articles and comments, on various topics converging on the discipline of law. Alive to our role, we hereby present you with the VIII edition of the Journal of Campus Law Centre. There is need to encourage young minds to participate in research based on the needs of the changing society and technical advances. The journal, we believe, would play an important role in fostering such legal research.

This issue of the journal has attracted some high-quality submissions that highlight the great variety of research topics currently being undertaken by Indian law academics. We are pleased to present seven articles that in their own ways contribute to a better understanding of a range of issues traversing international law, legal history, human rights law, comparative jurisprudence, advertising law, trademarks law, data protection, consumer law, organ donation, urban local governance, environmental law, sustainable development, child welfare law, administrative tribunals and administrative adjudication of disputes. Various topics covered transcend any single jurisdiction and our aim is thus to not only deepen and internationalise Indian public law debates, but also to insert distinctive Indian perspectives into those debates. We also strive to make our publication available to the broadest possible audience.

I thank all the contributors for their submissions to this edition of the JCLC and their cooperation with the editorial staff during the production phase. I would also like to express my gratitude to the editorial team, whose commitment and perseverance made its publication possible.

Prof. (Dr.) Raman Mittal

Professor-In-Charge

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"GOOGLE ADWORDS" A TRADE MARK INFRINGEMENT?: A COMPARATIVE ANALYSIS ON INDIA, U.S. AND E.U. WITH SPECIAL REFERENCE TO CONSIM v. GOOGLE CASE

Vasishtan P* & Samhitha Reddy†

Abstract

AdWords® is Google's Flagship advertising programme that uses certain keywords, to track the user preferences and display advertisements that are suitable. Any third-party advertiser can bid on these keywords and possess them for a limited period of time and display their advertisements to any user who uses these purchased keywords. However, there is no statutory provision to prevent AdWords from featuring any keyword that is trademarked by someone else. This raises a trademark infringement concern among the trademark holders who claim trademark infringement.

This paper, from a critical standpoint, attempts to comparatively analyse the law relating to such alleged trademark violation in different countries, highlighting the inadequacy of the Indian precedential and statutory law, all in the light of Consim v. Google's case. Further, the paper would comparatively analyse between U.S., E.U. and India pertaining to this issue.

Keywords: Meta Tags, Keyword Advertising, Google AdWords, Trademark Infringements.

I

Introduction

The Internet has become the new lounge for active digital users for various reasons of entertainment, educative learning, shopping, developing skills, and while some even create their own online space to earn their primary source of income. Likewise, there have been several online services and applications that have increased in number, to cater to the demands of the floating population on the internet. The entire online network has proven to become more

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† Advocate.

convenient, opportune, and cost-effective. This entire online ecosystem comprising of demands from the online users and appropriate online services to supply with such demands, collectively as a whole, is known as the Internet of Things (or IoT).

The online users are transitioning rapidly towards depending on everything available online as every requirement has a compatible solution from various parts of the world, at competitive prices. Something, the local markets cannot offer. Commerce has seen a steady rise economy-wise on the e-platforms as they have grown more convenient than ever, and the paradigm shift towards the virtual market garners more consumers, day by day. As Virtual markets have created a solid platform to carry out business and regulate the flow of money in advertising or shopping easier, the online ecosystem has grown prominent among the brands that seek their consumers in the most cost-efficient manner, thanks to the convenience it offers.

Search Engines play a crucial role in bridging the internet users/consumers and the service providers. They offer users the most relevant information that they seek and display various appropriate results that customers would navigate through. This bridge creates an opportunity for the advertising market to directly reach the consumers, who are in pursuit of specific goods and services that the brands offer.

To catalyse the process of customers reaching their desired search results expeditiously, almost all of the search engines use a technology called keywords where the pattern of a customer's search is analysed through specific identifiable words and only the relevant services are displayed to them, thereby making the entire process expedient and rapid.

As keywords returned a warm response from the internet users, the door to bright business opportunity through this successful conceptualisation was opened. Soon enough, the search engines monetised this opportunity by connecting the advertisers directly to the consumers/users by playing the role of intermediary who would identify an advertiser's potential customer on payment of a definitive sum of money. Keywords became the hotkeys to purchase as they principally became the tool for advertisers to reach their consumers directly. Each major search engine platform owns its own entity of keyword advertising programme.

Google "AdWords" ('AdWords') is Google's keyword-advertising programme in which advertisers bid on certain keywords for their clickable ads to appear in Google's search results. Since advertisers have to pay for these clicks, Google earns revenue from such searches. In fact, the AdWords program has proven to be the major contributor to Google's Sixty-Six

Billion U.S. Dollar revenue in 2014. Now the use of trademarks as biddable keywords has been accused of constituting infringement, with owners of such marks insinuating foul play on the part of Google and its AdWords clientele.

This dilemma has, to a large extent, proven to be beyond the purview of the traditional articulation of trademark jurisprudence, at least as far as the Indian legal system is concerned. Courts in the West have taken efforts to concretise the law on this issue and despite diverse stands being taken, have evolved certain objective prongs and constituents which would help establish a finding of trademark infringement.

This paper, from a critical standpoint, attempts to comparatively analyse the law relating to such alleged trademark violation in the U.S., U.K., and Indian regimes, highlighting the inadequacy of the Indian statutory provisions for their inability to safeguard all the rights of the trademark holders, all in the light of *Consim Info Pvt. Ltd. v. Google India Pvt. Ltd. & Ors*.[1]

Written to learn whether is there any remedy for the trademark holders to immune themselves from trademark infringements through keyword advertising, while not compromising on the ease of access for end consumers, the paper reads on the concept of trademark protection vis-à-vis contemporary virtual marketing.

Understanding Keywords

The terms or words typically used by a user to search for a product or service of interest in an online search engine are called keywords. These keywords directly link to the corresponding goods and services and their sellers, whose information is available on the internet. The search engines like Ask®, Bing®, or Google®, use these keywords to match with the information on the internet, to provide to the users seeking such information.

The keywords prove helpful to a targeted landing while searching and provide for faster and accurate results. These keyword-based fetching of results becomes a good opportunity for businesses to endorse themselves when a product-related query is raised by someone in the search engine, that they sell. This likewise becomes an opportunity to earn money for the search Engines. These entities are otherwise generically called as meta-tags, hyper-linking, deep-linking, etc. Without the keywords, the relevance of results shown might be extraneous, and

[1] 2013 (54) PTC 578 (Mad) (‘*Consim’*).

the possibility of diverging from what was intended to be searched in the first place could be high.[2]

Meta Tags

Meta tags are the specific set of keywords that are developed and used by the search engines to display relevant and custom results to a user seeking information online. However, meta tags are non-commercial in nature and are employed by the search engines solely to improve the user experience and evolve towards user-friendly interfaces. These tags are generated automatically by the search engines' analytics algorithm that monitors the usage pattern of a user and understands the consumer's need, thereby creating a web of interlinked words and data, each of which is relatable and thus lead to more accurate results.

Meta tags are created solely based on the number of times a specific word has been used to search by the users. If it is Diwali season in India, more users would search for terms like "crackers", "clothes", "diya" etc. The analytics now create these words as meta tags and whenever a new user searches "Diwali" then the search engine would display results on sellers who sell crackers, apparel, and diya.

There is no human manipulation or intervention in the functioning of a meta tag. This is because meta tags are solely used to increase the productivity of a search engine's efficiency in displaying a greater number of relevant results and better the user experience. Nevertheless, the success of meta tags and its core conceptualisation birthed the idea of creating a parallel business pathway using the same technology where the corresponding advertisers would pay the search engines to display their advertisements in the most prominent results whenever a user searches online using the keywords relating to their businesses and services offered.

Google AdWords

Google Ads® (Formerly known as Google AdWords) is Google's flagship keyword advertising programme, which has proven to be a major source of income for Google, accounting for over 70% of their gross profits every year.[3] The determination of the keyword

[2] Google AdWords Giving a Good Wallop to Trademark Law, IIPRD Blog – Intellectual Property Discussions, para.1, *available at:* https://iiprd.wordpress.com/2017/07/04/google-adwords-giving-a-good-wallop-to-trademark-law/ (Visited on June 22, 2020).

[3] Trefis Team, Google's Revenue Estimation, *Forbes*, December 24, 2019, *available at*: https://www.forbes.com/sites/greatspeculations/people/trefis/#58c252b84462 (Visited on July 02, 2020).

that is listed on the auction can also be automatically processed by Google's algorithm, based on the number of customers' usage of such a keyword in their searches.

Google auctions certain potential keywords that the sellers offering relevant goods and services can purchase so that their results are displayed on the first page or as advertisements, whenever a user searches using that specific keyword. In this way, the brands that bid on the keywords may have higher chances of that customer seeing their brand listing first before other competitors' names are listed. For every time a customer enters a brand's website found through using the purchased keyword(s), the brand would pay a fixed sum of money which, in the internet parlance is known as Cost Per Click (or CPCs).

The association for a brand with the bided keyword may usually last between three to five years however, there is no standard ruling or agreement lifetime on the same. The AdWords algorithms choose any words, whether being a proper dictionary term or coined terms like "Kodak" into its system, of whatever keyword that is being in the search trend. More a term is being searched; the demand also gets correspondingly high.

The Key Difference

i. Keywords are the generic terms assigned to any word, whether a dictionary term or jargon that are being used on the internet to search for desired results, by the online users. Keywords are mere indicators of usage of terms and have nothing to do with either technological ease of access or business motive.

ii. Meta tags are the Keywords that are created solely based on the user search pattern and sensations attached to certain words from time to time based on the user search trends. They are used by the search engines to provide more relevant results to the users based on understanding their interests or what is trending in the vicinity.

iii. AdWords are essentially Meta Tags but have a commercial nature and intent, as they are purchased by the advertisers to market and reach their brands to the potential consumers who surf online search engines for goods and services, that the advertisers offer.
AdWords are not necessarily meta tags as sometimes, the advertisers can pay for any keyword to buy and such a keyword would be created upon the purchase, irrespective of any user using such a keyword or not. (e.g., a new company with a distinctive trademark

"Blitzgo" can purchase a keyword in that name without "Blitzgo" being a meta tag). None of the above entities consider the used word being a trademarked word or not.

II

Does Google AdWords Amount to Trademark Infringements?:

A Comparative Study

As it was observed that AdWords may entail the risk of including a trademarked word since its programming and functions do not respect a word being generic or trademarked, this chapter will analyse *Consim* case in-depth, a first of its kind case in India that dealt extensively into the concepts of keyword advertising and trademark infringements and further compare the Indian position with that of the U.S. and U.K. positions to compare and understand tests of identifying trademark infringements in keyword advertisements in those jurisdictions.

Analysing *Consim Info v. Google India and Ors.*[4] in Detail

Facts

Consim Info Pvt. Ltd. is a web-based online matrimonial services platform owning trademarks like 'Tamil Matrimony'. The first respondent was Google, the search engine, and the second and third respondents were companies that owned competing online matrimonial services like Shaadi.com, Jeevansathi.com, etc. The cause of action was when Consim accused Google's AdWords program to illicitly identify their trademarked words and sell those to Consim's competitors like Shaadi.com, who would buy those trademarked keywords and place their advertisements in an especially featuring column called "Sponsored Links". The act of generating revenue (keywords) using a trademark-protected term was against the spirit of intellectual property laws and adversely affected the trademark holder. Google denied and stated that the keywords were generated from the number of search results using those term/trademarks; and that there is no human intervention in the process of selection of any term/trademark as a keyword.

The Madras High Court in the first judgment[5] held that Google's use of Consim's trademarks as keyword searches fell within the ordinary course of trade and thus, was not a

[4] *Supra* note 1.
[5] *Consim Info Pvt. Ltd. v. Google India Pvt. Ltd.* [2010(6) CTC 813].

violation of Trademark law since the keywords were used in a descriptive sense and not with the intention to divert Consim's business or otherwise impinge on its trademark. Consim appealed to the Divisional Bench that is discussed in this paper.

Issues

a. Does Google's AdWords program's algorithm violate the principles of trademark protection?

b. Should the online keyword-advertising programs involve human or algorithmic intervention to distinguish between trademarks and non-trademarked generic words?

Held

The registration of a trademark is, by itself, evidence of its validity and Google's actions did indeed constitute trademark infringement.

The Curious Case of the 'Matrimony'

This paper infers the case largely in the Indian context as it is the first-ever and proximal association for the keyword-advertising issue that has been claimed for trademark infringement in the Indian Trademark Regime.

The case started basically with Consim Info. Pvt. Ltd. ('Consim Info') which owns the Trademark "Matrimony" and other associated TM terms like 'Bharat Matrimony', 'Tamil Matrimony' etc., in India. Google on the other hand, through its AdWords programme, automatically determines the popular search terms (or keywords) and presents it for Auction for other relevant players in the same field to bid and purchase for a limited period.

'Matrimony' was one such word that was identified as a potential meta tag and was sold in the auction to the respondents who are the competitors owning domain names like www.shaadi.com; www.jeevansathi.com; and www.simplymarry.com.[6] When a customer inputs any one or whole part of "Bharat Matrimony" or other related Trademarks registered by the Appellant, the aforesaid Respondents' advertisement links appeared on the right side of the results page under the head of 'Sponsored Links'.[7]

[6] *Id.* at para. 9.
[7] *Id*. at para. 10.

The Appellant further mentioned that the search engine had not only developed the impugned Trademarks as meta tags or keywords but also auctioned other of its Trademarks belonging to the other classes to be associated with the purchase of AdWords as a whole, by its competitors, whose advertisements were also deceptively and similar looking to that to theirs, to lure its potential customers towards them, thinking it was www.matrimony.com.

The Appellant accused that Google allegedly allowed its competitors to bid on the keywords, which were essentially Trademarked terms belonging to them, despite knowing that such keywords were Trademarks belonging to them.[8]

The Issues in the case were, therefore, such an impugned act of Google and the other Respondents amounted to trademark infringement or not, under sections 2(2)(b)[9] and 2(2)(c)[10]?

The Chief contentions of Consim Info were that Google misappropriated their Trademark and their acts amounted to infringement under section 29 of The Trademarks Act, 1999[11] ('the Act') as its "Sub Clause (1)[12] states the general proposition of the law in this respect and lays down that when a registered trade mark is used by a person who is not entitled to use such a trade mark under the law, it constitutes infringement."

The Court also held that

> *"Sub Clause (6)[13] lays down the circumstances when a person is considered to use a registered trademark for the purpose of this clause. It includes inter alia*

[8] *Id*. at paras. 11 – 13.
[9] The Trade Marks Act, 1999 (Act 47 of 1999), s. 2(2)(b) reads: In this Act, unless the context otherwise requires any reference to the use of a mark shall be construed as a reference to the use of printed or other visual representation of the mark.
[10] *Id.*, s. 2(2)(c) reads: In this Act, unless the context otherwise requires to the use of a mark — (i) in relation to goods, shall be construed as a reference to the use of the mark upon, or in any physical or in any other relation whatsoever, to such goods; (ii) in relation to services, shall be construed as a reference to the use of the mark as or as part of any statement about the availability, provision or performance of such services.
[11] *Id.,* s. 29 — Infringement of registered trademarks.
[12] See, *id.*, s. 29(1) which reads: A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and, in such manner, as to render the use of the mark likely to be taken as being used as a trade mark.
[13] See, *id.,* s. 29 (6) which reads: For the purposes of this section, a person uses a registered mark, if, in particular, he— (a) affixes it to goods or the packaging thereof; (b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark; (c) imports or exports goods under the mark; or (d) uses the registered trade mark on business papers or in advertising.

affixing the mark to goods or packaging, offering or exposing the goods for sale or supply of service, importing or exporting the goods, the use of the mark as a trade name or trade mark on business paper or in advertising."[14]

Section 29(6)(d)[15] of the Act states, that no person without the consent of the owner of a trademark shall embark on any activity that involves copying or imitating a trademark with a nexus to advertise their goods and services, in any way that deceives a potential customer or creates a likelihood of confusion. Doing so, will attract civil suit for infringement.

There was another similar case[16] in an identical background and issue wherein Plaintiff's trademark 'Matrix' was the keyword that was bid and used by Defendant. However, the issue did not revolve around the same Trademark Class, and as a result, Plaintiff could not prove a *prima facie* case like *Consim*.

The Gujarat High Court reckoned that Defendant's engagement in the dishonest practice infringe the Plaintiff's trademark and reap profits out of that trademark, by luring potential customers through aggressive advertising using that AdWords. However, the Court also noted that since this was done to bring down the reputation to the Plaintiff's brand, and the very fact does not amount to trademark infringement, the case was dismissed.[17]

The 2013 Judgement was a divisional bench appeal of a previous Single Judge Bench that granted an interim injunction in favour of Consim Info but the same was vacated after one week. In the appeal, the Divisional Bench analysed various positions of Law in Foreign Jurisdictions.

[14] *Supra* note 1 at para. 14(b).
[15] The Trade Marks Act, 1999 (Act 47 of 1999), s. 29(6)(d) — Infringement of Trademarks — reads: For the purposes of this section, a person uses a registered mark, if, in particular, he uses the registered trade mark on business papers or in advertising.
[16] *Matrix Telecom Private Limited v. Matrix Cellular Services Private Limited*, (2011) 52 (3) GLR 1951.
[17] *Ibid.* at para. 9.6.

The European Union's Position of Law

A few months before *Consim* was decided, the England and Wales High Court referred to Articles 5(1)[18] and 5(2)[19] of the European Union Directive 89/104 ('EUD') & Article 9(1)[20] of the European Union Regulation 40/94 ('EUR'), in the case of *Interflora v. Marks and Spencer Plc.* ('*Interflora*')[21] Article 5 of the EUD grants the 'rights deliberated under a Trademark', wherein, Article 9 of the EUR contains the 'rights deliberated by a community Trademark'.

Reading together Articles 5(1)(a) of the EUD and 9(1)(a) of the EUR, it becomes clear that a Trademark's proprietor has powers to forbid anybody from using such a mark and if such mark is used for any other services during a trade practice, becomes detrimental to the distinctive character of the very trademark.[22]

Likewise, reading together Articles 5(1)(b) of the EUD and 9(1)(b) of the EUR would reveal that if there exist any forms leading to any part of the likelihood of confusion, then the

[18] Art. 5 — Rights conferred by a trade mark — (1) reads: The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade: (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered; (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign , there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.

[19] Art. 5 — Rights conferred by a trade mark — (2) reads: Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with , or similar to , the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to , the distinctive character or the repute of the trade mark.

[20] Art. 9 — Rights conferred by a Community trade mark — reads: A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade: (a) any sign which is identical with the Community trade mark in relation to goods or services which are identical with those for which the Community trade mark is registered; (b) any sign where, because of its identity with or similarity to the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark; (c) any sign which is identical with or similar to the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Community and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the Community trade mark.

[21] [2013] EWHC 1291 (Ch) ('*Interflora*').

[22] *Supra* note 19.

trademark proprietor vests full rights to prohibit such unauthorised usage of the trademark which exists in a course of trade, by an unauthorised party.

Thus, in *Interflora*, it was held that when an intermediary internet service provider uses a keyword, which is already a trademarked word, to display advertisements, such use does not qualify under the definitions and meanings of the aforesaid provisions of EUD and EUR.[23]

The Madras HC referred to one more case named *Google Inc vs. Louis Vuitton Malletier*,[24] over *Interflora*[25] to consider that in a course of a trade, a trademark's usage arises only "in contexts of commercial activities with a view to economic advantage", that is, when the ISPs generates money from a keyword, that is trademarked already.

This rule, may not be the case with the Reference ISPs. As they function in a way, who get paid to index an advertisement that may contain a third-party trademark, but since only indexing an advertisement becomes their role, such reference ISPs are immune from any infringement that is "carried out for commercial activity with a view to economic advantage".[26]

Reading all the above in toto, when a trademark is being used without authorisation by a third party, the proprietor of such trademark can prohibit the unauthorised usage, in view of both preserving the value of trademark as well as exercising the special powers granted by the trademark. However, when a third party uses the trademark in which, the efforts placed by the proprietor of the trademark are not in the nature of saving a Trademark from disparagement of its reputation, then that would not be considered as an infringement. This rule applies even if the usage of third parties would dismally result in some consumers not choosing the proprietor's goods and services.[27]

The United States of America's Position of Law

The Madras High Court considered the position in the U.S. Courts of Law as well. Analysing the U.S.' provisions side by side, it settles down to two main facets under which the keyword-trademark fiasco can be clearly determined.

[23] *Supra* note 20 at para.41.
[24] *SA* (C-236/08), paras. 55 and 58.
[25] *See, supra* note 1 at para.15(l).
[26] *Ibid.*
[27] *See, supra* note 20.

Usage of Trademark by the End-Consumers

The concept of "trademark use" was analysed in the case of *Playboy Enterprises Inc. v. Netscape Communications*[28] ('*Playboy* case'), by the U.S. Court of Appeals for the Ninth Circuit. Here, *Playboy* accused *Netscape* of directing its potential site visitors to its competitors' websites, by collaborating with the advertising intermediaries, thereby misappropriating their trademark. The initial visitors of *Playboy*, who in the thought of visiting its website, would have been re-directed to its competitors' websites by clicking on the appearing links, that deceptively appear to be *Playboy's*. However, being redirected to its competitors' websites, they would have been satisfied there since the type of content displayed was almost similar to that of *Playboy's*. This course of untenable action by its competitors by using the *Playboy* trademark created the nexus for a *prima facie* case, filed by *Playboy*.

In another case before the same Court of *800 JR Cigar v. GoTo.com*[29]('*Cigar*'), where the search engine was 'GoTo.com', performed actions of a "trademark use" in ways namely;

(a) GoTo.com engaged in the trade practice of auctioning the keywords to any of the competitors of 800 Cigar who were bidding on such keywords to display their results in searches involving the keywords of 800 Cigar.
(b) GoTo.com's actions amounted to a reasonable belief since it was engaging itself into moderating the search market by redirecting the potential users of Playboy to other competitors, based on who bid the highest money in acquiring the relevant keywords.
(c) By identifying the list of accurate and effective keywords that were directly identifying with Playboy by its users, Goto.com sold such keywords to Playboy's competitors.

Usage of Trademark by Identifying the Root of Genesis

The Madras High Court in *Consim*, referred to one of the most important cases of keyword advertising in the U.S., the *Rescuecom Corp. v. Google*[30] ('*Rescuecom'*). The *Rescuecom* case shared a similar issue but, in the U.S.' jurisdiction, pronounced its verdict in favour of Google based on no evidence to support Rescuecom's claims that Google, through its AdWords programme, infringed Rescuecom's trademarks. Before the U.S.' 2nd Circuit Court, Rescuecom could not establish any "trademark use" to which the Court highlighted that

[28] 354 F.3d 1020 (2004) ('*Playboy* case').
[29] 437 F. Supp. 2d 273, 278 (D.N.J. 2005) ('*Cigar*').
[30] 562 F.3d 123, 129-31 (2d Cir. 2009) ('*Rescuecom'*).

"a trademark use is one indicating the source or origin"[31], which is, 'placing trademarks on 'goods or services in order to pass them off as emanating from or authorised by' the trademark owner.'[32] Looking into this, the Court stressed the fact that the 'trademark use' could only be used for issues of paramount concerns and that they could not be used in light of "in commerce" or "likelihood of confusion" terms as mentioned in §1114 of the Lanham Act, 1946.[33]

Further, the Court acknowledged that Rescuecom had not proved any 'trademark use' since there was no evidence to conclude that the Trademark in question was neither displayed on any of the advertisements in any 'sponsored links' nor was moderated to other competitors through keyword bidding.[34]

So, the Court concluded that Google's activities as alleged by Rescuecom for infringement and the lack of conclusive evidence submitted to prove the allegation thus did not amount to 'trademark use'. The users intending to visit Rescuecom's website were never redirected to its competitors' websites and still landed on Rescuecom's website for any link that they clicked, that appeared when they searched for Rescuecom. So, Google's activities did not bring about any effect in appropriating Rescuecom's trademark that faced any effect to the public usage. Thus, the outline of Google's mechanism was not identified under the meaning of the Lanham Act as infringement.[35]

On the other hand, only the AdWords were commercial in nature, while 'meta tags' were used by Google to improve usability and as a step of offering the users convenience while searching. While the meta tags did not entail any commercial prospects to it, the question arises as to whether the words found in meta tags, which are trademarked words would amount to 'Trademark Use'.

However, there is a void in the U.S. Judiciary, as no cases yet have precisely addressed this issue because the principal *prima facie* case of infringement arises only when there is one when two or more parties are involved in a commercial relationship. In *Brookfield*

[31] Kristin Kemnitzer, "Beyond *Rescuecom v. Google*: The Future of Keyword Advertising", 25(1) Berkeley Technology Law Journal 412 (2010), *available at:* www.jstor.org/stable/24118641 (Visited on July 05, 2020).
[32] *Ibid.*
[33] *Ibid*.
[34] *Ibid.*
[35] *Supra* note 31 at 419.

Communications, Inc. v. West Coast Entertainment Corp.[36] ('*Brookfield*') the Ninth Circuit U.S. Court of Appeals subtly mentioned that the meta tags could include under the definition of 'trademark use' since it could be directly compared with placing a recommendation or an advertisement in front of another related store.[37]

So, understanding the U.S.' stand on whether AdWords would qualify to become trademark infringement, it is clear that 'trademark use' *per se* is required to be proven and the onus for the same vests with the Plaintiffs on the *per se* basis. The Madras High Court in *Consim*, took note of these ideals alongside noting other U.S. cases that dealt with similar questions of law.[38]

III

Identifying Trademark Infringements with The Litmus-Test Principles

Often the Courts have resorted to identifying a *prima facie* case of a Trademark infringement with a few tests to confirm whether such allegation is tenable to be understood within the definitions of trademark infringements. However, generalising the two main tests, this Chapter will analyse in the depth the two important principles used in this regard.

The Likelihood of Confusion Principle

Whenever, as an act of something, any sense of confusion occurs, this principle applies. The main criterion to invoke this principle is when a person's intervention creates confusion in another person's viewpoint whose intention would be to reach a different place.

Initial Interest Confusion Doctrine

When a potential consumer decides to purchase any goods or services, the likelihood of choosing the first link that comes across during a preliminary search is high. This is the very reason why the AdWords program is very successful. It becomes a well-returning investment as various brands attempt to lure the general potential consumers through their initial interest.

[36] 174 F.3d 1036 (1999) ('*Brookfield*').
[37] *Supra* note 31 at 424.
[38] *Supra* note 1 at paras. 15(l)(v) and 15(l)(vi).

The initial interest confusion doctrine is primarily based on a generic approach of a consumer pondering over to purchase any goods or services. "It is a matter of what is being sought rather than what is being bought"[39]

When the consumer is being redirected either by the display of the sponsored links, or deceitfully redirected through 'click-here'-like links to a competitors' website in an impression that the consumer is visiting a specific website, then such acts would amount to an unfair advantage of a consumer goodwill, and thus, would include under the definition of "initial interest confusion doctrine".[40]

In *Cigar*[41], the Court observed that the intermediary search engines that play a pivotal role in offering the sought information by a consumer, and the information offered, if they do not match, then the search engines would understand to be a party causing confusions and the likelihood of confusions within the consumers in this regard. The primary concern was that, all these acts allowed 'free ride on the goodwill' of a trademark. This act of "bait and switch" would impact the purchasing decisions of a customer that would also act as a portal of competitors to take advantage of the confusion created in a consumer, by the search engine, being its ally in this process overall.[42]

In the Indian jurisdiction, in *Yahoo Inc. v. Akash Arora & Anr.*,[43] the Delhi HC noted,

> "*even if an individual is a sophisticated user of the internet, he might not be a sophisticated consumer of information and such a person may find his/her way to the Defendant Internet site which provides an almost similar type of information as that of the Plaintiff and thereby confusion could be created in the mind of the said person who intends to visit the internet site of the Plaintiff, but, in fact reaches the internet site of the Defendant.*"

[39] Aman Anand & Ramkrishna Veerendra, "Google AdWords: A Legal Dilemma Testing the Boundaries Of Conventional Trademark Jurisprudence" 8 IJIPL 1 (2017), *available at:* https://www.nalsar.ac.in/indian-journal-intellectual-property-law-print-issn-0975-492x-and-e-issn-2278-862x (Visited on July 04, 2020).
[40] Ashley Tan, "Google Adwords: Trademark Infringer or Trade Liberalizer" 16 Mich. Telecomm. & Tech. L. Rev. 473 (2010), *available at*: https://repository.law.umich.edu/mttlr/vol16/iss2/5 (Visited on July 04, 2020).
[41] *Supra* note 29.
[42] *Supra* note 39 at 13.
[43] 1999 PTC (19) 201 (Delhi) at para.13.

Intent and Knowledge

The intent has been a sole factor that coloured between a criminal and a civil suit, or between claiming innocence or holding a defendant liable for their activities. As these factors rest on a dynamic wire, needing to investigate on a case-to-case basis, it has ever been a new battle for every infringement case in the trademark regime.

To testify Google's intent and knowledge in this likelihood of confusion pretexts, in the year 2004, the 'Keyword Suggestion Tool' as Google's then flagship programme for purchasing a meta tag for commercial usage reflected in advertisements, was introduced. It was backed by Google's Trademark protection policy clause that stated that the intention was not to infringe on anybody's Trademark but did not explicate further. The advertisers bided on keywords that were somebody's registered Trademarks as the main cover page advertisements that they endorsed in sponsored links.

Google understood the risks it entailed and updated this policy in 2009 in a bid to alleviate any risk of confusion in using a trademark as a keyword. In this iteration, the policy specified that such Trademarked words cannot be the face of the advertisements. However, even policy went in vain as the redirection links began to appear with deceptive links that appeared like an original website's link, that redirected a consumer to a competitor's website without their knowledge. This gray area was illuminated in *Rosetta Stone Ltd. v. Google Inc.*[44] ('*Rosetta*') where the Court held that Google was responsible for confusing as it provided for the platform and facilitated such a confusion in the first place.

This intent behind causing the likelihood of confusion is an essential factor identifying a trademark infringement and the same has been held in a plethora of cases like the *Brookfield* case,[45] *Playboy* case,[46] *Rescuecom* case,[47] *Polaroid Corp. v. Polaroid Electronics Corp*.,[48]etc.

The proof of intent does not necessarily have to be that the defendants must engage in certain practices where the doubt of their intent reveals in the process, but mere non-performance towards preventing such incidents would also count. This was held in the *Playboy* case. Also, the fact above non-performance, the search providers are profited as in the entire

[44] 676 F.3d 144 (2012) ('*Rosetta'*).
[45] *Supra* note 36.
[46] *Supra* note 28.
[47] *Supra* note 30.
[48] 287 F.2d 492, 495 (2d Cir. 1961).

fiasco of advertisement on keywords, the parties in issue pay these search engines. So as soon as they have profited in this aspect, their nexus into the case is created.[49]

In *Playboy*, the competitor-defendant, upon receiving the first notice from Playboy Enterprises initiated a request to the search engine to do the minimum required to evade the allegation claim. The search engine company refused to still act upon it. This evidence added strength to the Plaintiff to prove in the Court that there was an intention on the part of the defendant, thus, contributing to the confusion with knowledge.

Intent on the Part of the Infringer

Getting back to analysing the *Consim* case, the next factor that applies as part of these tests is the intent of the infringer. There is significant bad intent as posed by both Google and the Defendants. The Defendants' act proved that they intended to "free-ride" on the reputation that Consim Info (the Matrimony Trademark) carried with it. Using the free advantage of the goodwill possessed by 'Matrimony' by tricking the potential customers using deceptive links that customers legit believed to be belonging to the Plaintiff's website, the Defendants deceitfully tricked the customers into their website, where the customers would also not quit as similar services were rendered by the Defendants and the customer in general, has no reason to stick to a particular brand as much as their needs for a marriage-alliance website is accessible.

Google's role in all of this, is that there were no visible, tangible, and effective measures adopted to prevent or discourage this kind of practice. The on-paper mention of Google to have highlighted the sponsored links in diffused yellow colour might sound technically valid, but in real-life usage conditions, it would have meant no colourable difference for a customer to distinguish and choose a specific trademark. The confusion would still exist.[50]

Therefore, the presence of a discernable intent establishes on the part of the Defendants and adds a strong foundation to prove the fact that confusion caused in the consumers' end, was deliberate and strategically positioned in the right way to immune themselves from preliminary accusations that they would mostly be safeguarded from, due to the present position of trademark infringement laws in India.

[49] *Supra* note 40 at 36.
[50] *Supra* note 39 at 18.

The Trademark Dilution Principle

Dilution of a Trademark occurs when its distinctive character is left to a detriment as a result of either the significance or sensation of the mark becoming watered down over time or ageing, or any external competitor indulging in any practices of disparaging its reputation by modes like disparaging advertisements, anti-competitive practices, lab-result comparisons, etc.[51] When a trademark becomes generic, it loses on its distinctive character to be able to identify itself with its relevant goods and services, in the minds of the consumer. This is also referred to as trademark genericised.[52] Some of the genericised trademarks include Escalator, Dry Ice, Sellotape, Trampoline, Videotape, Flip phone, Hovercraft among many.

The popular tests involved in identifying whether a trademark has become generic in the way the word has been used by the consumer and which consumers no longer associate such a word with the brand anymore are,

i. The 'Who Are You' Test — Initial Standard Test
ii. The 'What are You' Test — Initial Standard Test and
iii. The 'Imagination' Test — Secondary Standard Test

In the U.S.' 9th Circuit in *Filipino Yellow Pages, INC v. Asian Journal Publications INC.*,[53] the Court implemented the prime two initial standard tests. As these tests involved in whether the description of the very trademark only refers to the product sold, rather than the manufacturer or the brand standalone, then such a mark enters the generic domain.[54]

The Secondary Standard test called the 'Imagination' test involves all the impugned trademarks that are descriptive in nature. As the descriptive trademarks are always frail against a firm protection, the U.S. 5th Circuit Court in *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*[55] held that if an effort of imagination is put to understand and join the dots on how a trademarked word relates to the goods or service it offers, will reveal whether it is a suggestive term or has become generic in nature, if people only use the trademarked word to identify that goods and service it offers.

[51] Graeme B. Dinwoodie and Mark D. Janis (eds.), *Trademark Law and Theory: A Handbook of Contemporary Research* 134-35 (Edward Elgar Publishing Inc., 2008).
[52] *Ibid.* at 138.
[53] 198 F-3d 1143 (9th Cir, 1999).
[54] *Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296, 304 (9th Cir.1979).
[55] 698 F-2d 786 (5th Cir, 1983).

Inferring Article 5(1)(a) of the EUD[56] in the *Interflora* case,[57] when exercising an "*exclusive right of protection conferred by the trademark on the proprietor must be reserved to cases in which a third party's use of the mark or the sign adversely affects (or is likely to) the trademark's functions, particularly the origin function*".[58]

Cross applying these findings and references to the *Consim* case, the onus of reasoning only vests with the manner of how an advertisement is made using an impugned trademark as keywords or that is displayed on the competitor's advertisement itself. If the consumer cannot have knowledge on such a word being a trademark and enters the belief that such word is a generic term to identify the related goods or service, and not a trademark of the proprietor, then to its dismal fate, such word is also understood to have genericised. Thus, the advertisement of a competitor, irrespective of the standing on the trademark protection law, could have dire consequences on the trademark itself towards its dilution. There is a void for a specific law to address this gray area of online keyword advertising programmes. The search engines' trademark policies do not exhaustively address enough to touch this aspect.

In India, §29(4) of the Act, 1999[59] refers to any third party taking unfair advantage over a trademark under the definitions of infringement, which results in the detriment to the trademark's distinctive character or its reputation. The Delhi High Court in *ITC Limited vs. Philip Morris Products Sa & Ors.*[60], also held the same. The colourable and contrasting difference between the approach of the Indian and the U.S. Courts in this aspect is that in India, for dilution, a mark must have a reputation in the territory while in the U.S., the requisite is that such a mark must be famous. A famous mark is a well-reputed mark wherein not all the marks having good repute necessarily be famous.

[56] *Supra* note 18.
[57] *Supra* note 21.
[58] *Supra* note 39 at 20.
[59] See, The Trade Marks Act, 1999 (Act 47 of 1999), s. 29(4) — Infringement of registered trade marks — which reads: A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which — (a) is identical with or similar to the registered trade mark; and (b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and (c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.
[60] 2010 (42) PTC 572 (Del.) at para.44.

IV

The Trademark Infringement Concern in Google AdWords: Through the Lens of a Trademark Holder and Google

As there have been no sector-specific laws that either govern the business of AdWords or provide guaranteed protection to the Trademark holders who are aggrieved in this regard. As both sides have argued their own justifications, this Chapter shall take an anomalous yet quirky view to analyse why both sides attempt to retain their business, from their own standpoints.

Position of an Aggrieved Trademark Proprietor

The essence of any Trademark is to grant the proprietor the exclusive rights to create an identity under such a mark and prevent others from using the same. Understanding the term Intellectual Property Rights, naturally, a trademark becomes the owner's property if granted legitimately. The rights the owner bestows and entitles upon such property to own, use it, monetise from it, and prevent others from expropriating and taking advantage of it.[61]

Consim Info in this Madras HC Judgement of *Consim* presented its trademark to be a combination of generic and descriptive words,[62]however, as much as once the trademark has been granted, the entitlements over a trademark should be treated at par with that of property ownership. The trademark proprietors' efforts to establish themselves in the market with their marks, must not be trivialised. For the forbearing efforts to sustain in the market with a single-bridge identity of a trademark, allowing any third parties to use such a mark for their business promotions reeks iniquity and impropriety.

As held in *Rosetta*,[63] a trademark owner without being obtained the consent, the service providers should not create a shortcut to the competitors to not only unscrupulously misappropriate another's trademark but also get benefitted from attracting more consumers who were initially intended to visit the original trademark's proprietor. Any search engine that has benefitted monetarily in this process naturally becomes a party to this infringement. The fine line difference between finding safe harbouring for the search engines is the bonafide intention or non-knowledge. But as held in *Google India Pvt. Ltd. v. Visaka Industries*,[64]

[61] *Supra* note 51 at 4.
[62] *Supra* note 1 at para.29.
[63] *Supra* note 44.
[64] 2019 SCC OnLine SC 1587 at para.150.

despite having the aforesaid immunities, beyond an extent, if the search engines do not reasonably discharge their duties to prevent online infringements upon notice, then such immunities will cease to exist.

AdWords provides for a platform where the infringements exist in broad daylight yet, somehow endures legally from the time the programme was initiated. This might be due to the foundation laid by the Google's Trademark Infringement Policy in AdWords. The stricter sense of interpreting their policy could lead to a lot of loopholes that victimise the rightful trademark holders. When Courts have ensured offline infringements of trademarks provide a *prima facie* case and immediately qualifies for an interim/permanent injunction, the same footing is absent in online platforms.

As held in *Rescuecom*[65], the Court's strict interpretation to demand the Plaintiffs to prove 'trademark use' for infringement, when the AdWords programme *per se* has not yet been identified whether it includes trademark use, is inequitable to the trademark holder. The benefit of doubt should always be endowed to a trademark holder albeit urging the onus of proof on them as well, to prove a *prima facie* case.

As every law sports its own loophole, if the requirement to prove infringement is difficult on the part of the trademark holder, then the infringers would always discover one way or the other, to bypass the law, but legally.

As held in the *Brookfield* case,[66] the lack of intent to cause confusion in the consumers however becomes immaterial to the fact that whether consumers would be confused otherwise. If a consumer accesses a search engine that allows keyword-based advertisements, there must be an initial presumption that a consumer's confusion would largely be impacted by the results that the search engines return to the keyword input given by the consumer. The search engines must take the responsibility of avoiding any confusion since they moderate the results page due to the dynamics of auctioning various keywords to the market players.

On the other hand, the competitor third parties that resort to the "free-riding" on the goodwill of another's trademark must be strictly identified and restricted by the search engines, and on the failure of their part, the Courts. The right to prevent any third party from taking

[65] *Supra* note 30.
[66] *Supra* note 36.

advantage of someone else's trademark to profit and benefit themselves comes under a valid definition under the exclusive rights of the property owner. There is no necessity for a proprietor to prove that their mark is at detriment as a result of free-riding by a third party. The same was held in *L'Oréal and Others*,[67] where the Court held that any act of exploitation of another's trademark to further one's portfolio is wrong in the eyes of law and is unfair *ipso facto*. The owner of the mark naturally derives the right to proceed to the court or send notices to the search engines providing such an advertising platform under the defence of protecting their property, and save the reputation and the distinctive character of such a mark.

In instances where the services or goods offered by two competitive brands under a similar or identical trademark which are descriptive or suggestive in nature, there is still plenty of opportunities to categorise their advertising dynamics and protect their respective marks from each other from infringements in the AdWords programme. Having a descriptive trademarked name would always entail the risk of likelihood of confusion cases and this conclusion cannot be used to justify an infringement.

The Ruling of Indian Competition Commission of India, in *Eximcorp India Pvt. Ltd. v. M/s. Google India Pvt. Ltd.*,[68] ('*Eximcorp*') Eximcorp accused Google of its dominant position to determine and handle the flow of the market as they sell the keywords to the highest bidders. However, the Judgement was applying a strict sense of onus of proof and therefore held that there was no *prima facie* case shown and thus, dismissed the case. The least effort of the Competition Commission to grant the benefit of the doubt and instead, not acting in a positive nature could have been appreciable and would have given hopes for the trademark holders to be immune from their losses created through undefined zones in the void of laws.

As enumerated in the First Chapter, the AdWords may not always be words that are formed organically like the meta tags. Sometimes, if an advertiser wishes to purchase a keyword that was neither generic nor a meta tag before, such words can still be created by virtue of the advertiser purchasing it. This business-oriented manipulation of newly coined words would prove the intent of the commercial establishment of Google and thus, would draw the nexus to become a necessary party to an infringement suit. As consequence, Google would also lose its merit under safe harbouring under section 79 of the Information Technology Act,

[67] [2009] ECR I-5185.
[68] Competition Commission of India, Case No. 68/2010.

2000.[69] As the bonafide intention is one of the chief factors to claim safe harbouring under the provision.[70]

Usage of Trademark by Google Adwords in its Standpoint

Google (or similar services) uses meta tags or keyword linking in their search engines with only one motive, to improve the user experience and interactivity. The more intuitive a search engine is the greater number of users subscribing to it. However, in an oligopoly, there is competition for the search engine providers as well, and AdWords is just another offering from Google as part of its competitive practice.

Again, as the entire motive for a company to sustain itself in the market depends on commercial activity, AdWords was launched, soon followed by another flagship advertising programme AdSense. So, the prime contrast between a meta tag and AdWords is that meta tags are not commercial in nature while AdWords is. Also, meta tags enable Google to improve its user interactivity that is dynamic, based on the current affairs and varying interests in a region/state/nation. With meta tags, displaying more relevant data and predicting a user's future pattern of searches in advance, and recommend them of appropriate information is essentially the purpose of a search engine in the first place.

Only the users who can improve their interactivity levels will be able to suit themselves to the rapidly improving technological advancements. Meta tags play a significant role in this, and Google is aware of the same. This must be the reason why, despite facing a plethora of infringement suits worldwide, from *Rosetta* case to the latest *Consim* case, Google does not leave its stand on meta tags/AdWords, nor amend its Trademark policy to be aggressive and eliminating all odds that would potentially arise against any impugned trademark. If Google gives up on this front, it would enormously affect their very business and revival would become difficult if it starts losing its market share.

India's Competition Commission allows dominant position but only does not tolerate abuse of dominant position. This is the large gap that Google sustains by its monetisation from AdWords. The same is the case with the U.S. As much as Google's role is not violative of the

[69] See, The Information Technology Act (Act 21 of 2000), s. 79 — Exemption from liability of intermediary in certain cases.
[70] *Supra* note 64 at para.90.

Lanham Act, the Courts are not going to question their intermediary role or activity of auctioning the keywords.

Revisiting the purpose of AdWords as a platform, just over its commercial garb, AdWords significantly helps run various businesses and improves the user experience to a large extent. As the likelihood of confusion concept would deter this user interactivity, like observed in Rescuecom case, the consumers would settle with any offeror who offers goods and services that the customer receives more value proportion. An aware consumer who is specifically searching for a specific brand/company would be able to distinguish between the target site and the redirected sponsored links. The same was held in the *Eximcorp* case.

Coming to the keywords, in *Consim*, the word 'Tamil + Matrimony' etc., was in question. It is a combination of 'generic + suggestive' words. Matrimony is a word relating to marriages, weddings, etc., and there are not many synonyms that consumers could potentially think of when they initiate a search seeking offerors of this service. If the consumer no longer associates the term with the specific trademark holder, then the suggestive term also becomes generic and goes out of the scope. Either way, it is not for Google to concern about this issue as this is a mere matter of Trademark Law and how the trademark regime functions.

Google must only be concerned on the issues arising out of impugned marks that are distinctive in nature (e.g., Purchasing of the keyword 'Kodak' for photography-related advertisements of the third parties) whose keywords are purchased, only to advertise in a deceptively similar manner, to an extent that it would fail the tests laid by the Court.

Otherwise, Google's only objective is to flourish commercially while shifting the paradigms to superior technological advancements. In the digital and technological realm, an upgrade or advancement means, to keep an action or process minimal and simpler than its earlier iteration, be it software or hardware. Being a major software company with a dominant position in the market, Google should only focus on whatever it takes to enhance the technological fora, as much as they are legal and falls within the legalities in the State that they operate. Without users finding new methods to access information and develop their interactivity with the sellers, the trademarks, or the businesses online, would go in vain.

The Present-Day Narrative

Analysing a 7-year-old case law in 2020 is still a fresh topic as the position of present-day law has not evolved much despite the evidence from the analysis explicitly revealing that the gray area still exists in the Indian trademark regime. The trademark policy of Google though faced minor alterations over time, still lacks to accommodate and safeguard the interests of the trademark holders who could be concerned about their marks being used as Google AdWords. There is no redressal for their exclusive rights and there have neither been any future cases that dealt with issues as close as *Consim* did. *Consim* did not effectively capitalise on the role it could have had but limited itself to addressing the issues and reflecting on limited conundrum in the Indian aspect, albeit, the case had every chance of the likes of the *Rosetta* case in the US.

The Way Forward

Analysing from both the jurisprudential stands, it becomes clear that both protection of trademarks and technological advancements are quintessential and must coexist in the right balance. The void for a specific law to address this issue would prove detrimental to the trademark holders whose distinctive marks are being infringed in the easiest yet unstoppable way. However, without one of these two aspects in the right proportion and balance, the high levels of interactivity with the consumers will cease to exist. Something, why both trademark holders and intermediary service providers exist to serve and commit in business in the first place.

The research assumes this reason could be why the Courts have not been awarding "*one size fits all*" sort of Judgements. The Courts, by analysing each instance on a case-to-case basis, also contribute to maintaining this right balance as per the research's findings.

V

Conclusion

With all the analyses in mind, in this instance of *Consim*, the Court ruled that the Respondents using the keywords which are the trademarked words by Consim Info, were

indeed included under the definition of sections 2(2)(c)(ii)[71] and 29(6)(d)[72] of the Act, 1999, and thus qualified for infringement on the bases of two reasons.

i. The role played by Google did not qualify under good intention due to the failure on their part to remove the infringing advertisers' contents from the sponsored links even upon receiving the notice from Consim Info, directing to do the same.
ii. All the actions of Google qualified under infringement under the aforesaid provisions and failed to claim the safe harbouring principle.

Despite *Consim* being a landmark judgment in the Indian context, the nature of the case's issues did not exhaustively and extensively touch upon all the corners of the gray area created by the Keyword Advertising programme, which has an adverse impact on the rights of a trademark holder. The issues of the case were limited and conditional. Google, however upon losing the case, there were other factors like the conclusive proof submitted by Consim Info to prove Google's ignorance towards the notice sent by Consim Info that led to the verdict of the case.

The case, however only addressed, what was the tip of the iceberg and did not enumerate the dark corners that were required to be addressed. Unlike *Rosetta*[73] or *Rescuecom*[74] cases, this case did not deal expansively within the framework of all the possibilities nor laid any tests like the other cases of the U.S. and U.K. regime laid. The point of repentance of this research is when the issue of trademark infringements is tangible and threatening to all the trademark holders when there is an explicit marketing campaign disguised as being contemporary, infringing all the rights alike, for the promotion of their business, cases like *Consim* that are not so often, could be the only hope to safeguard the rights of trademark holders and trademarks *per se*.

However, this case went against the favour of Google, there is still a cloud of the unlikelihood that if a similar case comes before the Court in the future, whether *Consim* could act as a strong precedent to rescue another trademark holder in sabotage, mainly because of this case being determined based on other factors but those which are not significant to the core issue of 'Contemporary Marketing Technique v. Trademark Protection'.

[71] *Supra* note 10.
[72] *Supra* note 15.
[73] *Supra* note 44.
[74] *Supra* note 30.

Trademark protection has been a longstanding doctrine and organically been evolving in various facets of circumstances to safeguard the rights of the Trademark owners, and when cases like these appear, yet do not leave a strong precedent behind, do not contribute to the strengthening of the trademark protection in India.

In a similar instance, the U.S. Federal Court in *Interflora* imposed a heavy fine against the defendants for their acts. *Consim* ruled the award for the damage being ₹10,05,000 that was germane to the damages suffered by Consim Info. The concept of big MNCs being slapped with heavy fines is often the symbol to keep them under the power check and to remind them, any form of abuse of the dominant position may entail serious consequences.

With India being a welfare state, any act of jeopardising the rights of fair business should be handled with zero tolerance. The Courts are in the supine position to ensure that every judgment not only has to do with awarding justice and merit to the party it so deems fit, but also act as a precedent to protect the future cases from falling into the same pit, time and again, on the same issue but different occasions. India should have a robust agenda of tests to prove the 'trademark use' that is drafted in a manner that would felicitate young businesses from being exploited in gray area provisions.

Getting to the question of distinguishing between technological development, modern marketing techniques under the meaning of fair business, and protection of trademarks, the Court can neither award a 'one size fits all' kind of a judgment either. But the approach of the Courts towards rendering justice should be inclined towards the equitable front rather than the positive front, in times when there is no express law to deal with an issue.

Also, as the internet is a confusing place to be with lots of gray areas that are yet to be enlightened or protected under laws, the data privacy regime is only evolving in this period and we may expect it to reach its fullest potential and feature by 2026. At such time, the ideal law must be to responsibly balance between trademark protection, the ability to distinguish between technological improvement (Meta Tags) and modern marketing techniques (AdWords), and discover a superlative balance, so that, every aspect of the law could co-exist in one system.

It is never an antithesis that finding a balance between AdWords and trademark protection is impossible because it has been wrongly attributed that AdWords contribute to a dynamic consumer business connection. It is a misguided principle. The research finds the meta tags being the yardstick for breakneck technological advancement but as AdWords are

concerned, albeit it being constructed on the concept of meta tags, it could never be equated with the intent of meta tags because of the very nature of commercialisation realm it attaches itself to.

As the complications arise for every competitor in the market, the paper hypothesises the fact that however, AdWords is a pathbreaking flagship programme in cyberspace, the odds arising out of it can never be prevented since there is no focal point that this issue could settle under. Even if it does, it would only defeat the purpose of dynamic marketing to attract and engage a consumer. Nonetheless, it is always possible to identify a focal point bisecting technological development (Meta Tags) and Aggressive online marketing (AdWords). Solving such a conundrum would naturally extend its protection to other aspects of the law that are constantly impugned in relation to the keyword advertising programme.

NEW KID ON THE BLOCK: THE PERSONAL DATA PROTECTION BILL, 2019 AND ITS TREATMENT OF PRIVACY POLICIES AND CONSUMER PRIVACY

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Abstract

Privacy policies are often the first line of defence for consumer privacy. They are meant to inform consumers of the personal data collection, storage, use, and sharing practices of the particular business or website. But their use has become more associated with disclaiming liability rather than to inform. Both traditional contract and consumer protection laws are no longer sufficient to regulate privacy policies.

The Personal Data Protection Bill, 2019, when passed, will be the latest entrant to the consumer protection stage. This paper examines the treatment of privacy policies under the Personal Data Protection Bill, 2019, through the perspective of consumer privacy and consumer protection. It concludes that the Bill if passed, will considerably enhance both while highlighting the issues that remain.

Keywords: Right to Privacy, Consumer Rights, Consumer Privacy, Personal Data Protection, Privacy Policy, Notice and Consent

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I

Introduction

Market digitization and the boom in e-commerce transactions have led to a paradigm shift in the way consumers and markets operate. Data-driven marketing enabled by real-time bidding such as targeted and personalized ad-campaigns and behavioural advertisements has become vital strategies employed by e-commerce companies to get consumers to buy their products.

The majority of these business and marketing strategies are carried out on the basis of disclosures, if at all, in privacy policies. Since these policies are treated as contracts, it is assumed that the consumer has consented to and is therefore bound by the terms thereof.[1] The regulation of privacy policies, therefore, becomes vital from the orientation of consumer protection.

Consumer protection and data protection are two sides of the same coin. Both share common goals of balancing unequal informational and market power resulting from rapid and intense digitization of markets.[2] Till now, businesses were profiting from consumers being unaware of the different ways in which consumer data was being used with no remedy for it in traditional consumer protection legislation in India. This is changing.

The Indian government is at the cusp of legislating a comprehensive data protection law, i.e., the Personal Data Protection Bill, 2019. The Bill lays down the contents and contours of the right to privacy, not only as a fundamental right against the State but also as a legal right against corporations. In doing so, it creates and protects several rights paramount for safeguarding consumer interests in the digital age. These rights are rooted in the 'notice and

[1] Elonnai Hickok, "*Consumer Privacy - How to Enforce an Effective Protective Regime?*", The Centre for Internet and Society, *available at*: https://cis-india.org/internet-governance/blog/privacy/consumer-privacy (Visited on July 22, 2020).

[2] European Data Protection Supervisor, "EDPS Opinion 8/2018 on the Legislative Package for "A New Deal for Consumers"", *European Data Protection Supervisor* (2018).

consent' framework, whose primary mechanism is the privacy notice or policy.[3] Hence, privacy notices often become the first line of defence for consumer privacy, making their regulation the need of the hour.

This article examines the impact of India's proposed data protection legislation on privacy policies and highlights its importance in consumer privacy as a whole. It does this by first briefly laying out the main challenges posed by technology in the digital age to consumer privacy. This is followed by a critical analysis of the notice and consent model adopted by extant data protection laws to deal with these challenges. Problems with privacy policies under this model are also pinpointed. The article then examines the mechanics of how the Personal Data Protection Bill, 2019 proposes to deal with privacy policies and consumer privacy in India. The authors conclude that while consumer privacy will on the whole fare better under India's proposed data protection model, issues remain.

II

Consumer Privacy - Challenges in the Digital Age

Businesses today utilize consumer data in manifold ways, most of which are beyond the average consumer's comprehension. Online transactions or even simply online presence leaves available vast amounts of personal data for collection and use by e-commerce businesses and companies. This data is mined, extracted, and used to create consumer profiles, which are then utilized for behavioural targeting and other marketing purposes.[4] For instance, Amazon uses the data generated when a purchase is made on its platform, such as details of the product bought, quantity, purchaser's name, address, and so on, to predict future product choices by the said consumer and markets those aggressively.[5] Consumer data can also be used to obtain

[3] Thomas B Norton, "The Non-Contractual Nature of Privacy Policies and a New Critique of the Notice and Choice Privacy Protection Model", 27 *Fordham Intell. Prop. Media & Ent. L.J* 185 (2016).

[4] Francois Nawrot, Katarzyna Syska and Przemysław Świtalski, "Horizontal Application of Fundamental Rights: Right to Privacy on the Internet" 3 (2010) (9th Annual European Constitutional Seminar, University of Warsaw), *available at:* http://en.zpc.wpia.uw.edu.pl/wp-content/uploads/2010/04/9_Horizontal_Application_of_Fundamental_Rights.pdf (Visited on Aug. 23, 2021).

[5] Mike Sands, "How Amazon Is Minting A New Generation of Customer-Data-Obsessed Companies" *Forbes*, Mar. 2, 2018, *available at:* https://www.forbes.com/sites/mikesands1/2018/03/02/how-amazon-is-minting-a-new-generation-of-customer-data-obsessed-companies/?sh=66a4e0ee28ed (Visited on July 22, 2021).

deeply personal information[6], such as whether a lady is pregnant based on her purchasing choices.[7]

Rapid technological advancements are only increasing businesses' abilities to maximize the use of and profit immensely from consumer data.[8] Companies have begun using a combination of the Internet of Things, which collates and amasses mountains of consumer data, and artificial intelligence, which then analyzes and identifies patterns, makes predictions or recommendations, to help them tailor their products and services more closely to consumer preferences.[9] Amazon recently admitted that its employees were listening to conversations between 'Alexa', its virtual assistant AI technology, and its owners.[10] Even though it claimed that it was only listening to anonymized conversations (to alleviate privacy concerns), it still admitted that it was listening to a small sample of Alexa voice recordings in order to "improve customer experience" and that it helped them train their "speech recognition and natural language understanding systems".[11]

The profiting by companies from consumers' personal data, vastly disproportionate to the value of the products or services offered, has raised different consumer protection issues, besides privacy. For example, Google reportedly used technology to access and "read" its Gmail users' emails and then used the email contents on the free email service to provide more targeted advertising.[12] Business models like these have prompted interesting arguments of consumer protection laws applying to these so-called "free" services as well, since the

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[6] Michiel Rhoen, "Beyond Consent: Improving Data Protection Through Consumer Protection Law" 5 *Internet Policy Review Journal on Internet Regulation* 5 (2016).

[7] Charles Duhigg, "How Companies Learn Your Secrets" *The New York Times*, Feb. 16, 2012, *available at*: https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html (Visited on July 22, 2021).

[8]See OECD Background Report, "Challenges to Consumer Policy in the Digital Age" (2019), *available at:* https://www.oecd.org/sti/consumer/challenges-to-consumer-policy-in-the-digital-age.pdf (Visited on July 22, 2021).

[9] *Id*. at 8.

[10] David Phelan, "Amazon Admits Listening To Alexa Conversations: Why It Matters" *Forbes*, Apr. 12, 2019, *available at:* https://www.forbes.com/sites/davidphelan/2019/04/12/amazon-confirms-staff-listen-to-alexa-conversations-heres-all-you-need-to-know/?sh=51c7e3bf5d9d (Visited on July 22, 2021).

[11] *Ibid.*

[12]Laurence Dodds and Margi Murphy, "Google Admits It Lets Hundreds of Other Companies Access Your Gmail Inbox" *The Telegraph*, Sep. 20, 2018, *available at:* https://www.telegraph.co.uk/technology/2018/09/20/google-admits-hundreds-companies-read-gmail-inbox/ (Visited on July 22, 2021).

companies offering them clearly profit from the personal data relinquished by consumers, meaning the service in actuality, is not free. In fact, there is already a view in the European Union that consumer protection should also be extended to digital services for which consumers "pay" with their personal data as opposed to actual currency.[13]

Privacy policies are meant to inform consumers of these practices and how businesses generally handle consumer data.[14] But they have stopped serving this purpose and often mislead consumers into consenting to the encroachment of privacy. In the garb of these policies, several data breaches have already occurred.[15] Consequently, recent efforts have been to focus on making companies accountable for their privacy policies and ensure consumer consent is taken in a way that is well informed and meaningful.

III

Privacy Policies under the Notice and Consent Model

Companies justify their collection and exploitation of the vast amounts of consumer data on the ground that they provide notice and take consent typically in the form of privacy policies with boxes for checking "I agree". For instance, Google, when dealing with controversy regarding access to third-party developers to Gmail users' emails, stated that this was only allowed with "user's explicit consent".[16]

The 'notice and consent' approach forms the bulwark of most data protection models today.[17] It works on the assumption that privacy is sufficiently safeguarded if consumers (and users generally) can *consent* to their personal data being processed after they are made aware

[13] *Supra* note 2 at 10–11.

[14] *Supra* note 3 at 186.

[15] Karim Z. Oussayef, "Selective Privacy: Facilitating Market-Based Solutions to Data Breaches by standardizing Internet Privacy Policies" 14 *B. U. Journal Sci.& Tech. Law* 104 (2008).

[16] Shannon Liao, "Gmail App Developers Have Been Reading Your Emails" *The Verge*, Jul. 2, 2018, *available at:* https://www.theverge.com/2018/7/2/17527972/gmail-app-developers-full-email-access (Visited on July 22, 2021).

[17] Government of India, "Report: Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, A Free and Fair Digital Economy- Protecting Privacy, Empowering Indians" *Ministry of Electronics and Information Technology* (2018), *available at:* https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf (Visited on July 22, 2021).

or *notified* of what happens to their data.[18] This is perceived as transferring autonomy and control in the hands of the consumers, thereby empowering consumers.[19]

As critics of the 'notice and consent' approach note, however, this is not easy to implement in practice.[20] Consent given by consumers on the internet is hardly ever meaningful, given they usually consist of checking or ticking some boxes on boilerplate privacy notices that are as complex as they are lengthy.[21] In the example above, Google's way of taking consent was by having users click the "I Agree" option to a privacy policy, which few read.[22]

Although privacy policies or privacy notices are technically standard form "privacy contracts" that can be employed to take consent and typically include information regarding the company's practices regarding the collection of personal data, permissible uses of personal data, data sharing and data breaches, etc.,[23] studies have shown that very few people actually read them[24], due to the policies being notoriously complicated.[25] A study in early 2018 that compared the privacy policies of WhatsApp, Google, Uber, Flipkart, and Paytm, and which asked respondents to answer questions based on a reading of the privacy policies, found that their readability was poor, rating WhatsApp and Flipkart's policies as 'difficult' and Uber, Google and Paytm's policies as 'very difficult' to read.[26]

An Expert Committee headed by Justice (Retd.) Srikrishna was constituted by the Government of India in July 2017 to recommend a data protection framework and bill to the

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[18] See, Rishab Bailey and others, "Disclosures in Privacy Policies: Does "Notice and Consent" Work?" *National Institute of Public Finance and Policy Working Paper* (2018), *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3328289 (Visited on July 22, 2021).

[19] Adam D Moore, "Toward Informational Privacy Rights" 44 *San Diego Law Review* 809, 812–813 (2007).

[20] M Ryan Calo, "Against Notice Skepticism in Privacy (and Elsewhere)" 87 *Not. Dam. L.R* 1030 (2013).

[21] *Supra* note 17 at 32.

[22] *Supra* note 16.

[23] *Supra* note 3.

[24] Katharine Kemp, "94% of Australians Do Not Read All Privacy Policies That Apply to Them – and That's Rational Behaviour" *The Conversation*, May 14, 2018, *available at:* https://theconversation.com/94-of-australians-do-not-read-all-privacy-policies-that-apply-to-them-and-thats-rational-behaviour-96353 (Visited on July 22, 2021).

[25] See Susan E Gindin, "Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC's Action Against Sears" 8 *Nw. J. Tech.& Intell. Prop.* (2009).

[26] See, *supra* note 18.

government ("Srikrishna Committee"). The Srikrishna Committee released a white paper seeking comments in November 2017.[27] It submitted its final report in July 2018 proposing a data protection framework policy for India.[28]

The Srikrishna Committee acknowledged the difficulties in taking consent online through privacy policies, both in the white paper and the final report. The white paper discussed the following issues in some detail –

Notice Complexity and Difficulty in Comprehension

Most people or data subjects never read privacy notices and even when they do, they understand little in them.[29] Technical expertise is often required to fully comprehend the disclosures regarding how and what kind of data is being processed.[30] General literacy also does not always mean technical literacy. The study conducted by the National Institute for Public Finance used a sample size of undergraduate and postgraduate students and therefore likely to be well versed both in English and with online services,[31] but only 37% of the respondents could correctly answer whether or not the selected companies sold their personal data to third parties.[32]

This is besides the problem that even when consumers give consent to notices, they are not aware, nor can they be expected to be aware, of all the possible consequences of giving such consent to data collection.[33] The personal data collected at any given stage could be used downstream for multiple purposes in multiple ways. The collection of a piece of seemingly

[27] Komal Gupta, "Govt Releases White Paper on Data Protection Framework" *Livemint*, Nov. 28, 2017, *available at:* https://www.livemint.com/Politics/LIKM3FxX3KEcA52uGMlcJP/Govt-releases-white-paper-on-data-protection-framework.html (Visited on July 22, 2021).

[28] Staff Reporter, "Justice Srikrishna Committee Submits Report on Data Protection. Here're Its Top 10 Suggestions" *The Economic Times*, Jul. 28, 2018.

[29] Government of India, Report: "White Paper of the Committee of Experts on a Data Protection Framework for India" *Ministry of Electronics and Information Technology* (2017), *available at:* https://innovate.mygov.in/data-protection-in-india/ (Visited on July 22, 2021).

[30] Florian Schaub et al., "A Design Space for Effective Privacy Notices" *USENIX Association, Symposium of Usable Privacy and Security* (2015).

[31] *Supra* note 18 at 4.

[32] *Id.* at 36.

[33] Daniel Solove, "Privacy Self-management and the Consent Dilemma", 126 Harv. L. Rev. 1880, 1885 (2013).

benign data consented to at one point could be combined with another piece or pieces of data to draw a user profile.

Lack of Meaningful Choice

Privacy policies afford little choice to consumers.[34] Typical of the "take it or leave it" format of standard form contracts, they usually make acceptance of their terms and conditions a prerequisite before allowing any use of their services or websites by consumers.[35] The same applies to the 'permissions' they seek, sometimes which when refused, results in closure of the application or website, preventing the consumer from proceeding with using the service.[36]

Notice Fatigue

There are too many notices that continually require consent, given the amount of online activity per person per day.[37] Requiring consumers to read through each and every privacy policy or notice would be too time-consuming.[38]

Problems in Notice Design

Further, the privacy policies or notices are drafted with a focus to disclaim liability rather than informing consumers.[39] As a consequence, they are filled with legalese and complicated language.[40] The white paper also refers to privacy policies that are sometimes decoupled from the device and posted on the company's website, making it difficult to keep track.[41] Further, a substantial amount of internet users use it on their mobiles, the format for which the privacy policies may not be suitable.

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[34] *Supra* note 29 at 93.

[35] *Ibid*.

[36] See, *infra* note 70.

[37] *Supra* note 29 at 94.

[38] Aleecia M. McDonald and Lorrie Cranor, "The Cost of Reading Privacy Policies" 4(3) *I/S: J.L. & Pol'y for Info. Soc'y* 544 (2008).

[39] *Supra* note 18 at 7.

[40] *Ibid.*

[41] *Supra* note 29 at 94.

All in all, these issues have attracted criticism for hinging data protection laws solely on the shaky notice and consent approach[42], with some scholars suggesting discarding it altogether[43].

These discrepancies have been duly acknowledged in the final report of the Srikrishna Committee. However, the final report is less desolate about the notice and consent approach. It noted that there are problems with the implementation of the approach and not with its normative value.[44] The final report then discussed a 'modified' or 'revised' framework in which the notice and consent approach should operate.

Interestingly, this revised framework consisted of a model in which the privacy policy or notice would, instead of being treated as a standard form contract, be treated as a *product itself*.[45] In support of this, the final report relied on Athur Leff's logic exposited in his article 'Contract as Thing', that on account of not sharing any similarities with regular contracts since they lack the standard features such as bargaining, dickering, mutability, and so on[46], adhesion contracts (including privacy notices) should be treated as products as opposed to contracts.[47] The final report went on to state that the notice and consent system would be regulated by the product liability regime.[48]

This model postulates that in theory, a company ('data fiduciary' under the Personal Data Protection Bill) could be held liable for a 'defective' privacy policy, and the final report states as much.[49] It also speaks of liability for 'harm' caused to a consumer ('data principal' under the Personal Data Protection Bill) as a consequence of data processing, pursuant to providing

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[42] Amber Sinha and Scott Mason, "A Critique of Consent in Information Privacy" *The Centre for Internet and Society* Jan.11, 2016.

[43] See, Rahul Matthan, "Beyond Consent: A New Paradigm for Data Protection", *The Takshashila Institution* (2017), *available at:* https://takshashila.org.in/wp-content/uploads/2017/07/TDD-Beyond-Consent-Data-Protection-RM-2017-03.pdf (Visited on July 22, 2021).

[44] *Supra* note 17 at 33.

[45] See, Kwame Anthony Appiah, *As If: Idealisation and Ideals* (Harvard University Press, 2017) and Thomas Nagel, "As If" *The New York Review of Books* (2018), as cited in *supra* note 17 at 34.

[46] Arthur A. Leff, "Contract As Thing" 19(2) *Am. U.L. Rev.* 131 (1970).

[47] Andrew Robertson, "The limits of Voluntariness in Contract" 29(1) *Melb. Uni. L. Rev.*179 (2005).

[48] *Supra* note 17 at 34.

[49] *Ibid.*

consent.[50] Accordingly, collection and sharing of personal data that is not reasonably expected by the consumer, are examples of 'harm' that according to the report are analogous to 'traditional marketing defects' in a product liability regime.[51] Further, the privacy policy or notice not appearing before the application being installed, the existence of pre-checked boxes, or the privacy policy or notice not being sufficiently clear, are considered analogous to 'traditional design defects' in a product liability regime.[52] Potentially harmful or onerous clauses in the privacy policy or notice not being specifically pointed out to the consumer or data principal are stated to be analogous to a 'marketing defect' in a product liability regime.

However, this 'privacy as a product' approach espoused in the final report appears to be a red herring, as it is not reflected in the Personal Data Protection Bill, in either the 2018 or the 2019 version. The Personal Data Protection Bill, 2019 has gone ahead with the notice and consent model, albeit with a few innovations to attempt to address its criticisms.

IV

India's Personal Data Protection Bill – Best of Both Worlds?

While the notice and consent model certainly has its problems, alternatives are few, if any. Some scholars have proposed the 'rights-based' or 'accountability' model as opposed to consent, arguing that data today can be used in ways that even the most skilled data scientists could never predict thereby making it impossible to take consent for all of them.[53]The rights-based model aims at protecting the rights of data subjects over their data and shifts the burden of protecting data subjects from harms arising out of processing their data to the data controllers. It is based on the principles of accountability, autonomy, and security.[54] The accountability principle helps address the concerns regarding information asymmetries[55],

[50] *Ibid.*

[51] See, David G. Owen, *Products Liability Law* (Thomson West, 2008), and *supra* note 17.

[52] *Supra* note 17.

[53] *Supra* note 43 at 3.

[54] *Ibid.*

[55] *Supra* note 33.

cognitive biases,[56] and consent fatigue.[57] It does so by placing a higher degree of responsibility on the part of the data controller and does not rely only on the ability of the data subjects to understand the implications of data sharing and give consent.[58] Hence, data controllers are liable to remedy any harm caused by data collection and processing irrespective of the consent of the data subject.[59] This model ensures more rights to the data subject than the notice and consent model. These include the right to fair treatment, information, data security, and the right against processing.[60]

However, the Supreme Court's characterization of 'informational privacy' in Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors (*Puttaswamy I*), that an individual should have control over the use and dissemination of information that is personal to her[61], may make it impossible to discard the consent model entirely. That said, J. Chandrachud's majority opinion, issued on behalf of himself, C.J. Kehar, J. Agrawal, and J. Nazeer, also acknowledges that "a solely consent-based model does not entirely ensure the protection of one's data, especially when data collected for one purpose can be repurposed for another", and that "it would be appropriate to leave the matter (of data protection) for expert determination".[62] This possibly set the stage for a model partly based on consent but also covering other facets of data processing and additional safeguards.

This is what the Personal Data Protection Bill in India appears to have accomplished – an attempt to take the best from both worlds. The Bill has combined the notice and consent model with a suite of rights for data subjects while fencing it with some added safeguards.

Notice and Consent in the Bill

As far as notice and consent are concerned, Clause 7 of the Bill lays down the detailed requirements for notices for the collection and processing of personal data. It requires notices to be clear, concise, and easily comprehensible to a reasonable person as well as be issued in

[56] *Ibid.*

[57] *Supra* note 17.

[58] *Supra* note 43 at 4.

[59] *Id.* at 7.

[60] *Id.* at 5.

[61] *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors*., (2017) 10 SCALE 1.

[62] *Id.* at 251.

multiple languages as far as practicable.[63] Privacy policies, that were previously governed under the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011[64], will be governed by this provision when the law comes into effect. While the requirement to be issued in multiple languages is not mandatory, it is still a welcome step given the diversity of languages in India.

The Bill generally prohibits the processing of personal data except with consent and also lays down the content of consent, which is that it has to be – [65]

- 'free' in terms of Section 14 of the Indian Contract Act, 1872 – consent not caused by coercion, undue influence, fraud, misrepresentation, or mistake;
- 'informed' – the data principal should be provided with the information mandated under Section 7 of the Bill;
- 'specific' - whether the data principal can determine the scope of consent in respect of the purpose of the processing;
- 'clear' - whether it is indicated through an affirmative action that is meaningful in a given context; and
- 'capable of being withdrawn' - whether the ease of such withdrawal is comparable to the ease with which consent may be given.

This standard for consent is at par with General Data Protection Regulation (GDPR) standards.[66]

A higher threshold of 'explicit consent' is required for processing any sensitive personal data. This will be obtained by the data fiduciary (a) after informing him of the purpose of, or operation in, processing which is likely to cause significant harm to the data principal, (b) in clear terms without recourse to inference from conduct in a context, and (c) after giving him

[63] Personal Data Protection Bill, 2019, clause 7.

[64] Information Technology (Reasonable Security Practices and Procedures And Sensitive Personal Data Or Information) Rules, 2011, rules 4, 5 and 6.

[65] Personal Data Protection Bill, 2019, clause 11.

[66] General Data Protection Regulation, article 4(11).

the choice of separately consenting to the purposes of, operations in, the use of different categories of, sensitive personal data relevant to processing.[67]

E-commerce companies and other data fiduciaries collect and process both types of data – personal and sensitive personal data. Purchases made always involve personal information as well as financial information such as bank account details and card verification values (CVV). Purchases of medical goods and services can involve divulging of health data, genetic data, biometric data, and sometimes even details of sex life, sexual orientation, and so on, all of which also constitute sensitive personal data under the bill.[68] Hence, in accordance with Clause 11(3), businesses including hospitals requiring such data will be obligated to inform consumers of the 'significant harm' that can be caused to them and that too without leaving it to be inferred or shrouding it in legalese. Additionally, consumers will have to be provided the choice of separately consenting to the various uses that the different categories their sensitive personal data will be put to. Significant harm means that harm has an aggravated effect with regard to the nature of the personal data being processed, the impact, continuity, persistence, or irreversibility of the harm.[69]

This segregation between sensitive personal data and personal data and the difference in their standards of protection has been criticized since big data analytics has now made it possible for businesses to process seemingly non-sensitive personal data and yet arrive at sensitive personal data.[70] In line with the example provided earlier, shopping patterns combined with other innocuous information can reveal health data such as whether a woman is pregnant. This in essence means personal data should be given the same level of protection as sensitive personal data, negating any need for segregation in the first place. The Bill also uses the term "critical personal data" in certain contexts[71], creating three categories of personal data in total, but "critical personal data" is left undefined.

[67] Personal Data Protection Bill, 2019, clause 11(3).

[68] *Id.,* clause 2(36).

[69] *Id.,* clause 38.

[70] Dvara Research, "Comments to the Ministry of Electronics and Information Technology (MeitY) on the Draft Personal Data Protection Bill 2018, Dated 27 July 2018, submitted to the Committee of Experts on a Data Protection Framework for India".

[71] Personal Data Protection Bill, 2019, clause 40(2).

As far as "harm" is concerned, the Bill does not define it but contains an expansive and non-exhaustive list of outcomes that would tantamount to harm. These include bodily or mental injury, loss, distortion or theft of identity, financial loss or loss of property, loss of employment, any discriminatory treatment, any subjection to blackmail or extortion, denial or withdrawal of a service, benefit, or good resulting from an evaluative decision about the data principal; any restriction placed or suffered directly or indirectly on speech, movement or any other action arising out of a fear of being observed or surveilled, or any observation or surveillance that is not reasonably expected by the data principal.[72] Further, the Bill also contains provisions for compensation to data principals who suffer harm due to any violation of the provisions of the Bill by a data fiduciary or a data processor.[73] Although a detailed discussion[74] on "harm" and compensation due on account of such "harm" is outside the purview of this paper, it is worth noting that the content and boundaries of privacy harms are the subject of much debate even in other jurisdictions and are not settled issues by any means. It remains to be seen how defective privacy policies will be treated in the context of harm under the Bill.

Other Measures Beyond Consent

The Bill, fortunately, does not solely rely on notice and consent. By adopting and applying a fiduciary relationship between the data subjects and the data controllers (terming them 'data fiduciaries'), the entire Bill is underpinned by the requirement that the collection and processing of personal data always be *in the interest of* and *not to the detriment of* data principals. Besides being a novel approach to data protection from a consumer privacy perspective, it is also intended to safeguard consumers from the impact of the information asymmetry between data principals and data fiduciaries, since data fiduciaries inevitably always have so much more knowledge of how the data is being collected and used than is possible for data principals to know and give meaningful consent to.[75]

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[72] *Id.,* clause 2(20).

[73] *Id.,* clause 64(1).

[74] For a discussion on privacy harms, see, M Ryan Calo, "The Boundaries of Privacy Harm" 86 *Ind. L. J.* 32.(2011).

[75] David Medine and Gayatri Murthy, "India's Proposed Data Protection Bill Breaks from Notice and Consent"*CGAP,* Mar. 9, 2020, *available at*: https://www.cgap.org/blog/indias-proposed-data-protection-bill-breaks-notice-and-consent (Visited on July 22, 2021).

Further, the Bill introduces the privacy-by-design policy in India, which obligates data fiduciaries to take into account the managerial, organisational, business practices and technical systems and ensure that they are designed to anticipate, identify and avoid harm to the data principal.[76] This will, undoubtedly, also cover the privacy notices of data fiduciaries. The Bill mandates carrying out data protection impact assessments by significant data fiduciaries which will assess the potential harm that may be caused to the data principals whose personal data is proposed to be processed as well as measures for managing, minimising, mitigating or removing such risk of harm. While not expressly required under Clause 7, subsequent regulations may well require the results of such data protection assessments to be disclosed in the privacy policies.

Significantly, businesses will not be permitted to make the provision of any goods or services or the performance of any contract conditional on the consent to the processing of any personal data not necessary for that purpose.[77] This addresses a serious problem with the consent model, in which consumers are forced to consent to the collection of unnecessary data as well as authorize a host of unnecessary actions relating to that data, with little relevance to the goods or service they provide, all at pains of being denied the goods or services if they do not consent. Mobile apps ask for permission to access all kinds of data that are not per se relevant for them and deny further use or service if not consented to.[78] These instances, such as word games seeking permission to access location data or photo applications seeking permission to access contact details stored in the phone, will in all likelihood reduce after the introduction of this provision.

Taking a leaf out of the accountability model, the data fiduciary is made responsible for complying with the provisions of the legislation in respect of any processing undertaken by it or on its behalf.[79] The wording of the provision ensures that the actions of the data processor are also brought within the provision's ambit. As an example, Flipkart will be responsible for complying with these provisions for any consumer data processing, both undertaken by it as

[76] Personal Data Protection Bill, 2019, clause 22(1).

[77] Personal Data Protection Bill, 2019, clause 11(4).

[78] Katie Conner,"Over 1,000 Android Apps Were Found to Steal Your Data. Here's What You Can Do" *CNET*, Jul. 16, 2019, *available at:* https://www.cnet.com/tech/mobile/over-1000-android-apps-were-found-to-steal-your-data-heres-what-you-can-do/ (Visited on July 22, 2021).

[79] Personal Data Protection Bill, 2019, clause 10.

well as by entities on its behalf such as Paytm for payment gateways. The burden of proof of having obtained valid consent is also placed on the data fiduciary, which acts as another safeguard from the pitfalls of consent having been helplessly provided to complicated notices.[80] Class action suits by the data principals that have suffered harm caused by the same data fiduciary or processor have also been made possible, strengthening consumers vis-à-vis data fiduciaries and processors.[81]

The data fiduciary is also required to notify in case of breach of any personal data processed by the data fiduciary where such breach is likely to cause harm to any data principal as soon as possible, with the exact period to be specified through regulations.[82] This requirement to notify, however, is to the Data Protection Authority and not the data principal or consumer, which will then decide whether or not to inform said data principal or consumer depending on the severity of the harm or any mitigatory action required from the data principal or consumer.[83]

Consent is also not required in all cases of data processing. Personal data can be processed without consent where it is "necessary for such reasonable purposes as may be specified in regulations" by the Data Protection Authority ("DPA").[84] Somewhat problematically, according to Clause 14 of the Bill, the "reasonable purposes" not requiring consent could include credit scoring, recovery of debt, and the operation of search engines, among other activities.[85] Aside from the issue of why credit scoring and recovery of debt are activities that personal data can be used for without requiring consent, any applicable regulations will require particular vigilance given that the algorithms used in these processes are themselves subject to and capable of bias and prejudice.[86] The Data Protection Authority also has the power to determine whether the provision of notice under Clause 7 will be applicable at all to these cases

[80] *Id.,* clause 11(5).

[81] *Id.,* clause 64(3).

[82] *Id.,* clause 25.

[83] *Id.,* clause 25(5).

[84] *Id.,* clause 14.

[85] *Ibid.*

[86] Harini V, "A.I. "bias" Could Create Disastrous Results, Experts Are Working out How to Fight It", *CNBC*, Dec. 14, 2018, *available at*: https://www.cnbc.com/2018/12/14/ai-bias-how-to-fight-prejudice-in-artificial-intelligence.html (Visited on July 22, 2021).

of processing on account of "reasonable purposes" since they constitute grounds other than consent.[87] It can be exempted if the notice requirement will cause "substantial prejudice" to the relevant reasonable purpose. There is no clarity as to the reason for the notice requirement to be done away with simply because consent may not be required and hopefully the Data Protection Authority will only sparingly allow this exemption.

Data Trust Scores and Consent Managers

Certain provisions in the Bill symbolize the effort to simplify consent and make the model workable. It mandates assigning ratings in the form of data trust scores to significant data fiduciaries, pursuant to a data audit.[88] Significant data fiduciaries are data fiduciaries that have been notified as such on account of the volume and sensitivity of personal data they process, turnover, risk of harm by processing by such fiduciary, use of new technologies for processing by such fiduciary and any other factor causing harm from such processing.[89] The clarity and effectiveness of the privacy notices of these significant data fiduciaries under Clause 7 of the Bill are required to be evaluated by data auditors[90], and they are also required to specify the data trust score where applicable[91]. Likely, several major e-commerce businesses including Flipkart, Amazon, e-bay, etc. will be classified as significant data fiduciaries on account of the high volumes of personal and sensitive personal data they process and the risk of harm resulting therefrom. Hence, once the law is passed, their privacy policies will have to disclose these data trust scores, giving consumers the ability to compare and assess the trustworthiness of the entity they are entrusting their consumer data to. These data trust scores will also be maintained by the Data Protection Authority on its website[92] for easy access to consumers.

Aside from this, the bill also establishes other practical measures to address the problems with privacy policies. Somewhat an innovation, the bill establishes the concept of a

[87] Personal Data Protection Bill, 2019, clause 14.

[88] *Id.,* clause 29(5).

[89] *Id.,* clause 29(2).

[90] *Id.,* clause 26.

[91] *Id.,* clause 7(1)(m).

[92] *Id.,* clause 49(2)(c).

"consent manager" through whom data principals will be required to exercise their rights.[93] This is to address consent fatigue since data principals or consumers would have given consent to sharing their personal data with too many businesses to be able to manage withdrawal on their own, or indeed exercise any other right with respect to that consent. Consent managers can do this for data principals, according to the bill. They are data fiduciaries or their appointees, who enable data principals "to gain, withdraw, review and manage his consent through an accessible, transparent and interoperable platform".[94] Data principals can also provide and withdraw their consent through the consent managers.[95] This helps enable dynamic consent renewal. The consent manager is essentially a data fiduciary and is to be registered with the Data Protection Authority.[96] All the obligations and principals of data collection and processing under the bill will be applicable to consent managers as well.

The Bill does not flesh out the set-up or form of the interoperable platform, which is expected to be done in the regulations. However, the final report by the Srikrishna Committee discusses a "consent dashboard" which is supposed to enable data principals to keep track of consent for processing in real-time and operationalize their rights under the Bill.[97] The final report also recommends incrementally introducing the consent dashboard, first starting with a fiduciary-controlled dashboard, and then a central sector-wise or universal dashboard that coordinates with various fiduciaries can be introduced over a period of time.[98]

Consent managers under the Bill can also take another form. The RBI's Non-Banking Financial Company - Account Aggregator model is an example of this.[99] These Account Aggregators allow users to digitally share their data with service providers in exchange for easier access to credit, insurance, and other financial products, or to just keep track of all their

[93] *Id.,* clause 21.

[94] *Id.,* clause 23.

[95] *Id.,* clause 23(3).

[96] *Id.,* clause 23.

[97] *Supra* note 17 at 38.

[98] *Id.* at 39.

[99] Master Direction- Non-Banking Financial Company - Account Aggregator (Reserve Bank) Directions, 2016.

investments.[100] They act as consent brokers that can access a user's financial accounts and aggregate and organize all their financial information in one place, pursuant to user approval. The framework built by Account Aggregators allows users to control whom to share their data with, what data they want to share, for what purpose, over what time period, as well as revoke permissions to access their data.[101] Explicit consent of the customer is required at every step of transfer, retrieval, or sharing of data.[102] The consent of customers is to be given to the Account Aggregators in the form of a standardized consent artefact which includes details of the identity of customers, nature of information required, purpose of collection, identity of the recipient, etc.[103] Account aggregators provide information to the user in a consolidated manner. If this model is adopted, a consent manager would in essence be a 'consent aggregator' that tracks consent, and only stores the factum of the various forms of consent given by the data principal to the different data fiduciaries and not ordinarily store any of the actual data.[104]

Either way, once this provision kicks in, it is expected that consumers will no longer have to forego their rights once they tick certain boxes providing consent as is the case currently, they will now have the option to manage and withdraw it efficiently using a single platform.

V

Conclusion

The Personal Data Protection Bill, 2019 is a serious attempt to protect consumer privacy. It balances the power imbalance between consumers and businesses by imposing obligations on the latter that do not make it as easy to exploit and profit from consumer data. Businesses very often profit much more with consumer data than with money, something that will henceforth be circumscribed by the consent, collection, purpose, and storage limitations contemplated under the bill.

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[100] Nilesh Christopher, "Consent brokers: India's new data-sharing model can be a game-changer but has several loose ends", *Factor Daily*, Mar.25, 2019, *available at:* https://archive.factordaily.com/consent-brokers-indias-new-data-sharing-model-can-be-a-game-changer-but-has-several-loose-ends/ (Visited on July 22, 2021).

[101] *Ibid.*

[102] Master Direction- Non-Banking Financial Company - Account Aggregator (Reserve Bank) Directions, 2016.

[103] *Ibid.*

[104] *Supra* note 17 at 39.

Though far from perfect, the current *modus operandi* for consumer privacy protection across the world appears to be the notice and consent model. The suggestion of the hard-line critics to do away with the consent model entirely may not be possible anymore in India, given *Puttaswamy I*'s an implicit endorsement of consent or autonomy of personal data in the hands of the data principals. In any case, nobody has yet come up with efficacious alternatives to consent. Data protection laws the world over including the GDPR and the California Consumer Privacy Act are still by and large based on consent. Models such as the accountability model which were proposed as alternatives are also criticized since they may require proving harm, whereas consent models do not.[105]

The critics have not gone completely unheard, though. Acknowledging that the onus of choosing to share personal data and all the consequences therefrom cannot be imposed entirely on the consumers, the Personal Data Protection Bill, 2019, has attempted a blend of both the consent model as well as the accountability model. It attempts to ease the inherent tension between the two by ensuring a minimum level of accountability that cannot be overridden by consent. By imposing requirements on businesses to provide granular privacy notices and barring the collection of non-essential consumer data, the bill attempts to bring back the balance between the consumer and businesses, currently heavily skewed in the businesses' favour. The requirement for consent to be free, informed, specific, clear, and capable of being withdrawn is also welcome. Businesses will also no longer be able to disclaim any and all liability through incomprehensible privacy policies or notices.

The bill, once passed, will still not be a panacea for all ills plaguing privacy policies. The form and content of the privacy notices or policies will require churning out and refining by the Data Protection Authority, which has the requisite power to do so under the bill.[106] In this regard, the Data Protection Authority would do well to examine the practices in other jurisdictions. For instance, businesses that fall within the ambit of the California Consumer Privacy Act of 2018, are required to include a "Do Not Sell My Personal Information" link at a noticeable place on the homepage of their website.[107] They are not allowed to sell the personal

[105]Staff Reporter, "Privacy Laws: Alternatives to Consent", *Livemint*, Aug. 11, 2017, *available at:* https://www.livemint.com/Technology/6Bsa8NyF99ZMLb3txybx1J/Privacy-laws-Alternatives-to-consent.html (Visited on July 22, 2021).

[106] Personal Data Protection Bill, 2019, clause 50(6)(a).

[107] California Consumer Privacy Act of 2018.

information of consumers who have clicked the link.[108] This is an easy-to-use feature that consumers in India can benefit from as well.[109]

For now, it looks like privacy policies are here to stay and there is a real possibility that the requirements for disclosure will only make it less likely for them to be read, no matter how clear or concise they can be made. This problem has less to do with any deliberate obfuscation by businesses and more to do with the nature of internet use and consumption itself, with consumers simply not being ready to sit and read through information they are not inclined to. Nevertheless, innovations are being made. The Usable Privacy Project, a collaborative effort between Stanford, Fordham, and Carnegie Mellon Universities, is focused on using interactive tools to develop "privacy assistants" in the form of plug-ins in browsers that can read privacy policies and present the requisite information in a succinct and readable form to users.[110] But even this is a work in progress, with the artificial intelligence reportedly being able to achieve only up to 79% accuracy.[111]

The significance of the data trust scores in such an ecosystem cannot be emphasized enough. They will make it easier for consumers to track and assess the trustworthiness of businesses and should they find that a business has too low a data trust score, consent managers will enable them to withdraw consent as well as their personal data and move to other businesses. The functioning of the data auditors and the data protection authority also becomes crucial in this context, as consumers will surely set much store by the authenticity of the scores fixed by them. It may be helpful to have non-governmental bodies such as consumer protection watchdogs also independently assess the efficacy of privacy policies and assign their own version of data trust scores as well as make these available to the public so as to assist them in

[108] *Ibid.*

[109] It must be mentioned here that although the CCPA allows consumers an easy option to stop businesses from selling information, there exist exceptions, such as for instance, where the information sale is necessary to comply with legal obligations. Further, if the business is using a service provider, users may not request the service provider to stop selling information and may only direct their requests to the business contracting with said service provider. Importantly, the stop-the-sale request can only be submitted to businesses.

[110] Daniel Tkacik, "Website Sheds Light on Shortcomings of Privacy Policies", Carnegie Mellon University, Mar. 11, 2016, *available at:* https://www.cmu.edu/news/stories/archives/2016/march/privacy-policy.html (Visited on Aug. 24, 2021).

[111] Kaleigh Rogers, "Not Even AI Can Make Total Sense of a Privacy Policy", Vice, Mar. 20, 2018, *available at:* https://www.vice.com/en/article/a3yz4p/browser-plugin-to-read-privacy-policy-carnegie-mellon (Visited on Aug. 25, 2021).

their evaluation.[112] E-watchdogs in the United States such as Electronic Frontier Foundation already list 'dangerous terms' commonly found in licensing agreements, including those that bar criticism of products, permit monitoring of a transferee's computer, and allow modification of agreements without notice or consent.[113]

It is clear that at some point the consumer protection and data protection regimes will converge. This is true for issues even other than consumer privacy. For instance, as previously discussed, there are already proposals in the European Union for considering personal data as consideration that is paid by consumers to businesses similar to currency, thereby bringing several 'free' goods and services within the ambit of consumer protection law.[114] Cybersecurity is another such issue, given that merely regulating the collection and use of personal data is insufficient, say in the hands of banks or hospitals, if they are susceptible to breach and theft. The Personal Data Protection Bill, 2019, endeavours to address it by requiring the implementation of necessary security safeguards[115], sans requisite elaboration. The moot point is that the power asymmetry between consumers and businesses will be required to be addressed by more than just consumer protection legislation, something already taking place in India. Much will also depend on the success of the Personal Data Protection Bill, 2019, and how the challenges it will surely face are dealt with. The only thing for sure is that the Personal Data Protection Bill, 2019, even once passed, is far from the last word yet on consumer privacy.

[112] Robert A Hillman, "Consumer Internet Standard Form Contracts in India: A Proposal", Cornell Law School Legal Studies Research Paper Series 10.

[113] *Ibid.*

[114] *Supra* note 2 at 8.

[115] Personal Data Protection Bill, 2019, clause 24.

BRAIN DEATH AND ORGAN DONATION IN INDIA: NEED TO HEAR THE PARADOX

Dr. Sougata Talukdar*

Abstract

The incident of brain death and organ donation are linked with each other from an ethical, legal, and clinical perspective. The concept of brain death has travelled through various developments and ultimately taken the present shape in India with its specification on brain stem death. The ethical question lies in the debates regarding the time of death and its determination. However, legal perceptions regarding brain death and organ donation started to take a specific outline with the enactment of the Transplantation of Human Organs and Tissues Act, 1994 (THOA). Thus, this article aims to elaborate the definitional scheme of brain death and its ethical aspect through the "dead donor rule". Apart from that this article attempts to discuss the provisions of the THOA and the importance of the consent mechanism in relation to the above-mentioned issues.

I. Introduction

Primarily the notion of "death" used to be defined as the complete and irreversible cessation of spontaneous cardiac and respiratory functions.[1] However, the concept of "brain death" and efforts to refine criteria to identify that condition to recognise as "brain death" has been developing during the last four decades with a concomitant to spread the utility of life support systems in clinical medicine. However, when the concept of "coma" first came into the picture, then a new state was found, which was primarily termed as "beyond coma". Ultimately, this

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1 *Black's Law Dictionary* 488 (West Publishing Co., St. Paul, 1968). *See also*, F. L. Delmonico, "The Concept of Death and Deceased Organ Donation" 1(1) *IJOTM* 15 (2010); B. R. Sharma and D. Harish, "Organ Transplantation Programme-An Overview of the Present Scenario" 44 *Med Sci Law* 245 (2004); James L. Bernat, Charles M. Culver et.al., "Defining Death in Theory and Practice" 12(1) *Hastings Cent Rep.* 5 (1982).

new stage is termed "brain death" or "respirator brain" only.[2] Thus, Brain death has created a new class of dead people that do not conform to society's expectations of normal death and dying. Regarding the impact of "brain death", two concepts are mainly accepted. The traditional school prefers the view that "brain death" 'is primarily concerned with futility of care and finding ways to help physicians with the withdrawal of support'.[3] Others have posited that the concept of 'brain death' was developed to permit vital organs transplantation.[4]

The advancements in the field of science, technology, and medicine have made it possible to remove organs from living as well as deceased persons and to transplant such organs into the body of others to save the lives of the suffering human beings.[5] Therefore, transplantation of human organs both by natural and man-made substitutes is a landmark achievement in the aspects of curative techniques in the field of healthcare.[6] Although organ transplantation or donation is a personal issue, the process has medical, legal, ethical, organisational, and social implications.[7] Brain death and organ donation or transplantation have inter-relative aspects under the modern medico-legal jurisprudence.[8] The issue of the specific definition of "brain death" has to be understood in the perspective of organ donation. The consent mechanism and its implementation in the organ donation of a brain-dead person required detailed deliberation. Introduction of the Transplantation of Human Organs Act, 1994 (THOA) has recognised these issues under the Indian legal periphery. Thus, provisions of the THOA have to be discussed in detail with specific importance to the brain death cases.

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2 A. Earl Walker, E. L. Diamond *et.al.*, "The Neuropathological Findings in Irreversible Coma: A Critique of the Respirator Brain" 34(4) *J Neuropath Exp Neur* 295 (1975); John L. Moseley, Gaetano F. Molinari *et.al.*, "Respirator Brain: Report of a Survey and Review of Current Concepts" 100 *Arch. Pathol. Lab. Med.* 61 (1976).

3 M. N. Diringer and E. F. M. Wijdicks, "Brain Death in Historical Perspective" in E. F. M. Wijdicks (ed.), *Brain Death* 5 (Oxford University Press, Oxford, 2001).

4 R. D. Truog, "Is It Time to Abandon Brain Death?" 27 *Hastings Cent Rep.* 29 (1997).

5 *Balbir Singh* v. *Authorisation Committee*, AIR 2004 Delhi 413: (2004) ILR 2 Delhi 242

6 C. Manickam, "Organ Transplantation and the Law" 19 *Cochin Univ. LR* 176 (1995). For a discussion on man-made human organs see Mitchel E. De Bakery, "The Future of Organ Transplantation" in Hardy Boardman and Stuart A. Ross (eds.), *Biology in Human Affairs* 107 (Oxford University Press, Oxford, 1974).

7 A. J. Ghods, "Ethical Issues and Living Unrelated Donor Kidney Transplantation," 3 *IJKD* 183 (2009); Sanjay Nagral, "Ethics of Organ Transplantation" 3(2) *J. Med. Ethics* 19 (1995).

8 B. Jennett, "Brain Death" 53(11) *BJA* 1111 (1981).

II. Brain Death: The Concept

A. American View Point

Brain death is widely accepted as a criterion of death in medical, legal, and public opinion today in many parts of the world. The incident of brain death was first recognised in Paris, where it was found that some patients with head injury or intracranial bleed never recovered from such injuries.[9] Historically, the term "brain death" was officially introduced in 1968 by Henry Butcher, the Chairman of Medical School at Harvard University.[10] He defined this as the irreversible end of all brain and brainstem activities.[11] The report of the Ad Hoc Committee of the Harvard Medical School is known as the "Harvard criteria." The Committee's report described the following characteristics of a permanently non-functioning brain or an "irreversible coma": (i) unreceptivity and un-responsivity; (ii) no movements or breathing, and (iii) no reflexes. The unreceptivity and un-responsivity can be categorised when the patient shows a total unawareness to externally applied stimuli and inner need, and complete unresponsiveness, even when intensely painful stimuli are applied. No movements or breathing includes all spontaneous muscular movement, spontaneous respiration, and response to stimuli such as pain, touch, sound or light are absent. The indications of absent reflexes include fixed, dilated, pupils; lack of eye movement even when the head is turned or ice water is placed in the ear; lack of response to noxious stimuli; and generally, un-elicitable tendon reflexes.

Many scholars have criticized the Butcher's criteria for being too conservative and failing to capture enough patients who are for all practical purposes "dead".[12] However, it successfully preserved the interests of versions of the "technical progress" account tend to medical autonomy but suppressed professional uncertainty from public view and successfully established the first authoritative definition of brain death. Its guiding conceptual framework was technical and utilitarian, rather than popular, theological, or symbolic. But Joseph Verheijde and others vividly argued against the validity of the "Harvard criteria" for equating

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9 Sunil Shroff and Sumana Navin ""Brain Death" and "Circulatory Death": Need for a Uniform Definition of Death in India" 3(4) *Indian J. Med. Ethics* 321 (2018).

10 D. J. Powner, B. M. Ackerman, et.al., "Medical Diagnosis of Death in Adults: Historical Contributions to Current Controversies" 2 *Lancet* 1219 (1996).

11 The Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, "The Definition of Your Reversible Coma" 205 *JAMA* 337 (1968). C. Machado, "The First Organ Transplant from a Brain - Dead Donor" 64 *Neurology* 1938 (2005).

12 Mita Giacomini, "A Change of Heart and a Change of Mind? Technology and the Redefinition of Death in 1968" 44(10) *Soc. Sci. Med.* 1465 (1997).

brain death with human death. They contended that brain death does not disrupt somatic integrative unity and coordinated biological functioning of a living organism.[13] Again A. Mohandas and S. N. Chou suggested that patients should have known but irreparable intracranial lesions as well as irreversible damage to the brain stem and that the diagnosis of brain death should be a purely clinical diagnosis.[14] Recently, Truog and Robinson have specifically pointed out that the concept of 'brain death' 'is incoherent in that it fails to correspond to any biological or philosophical understanding of death'.[15] Later on, as per the Uniform Determination of Death Act, 1981 of the USA, a brain dead person means an individual who has sustained either (i) irreversible cessation of circulatory and respiratory functions, or (ii) irreversible cessation of all functions of the entire brain, including the brain stem. The determination of death must be made in accordance with accepted medical standards.[16] Ultimately, in 1995, the American Academy of Neurology published the practice parameters for the diagnosis of brain death.[17] The parameter emphasized the three clinical findings necessary to confirm the irreversible cessation of all functions of the entire brain, including the brain stem, absence of brainstem reflexes, and apnea.[18] Recently, the President's Committee on Bio-ethics in 2008 came up with a new definition of brain death, according to which a person was considered to be brain dead when he could no longer perform the fundamental human work of an organism. These are (i) openness to the world, that is receptivity to stimuli and signals from the surrounding environment, (ii) the ability to act upon the world to obtain selectively what it needs, and (iii) the basic felt need that drives the organism to act...to obtain what it needs.[19]

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13 L. V. Joseph, Y. R. Mohamed, *et.al.*, "Brain Death, States of Impaired Consciousness, and Physician-Assisted Death for End-of-life Organ Donation and Transplantation" 12 *Med. Health Care Philos.* 409 (2009).

14 A. Mohandas and S. N. Chou, "Brain Death. A Clinical and Pathological Study" 35 *J. Neurosurg.* 211 (1971).

15 R. D. Truog and W. M. Robinson, "Role of Brain Death and the Dead-Donor Rule in the Ethics of Organ Transplantation" 31 *Crit. Care Med.* 2391 (2003).

16 Michelle J. Clarke, Kathleen N. Fenton, *et.al.*, "Does Declaration of Brain Death Serve the Best Interest of Organ Donors Rather Than Merely Facilitating Organ Transplantation?" 101 *Ann. Thoracic Surg.* 2053 (2016).

17 American Academy of Neurology, "American Academy of Neurology Practice Parameters for Determining Brain Death in Adults (Summary Statement)" 45 *Neurology* 1012 (1995).

18 Eelco F.M. Wijdicks, Panayiotis N. Varelas, *et.al.*, "Evidence-based Guideline Update: Determining Brain Death in Adults" 74 *Neurology* 1911 (2010).

19 Seema K. Shah and Franklin Miller, "Can We Handle the Truth? Legal Fictions in the Determination of Death" 36 *AJLM* 540, 550 (2010).

B. English View Point

In the UK, the first attempt was made through the conference of Medical Royal College in 1976 to define the criteria of "brain death".[20] The finding of this conference concluded that the brainstem is the main part of the brain to be tested to define "brain death" which lead to the term 'brain stem death'.[21] Despite the apparent differences between views forwarded by the American and English scholars, the clinical determination of whole-brain and brainstem death is identical, although the role of confirmatory investigations is different and the burden of proof is lower in the case of brainstem death than whole-brain death.[22] The most frequently cited causes of brain death include (i) direct trauma to the head; (ii) massive haemorrhaging into the brain due to an aneurysm; and (iii) the lack of adequate oxygen to the brain because of cardiac or respiratory arrest.[23] Hence, an evaluation for brain death should be considered in patients who have suffered a massive, irreversible brain injury of an identifiable cause. The result lies to consider that person as legally and clinically dead.[24] Nevertheless, brain death is not the same as biological death; rather, it is a legal fiction designed to serve specific two purposes- (i) facilitate end-of-life care and (ii) promotion of organ donation.[25] However, the ethical question regarding organ donation from the brain-stem death person lies within the debate of dead or living. The opponents of organ transplant from brain dead persons believe that brain dead persons are not completely dead persons, somehow, they consider these persons as living one.[26] However, others believe that brain dead persons are dead persons in the clinical sense and there is no ethical barrier to conduct organ donation from such persons.[27]

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20 For detail discussion regarding the memorandum of the Conference, see, Conference Committee "Diagnosis of death: The Conference of Medical Royal Colleges and their faculties in the UK" 313 *Lancet* 261 (1979). See also D. Gardiner, S. Shemie, *et.al.*, "International Perspective on the Diagnosis of Death" 108(S1) *Br. J. Anaesth.* i14 (2012).

21 E. F. M. Wijdicks, "Brain Death Worldwide: Accepted Fact but No Global Consensus in Diagnostic Criteria" 58 *Neurology* 20 (2002); R. D. Truog, and J. C. Fackler, "Life, Death and Solid Organ Transplantation without Brain Death" 21 *Crit. Care Med.* 356 (1993).

22 M. Smith, "Brain Death: Time for an International Consensus" 108(S1) *Br. J. Anaesth.* i6, i7 (2012).

23 Samantha Weyrauch, "Acceptance of Whole-Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan" 17 *PBLJ* 91, 94 (1999).

24 Ajay Kumar Goila and Mridula Pawar, "The Diagnosis of Brain Death" 13(1) *IJCCM* 7 (2009).

25 *Supra* note 16 at 2053.

26 D. W. Evans, and M. Potts, "Brain Death" 325(7364) *BMJ* 598 (2002); W. F. Haupt, and J. Rudolf, "European Brain Death Codes: A Comparison of National Guidelines" 246(6) *J. Neurol.* 432 (1999); J. Slomka, "What Do Apple Pie and Motherhood Have to Do with Feeding Tubes and Caring for the Patient?" 155 *Arch. Intern. Med.* 1258 (1995).

27 L. Dosemeci, M. Cengiz, *et.al.*, "Frequency of Spinal Reflex Movements in Brain Dead Patients" 36(1) *Transplant. Proc.* 17 (2004).

C. Indian View Point

The Brainstem death or death of the tissues of the brain is the 'physiological core' of brain death. The concept of death is only defined in the Indian Penal Code, 1860. According to section 46 of the Indian Penal Code, the word 'death' denotes the death of a human being unless the contrary appears from the context. However, for the first time, there was an attempt from a statutory governmental group to elaborate on the concept of brain death in 1978. A national seminar was held in Mumbai, first in 1984 and then in 1989, which was sponsored by the National Academy of Medical Sciences and Bio-Medical Ethics Centre (Mumbai) recommended, with minor modifications, the adoption of brain death criteria used in England. During the same time, the National Medical Journal of India, in conjunction with the Ministry of Health and Family Welfare, Government of India, organized meetings in Calcutta and New Delhi on the issue of brain death. All these deliberations preferred the same proven idea of brain stem death based on the clinical criteria as provided by the English jurisprudence with minor modifications.[28] These English criteria have the advantage of being simple, clinical, unequivocal, and capable of confirmation.[29] Nevertheless, brainstem death has become operational in India after the passing of the Transplantation of Human Organs Act by the Indian Parliament in 1994[30] and the issue of notification in the Gazette of India in 1995. However, by the subsequent amendment in 2011, the legislation was renamed as the Transplantation of Human Organs and Tissues Act, 1994.[31] Under medical science, the brain stem is a small area measuring a few cubic centimeters of tissue on the floor of the aqueduct between the third and fourth ventricles of the brain. It says that if this small area is dead, the person becomes irreversibly unconscious and irreversibly apnoeic.[32] As per Section 2(d) of the Transplantation of Human Organs and Tissues Act, 1994, "brain-stem death" means the stage at which all functions of the brain-stem have permanently and irreversibly ceased and is so certified under sub-section (6) of Section 3. Thus, medically and legally, the patient is dead, if brain stem death has been certified.[33] The argument behind this concept is that the brain is the central organizer

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28 Sanjay K. Agarwal, Rakesh K. Srivastava, *et.al.*, "Evolution of the Transplantation of Human Organ Act and Law in India" 94(2) *Transplantation* 110, 111 (2012).

29 N. Wig, P. Gupta, and S. Kailash, "Awareness of Brain Death and Organ Transplantation Among Select Indian Population" 51 *JAPI* 455, 458 (2003).

30 Act 42 of 1994.

31 Substituted by Section 3 of Transplantation of Human Organs (Amendment) Act, 2011 (No. 16 of 2011).

32 Shankar M. Bakkannavar, *Forensic Medicine and Toxicology Practical Manual* 129 (Elsevier, New Delhi, 2018).

33 Anant Dattatray Dhanwate, "Brainstem Death: A Comprehensive Review in Indian Perspective" 18(9) *Indian J. Crit. Care Med.* 596 (2014).

of the body and that when the brain can no longer provide the necessary organizational influence, the body is no longer able to oppose the entropic forces favouring disintegration.[34]

Finally, by explaining the term "brain death" in *Aruna Ramchandra Shanbaug* v. *Union of India*,[35] the Supreme Court of India held that brain death means a state of prolonged irreversible cessation of all brain activity, including lower brain stem function with the complete absence of voluntary movements, responses to stimuli, brain stem reflexes, and spontaneous respirations. The Court further provides an explanation that: "This is the most severe form of brain damage. The patient is unconscious, completely unresponsive, has no reflex activity from centres in the brain, and has no breathing efforts on his own. However, the heart is beating. This patient can only be maintained alive by advanced life support (breathing machine or ventilator, drugs to maintain blood pressure, etc). These patients can be legally declared dead ('brain dead') to allow their organs to be taken for donation." Thus, one is dead when one's brain is dead.

III. The "Dead Donor Rule"

The "dead donor rule" lies at the heart of the current organ transplantation policy in most of nations.[36] The "dead donor rule" is a deontic constraint that categorically prohibits causing death by organ removal. John Robertson coined this expression "dead donor rule" to refer to a norm that organ donation policies have implicitly held since the beginning of multiorgan procurement, in the late 1960s. He characterized it "as a centrepiece of the social order's commitment to respect for persons and human life. It is also the ethical linchpin of a voluntary system of organ donation, and helps to maintain public trust in the organ procurement system."[37]

This informal rule has guided the practice of organ transplantation and organ donation since its inception. The "dead-donor rule" requires patients to be declared dead before the removal of

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34 For the similar view see D. A. Shewmon, "Chronic 'Brain Death'" 51 *Neurology* 1538 (1998).

35 AIR 2011 SC 1290: (2011) 4 SCC 454.

36 Govert Den Hartogh, "When Are You Dead Enough to be a Donor? Can Any Feasible Protocol for the Determination of Death on Circulatory Criteria Respect the Dead Donor Rule?" 40(4) *Theor. Med. Bioeth.* 299 (2019); Michael Nair-Collins, Sydney R. Green, *et.al.*, "Abandoning the Dead Donor Rule? A National Survey of Public Views on Death and Organ Donation" 41(4) *J. Med. Ethics* 291 (2014); A. S. Iltis and M. J. Cherry, "Death Revisited: Rethinking Death and the Dead Donor Rule" 35 *J. Med. Philos.* 223 (2010).

37 J. A. Robertson, "The Dead Donor Rule" 29 *Hastings Cent Rep.* 6 (1999).

life-sustaining organs for transplantation. The concept of brain death was developed, in part, to allow patients with devastating neurologic injury to be declared dead before the occurrence of cardiopulmonary arrest.[38] Thus, simultaneous reading of the definitions of "dead-donor rule" and brain death makes it clear that only after the death of the person is certified, the organs can be removed from his body. Advocates of the "dead-donor rule" seem to suggest that life gives people a particular moral and social status that creates expectations or obligations to treat them in certain ways. It is inappropriate to mourn for those who are still living.[39]

The major application of this rule can be observed in the process of recovery of organs from brain dead persons and save the lives of those dying from organ failure. However, it is an admitted fact that the "dead-donor rule" is not a legal rule; rather, it reflects the widely accepted belief that it is wrong to kill one person to save the life of another. Therefore, the "dead-donor rule" is an ethical norm, which makes the removal of organs for life-saving transplantation legally and ethically acceptable.[40] Broadly speaking, in general, the "dead-donor rule" played three interconnected roles: (i) preserving donors' interests in being respected and protected from harm, (ii) dissociating organ procurement from the practice of killing, and by virtue of the first two roles, and (iii) preserving public trust in organ donation.[41] The underlying principle of the dead donor rule is the premise that it is wrong to invade a person's body without the informed consent of the patient or an appropriate representative unless it is clearly in the patient's interest.[42] The resistance to organ removal from unconscious dying patients is based on the perception that it involves a bodily invasion that is not in the interests of the patient or it violates the bodily privacy of the patient. Thus, the "dead-donor rule" applies only to organ donation from deceased donors, not from living donors. It acts as a protective standard necessary to install public confidence.[43]

However, although the "dead-donor rule" is well-established in transplantation policy and practice, in recent years it has been challenged as an unnecessary fiction that results in lost lives

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38 *Supra* note 15, at 2391.

39 Elysa R. Koppelman, "The Dead Donor Rule and the Concept of Death: Severing the Ties That Bind Them" 3(1) *AJOB* 1, 2 (2003).

40 Franklin G. Miller and Robert M. Sade, "Consequences of the Dead Donor Rule" 97(4) *Ann. Thoracic Surg.* 1131, 1132 (2014).

41 David Rodríguez-Arias, "The Dead Donor Rule as Policy Indoctrination" 48(6) *Hastings Cent Rep.* S39 (2018).

42 Norman Fost, "Reconsidering the Dead Donor Rule: Is it Important that Organ Donors Be Dead?" 14(3) *Kennedy Inst. Ethics J.* 249, 252 (2004).

43 James L. Bernat, "Life or Death for the Dead-Donor Rule?" 369(14) *NEJM* 1289, 1290 (2013).

of the expecting donees.[44] Sometimes it can be argued, if the physicians perform their duty with utmost honesty, then there is no requirement of "dead-donor rule" in this modern technology-based medical era. It has been criticised that the strategy of re-labelling dying patients as dead through "dead-donor rule" to avoid public controversy fails to obtain satisfactorily respect and protect donors and may actually not be the best way to promote organ donation.[45] Thus, if any other alternatives are available, it is better to use that than the "dead-donor rule" as that alternative may increase organ donation trends among the general people. As a whole, it provides the balance between minimizing donor organ damage and the need for timely and exacting criteria for death determination for organ donation.

IV. The 'THOA' And Issues of Brain Death

A. Background of the Act

In India, the legislation to deal with human organs has evolved through a strong struggle. Prior to the THOA, there were few enactments by different States for regulating the procedure of organ transplant like the Eyes (Authority for Use for Therapeutic Purposes) Act, 1982, the Ear Drums and Ear Bones (Authority for Use for Therapeutic Purposes) Act, 1982 and the Maharashtra Kidney Transplantation Act, 1982. Therefore, there was a dire need of comprehensive legislation to regulate the activities of removal and transplant from a living as well as a deceased person's body. Two union ministers of the Government of India, speaking from the floor of the parliament on four separate occasions in 1989 and 1990, stated that the Central Government intended to introduce comprehensive legislation dealing with the recognition of brain stem death and the prohibition of commercial trafficking of human organs. A committee headed by Dr. L.M. Singhvi which included medical and legal experts was formed to bring abstracted legislation into reality. The said committee gave consensus on the following issues: (i) the concept and definition of brain death; (ii) the need to enact separate legislation to recognize brain death and the legal, medical, and social implications of such legislation; (iii) the safeguards that must be adopted to prevent the misuse of the concept of brain death; and

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44 Franklin G. Miller and R. D. Truog, "Rethinking the Ethics of Vital Organ Donations" 38(6) *Hastings Cent Rep.* 38 (2008).

45 W. Glannon, "The Moral Insignificance of Death in Organ Donation" 22(2) *Camb Q Healthc Ethics.* 192 (2013).

(iv) the manner in which the concept of brain death should be utilized to facilitate the availability of human organs for transplantation.[46]

On the basis of this report, finally, the Transplantation of Human Organ Bill was introduced in the Lok Sabha on August 20, 1992. The legislation got its ultimate shape in 1994 with the name 'Transplantation of Human Organ Act' and regulates the streamline organ donation and transplantation activities.[47] This Act provides regulations for the removal, storage, and transplantation of human organs for therapeutic purposes and to prevent commercial dealings in human organs.[48] The Act offers a detailed scheme and procedures regarding the transplantation of human organs.[49] It came into force in the Union Territories and the State of Goa, Himachal Pradesh, and Maharashtra on February 4, 1995. After that other States have adopted this central legislation under Article 252 of the Constitution. The 1994 Act was further amended through the Transplantation of Human Organs (Amendment) Act 2011 and came to its present form. Before the enactment of this Act, a doctor who removed an organ without the informed consent of his patient could be charged for criminal liability under the Indian Penal Code for the offences against the human body like assault and battery and could also face civil liability for professional negligence under the law of torts.[50] The Act defines "human organ" as any part of a human body consisting of a structured arrangement of tissues which, if wholly removed, cannot be replicated by the body[51] and "transplantation" means the grafting of any human organ from any deceased person or living person to some other living person for therapeutic purposes.[52] The Transplantation of Human Organ Act being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, this Act will prevail over the provisions of the Code of Criminal Procedure, 1973.[53]

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46 Akshaya S. Desai, "Analysis of Transplantation of Human Organ Act and Right to Life" 6(1) *IJRAR* 179, 180 (2018).

47 Ashok K. Sharma, Sudhir K. Bhagotra, et.al., "The Transplantation of Human Organs Act" 3(1) *JK Science* 51 (2001).

48 Transplantation of Human Organ Act 1994, Preamble.

49 For detail scheme see, Mukesh *Gandhi* v. *Deputy Secretary (Health) Medical Education and Research*, AIR 2009 Guj 7.

50 Seema Rathi, "Organ Transplantation Law in India: It's Legal and Ethical Issues" 47(1) *CMLJ* 52, 53 (2011).

51 Transplantation of Human Organ Act 1994, Section 2(h).

52 *Ibid.*, Section 2(p).

53 *Jeewan Kumar Raut* v. *Central Bureau of Investigation*, AIR 2009 SC 2763: (2009) 7 SCC 526.

B. Provisions Related to Brain Death

As described above, in India, the THOA 1994 and the subsequent amendments in 2011 and Rules in 2014 form the legislative foundation for brain death and organ donation.[54] Chapter II of the aforesaid Act deals with the authority for the removal of human organs from the body of a person in the event of her/his brain-stem death.[55] In detail, Sub-Sections (5), (6), and (7) of Section 3 deal with the removal of organs from the body of a deceased person or brain-stem death cases.[56] Thus, Section 3(5) of the THOA provides where any human organ or tissue or both is to be removed from the body of a person with brain-stem death, then such death has to be certified by the medical practitioners as provided under sub-section (6).

Further, Section 3(6) categorically states that no such removal shall be undertaken unless such death is certified, in such form and in such manner and on the satisfaction of such conditions and requirements as may be prescribed, by a Board of medical experts consisting of the following, namely: (i) the registered medical practitioner in charge of the hospital in which brain-stem death has occurred; (ii) an independent registered medical practitioner, being a specialist, to be nominated by the registered medical practitioner specified in clause (i), from the panel of names approved by the Appropriate Authority; (iii) a neurologist or a neurosurgeon to be nominated by the registered medical practitioner specified in clause (i), from the panel of names approved by the Appropriate Authority; (iv) the registered medical practitioner treating the person whose brain-stem death has occurred.[57] Further, the proviso made it clear that where a neurologist or a neurosurgeon is not available, the registered medical practitioner may nominate an independent registered medical practitioner, being a surgeon or a physician and an anaesthetist or intensivist, subject to the condition that they are not members of the transplantation team for the concerned recipient and to such conditions as may be prescribed. In the same line, the Transplantation of Human Organs Rules, 2014 provides for the panel of experts for brain-stem death certification.[58] From the provision, it is clear that in the absence

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54 Rahul Anil Pandit, "Brain Death and Organ Donation in India" 61(12) *Indian J Anaesth* 949 (2017).

55 *Vandana Dixit* v. *Visitor S.G.P.G.I.*, (2010) ILR 3 All 1058.

56 *Balbir Singh* v. *Authorisation Committee*, AIR 2004 Delhi 413: (2004) ILR 2 Delhi 242.

57 *Manoranjan Rout* v. *State of Orissa*, AIR 2010 Ori 99: 109 (2010) CLT 225; *Jaswinder Singh* v. *State of Punjab*, (2008) 2 PLR 774: 2008 (3) RCR (Criminal) 93. *See also*, Reeta Dar Khashu and Sunil Kumar Dar, "Legal Framework, Issues and Challenges of Living Organ Donation in India" 14(8) *IOSR-JDMS* 59 (2015).

58 The Transplantation of Human Organs Rules, 2014, Rule 4.

of such a legal sanction, the removal of organs from persons suffering brain-stem death is not possible. Thus, it can be assumed that the above provisions secure sufficient warrant for the removal of the human organ and no such removal is permissible except by a registered medical practitioner.[59] The most important pre-caution taken by the Act is that the doctors involved in the diagnosis should in no way be connected with the transplantation surgeries concerning the "brain-stem dead" body.

Further, the THOA provides that only registered hospitals under this Act have the capacity to conduct transplantation of any human organ or tissue or both.[60] But in reality, a large number of brain deaths occur in hospitals not authorized to do transplants. To solve this out, the Director of Health Services has registered all hospitals that have an operation theatre and ICU[61] as Non-Transplant Organ Retrieval Centers (NTORCs). These hospitals are permitted to certify brain death as per the prescribed procedure and then conduct organ retrieval for therapeutic purposes;[62] however, they are not permitted to perform actual transplantation.[63] To keep up the record of the brain-death cases, all these NTORCs have the duty to certify and notify the brain-death cases to the Zonal Transplantation Co-ordination committee. This is a strong step to streamline the procedure for cadaveric organ retrieval and transplantation.[64] The certification should be done on the laid-out forms as per the Transplantation of Human Organs Rules, 2014.[65] The declaration of brain death must be recorded in the medical notes with the date and time.

Thus, for brain death patients to convert into real donors a responsive, rapid, and efficient medical facility is crucial.[66] In Medico-Legal Cases, the medical practitioner dealing with the brain-stem dead person, after obtaining necessary permissions and consent, may intimate the detailed proceedings to a nearby Station Officer or the Superintendent of Police in the limit for the retrieval of organs or tissue from the donor and a copy of such a request should also be sent to the designated post mortem doctor of area simultaneously.[67] All the cost for maintenance of the cadaver, retrieval of organs or tissues, their transportation, and preservation may be borne

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59 *Nagendra Mohan Patnaik* v. *Government of A.P.*, 1997 (1) ALT 504: 1997 (2) ALD 83.

60 Transplantation of Human Organ Act 1994, Section 10(a).

61 The Transplantation of Human Organs Rules, 2014, Rule 27.

62 *Ibid.*, Rule 5.

63 K. Ganapathy, "Brain Death Revisited" 66(2) *Neurol. India* 308, 313 (2018).

64 *Supra* note 33, 597.

65 The Transplantation of Human Organs Rules, 2014, Form 10.

66 Anju Vali Tikoo, "Transplantation of Human Organs: The Indian Scenario" 1 *ILILR* 147, 167 (2017).

67 The Transplantation of Human Organs Rules, 2014, Rule 6. *See also*, Johny Kutty Joseph and Babitha K. Devu, "Organ Transplantation in India: Legal and Ethical Aspects" 9(8) *IJAR* 36, 37 (2019).

by the recipient or institution or Government or non-Government organisation or society as decided by the respective State Government or Union territory Administration.[68]

Apart from the THOA, Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, specifically states that withdrawing of supporting devices to sustain cardiopulmonary function even after brain death shall be decided only by a team of doctors and not merely by the treating physician alone. A team of doctors shall certify withdrawal of the support system. Such team shall consist of the doctor in charge of the patient, Chief Medical Officer or Medical Officer in charge of the hospital, and a doctor nominated by the in-charge of the hospital from the hospital staff or in accordance with the provisions of the Transplantation of Human Organ Act, 1994.[69] Thus, this 2002 Regulations also acted under the umbrella provisions of the THOA.[70]

C. Consent Mechanism

The general consent mechanism is not applicable in cases of brain-death patients.[71] Over time, informed consent has become an essential requirement for clinical diagnosis and treatment.[72] The process of informed consent enables the family to make critical end-of-life decisions, particularly the decisions with regard to the withdrawal of the life support system and organ donation. The medical expert registered with appropriate authority needs to have a dialogue with the relatives about carrying out the tests for brain stem death.[73] The consent to the criteria of brain death is conceptually and practically different from the consent to diagnostic processes.[74]

Thus, Section 3(7) of the THOA states that where brain-stem death of any person, less than eighteen years of age, occurs and is certified by a required panel of physicians, any of the parents of the deceased person may give authority, in such form and in such manner as may be prescribed, for the removal of any human organ or tissue or both from the body of the deceased

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68 *Ibid.*, Rule 9.

69 Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, Regulation 6.7.

70 *Common Cause* v. *Union of India*, (2014) 5 SCC 338: 2014 (3) SCALE 1.

71 A. Vincent and L. Logan, "Consent for Organ Donation" 108 (S1) *Br. J. Anaesth.* 180 (2012).

72 Sougata Talukdar, "Informed Consent in Medical Practices: A Prospective Discussion" 3(2) *IJSLR* 75 (2017).

73 Rahul Anil Pandit, Kapil G. Zirpe, et.al., "Management of Potential Organ Donor: Indian Society of Critical Care Medicine: Position Statement" 21 *IJCCM* 303, 308 (2017).

74 Osamu Muramoto, "Informed Consent for the Diagnosis of Brain Death: A Conceptual Argument" 11(1) *PEHM* 1, 2 (2016).

person. Any person can pledge his or her organs during his or her lifetime if he or she wants his or her organs to be used after death. After certification of brain stem death of the person, it is now mandatory for the medical practitioner to ask the near relative or person in lawful possession of the body of a person admitted in Intensive Care Unit regarding the plan of organ donation.[75] Even if the donor has pledged his organs before death, the consent of a near relative or person in lawful possession of the body is also required.[76] The consent should be taken on the laid out forms as per the Transplantation of Human Organs Rules, 2014.[77] After consent has been taken, the registered medical practitioner through the transplant coordinator shall inform the authorised registered Human Organ Retrieval Centre for removal, storage or transportation of organ or tissue.[78]

However, in reality, while in western countries family members generally give consent to organ donation because they are certain that this would have been the wish of the deceased relative, in India, it is invariable that the family members decide about organ donation in the absence of any antemortem input.[79] The common reasons for refusal were differences in opinion of family members toward consent, fear of criticism by society, and concern with the quality of patient care, among other things. Nevertheless, recently a slow change in the perception of Indian families towards organ donation has been noticed. But a long way to go to utilise these mechanisms to their fullest extent.

V. Conclusion

It is well said that the care of the donor is essentially the simultaneous care of multiple recipients.[80] Still now, however in India, organs transplantations from brain stem dead persons are not that common owing to a plethora of debates and dilemmas from medical perspectives[81] as well as people's perspectives.[82] The definition of "brain death" travelled a long way from its first coinage. However, in the absence of a consensus on the definition of death, the whole

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75 The Transplantation of Human Organs Rules, 2014, Rule 5(1)(b).

76 *Ibid.*, Rule 5(4)(a).

77 *Ibid.*, Form 8.

78 *Ibid.*, Rule 5(1) (c).

79 Avnish Kumar Seth, Pradhi Nambiar, et.al., "First Prospective Study on Brain Stem Death and Attitudes Toward Organ Donation in India" 15 *Liver Transplant.* 1443, 1446 (2009).

80 Lakshmi Kumar, "Brain Death and Care of the Organ Donor" 32(2) *J Anaesthesiol Clin Pharmacol.* 146, 151 (2016).

81 Reeta Dar Khashu and Vivek Adhish, "Debates and Dilemmas of Organ Donation from Brain Stem Dead Bodies from the Perspective of Professionals" 1(4) *EIJMR* 1 (2014).

82 Reeta Dar Khashu and Sunil Kumar Dar, "People's Perspectives: Insights into Organ Donation from Brain Stem Dead Donors" 19(12) *IOSR-JHSS* 70 (2014).

literature on confirmatory testing for brain death is incoherent.[83] These differences cause problems for the physicians and legal experts in securing organ donation from brain-dead patients. Similarly, as people are not aware of brain deaths; it becomes difficult to convince the relatives of the patients for organ donation.[84]

Currently, India has followed the "opt-in" approach to organ donation which is a method wherein the potential donor expresses readiness for removing the organs for transplantation after declaring her/his brain stem death. But this method is very much dependent upon the consent mechanism after the brain stem death. However, to increase organ donation, India should prefer the "opt-out" approach like many other countries.[85] The "opt-out" approach follows the concept of presumed consent to donate the organs by anyone with the potential to donate. The relatives of brain stem death person will be given a chance to opt-out rather than opt-in for organ donation.[86] Further, to ensure optimal use of organs of brain-dead patients and to rule out the possibility of wastage of organs because of the absence of near relatives at the time of certification, the 1994 Act should include the 'nearest relative' hierarchy aiming to identify the person closest to the deceased in life. So that the close person may be able to express the deceased's wishes about organ donation. Thus, the building of awareness amongst the public on the eventuality of the incident of brain death and improvement of resources to support the organ donor to increase the numbers and quality of organ donation should be the immediate goals in our country. In addition to these, the speedy disposal of the organ donation prayer is another concern. A balance should struct between the protection of the donor and the need for donation by providing less administrative interference and smoother arrangements for transportation of the organ to the intended donee. Apart from these, to avoid hidden monetary transactions, fixing of a specific price for specific organ and support system with regard to this through State aid, in case of poor people, is the way that should be considered by the legislature and should be made amendments in the 1994 Act accordingly.

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83 K. G. Karakatsanis, "'Brain Death': Should It be Reconsidered?" 46 *Spinal Cord* 396, 400 (2008).

84 Reeta Dar, "Challenges to Organ Donation from Brain Stem Dead Persons in India" 3 *Nurs J India* 105 (2014).

85 The opt-out approach is legally accepted in Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Greece, Hungary, Italy, Luxembourg, Latvia, Norway, Poland, Portugal, Slovak Republic, Slovenia, Singapore, Spain, Sweden and Switzerland.

86 S. Bramhall, "Presumed Consent for Organ Donation: A Case Against" 93(4) *Ann R Coll Surg Engl.* 270 (2011).

Urban Local Governance in India: Organization, Challenges, and Prospects

Rajesh Kumar*

Abstract

Urbanization is a journey from agrarian to industrial society, which paves the way for a transformation from the informal to the formal lifestyle. It also determines the level of development of a country. A well-established and efficiently functioning urban setup works as a catalyst for the all-around development of surrounding underdeveloped regions. But if urbanization is not well planned, guided, and efficiently administered, then it may lead to the choking of the overall development. In such a situation, every potential would remain underutilized. While considering the importance of urban governance, the Constitution of India has provided a mechanism for the decentralization of government up to the local level. However, initially, there were no explicit provisions in this regard. But with the insertion of the 73rd (for rural local government) and 74th (for urban local government) amendments, a proper mechanism has been incorporated in the Constitution.

To have a better understanding of the topic, the present paper has been categorized into four sections. The first or the introductory section has provided the role and importance of India's urbanization. It has also covered a brief historical evolution and causes of the present-day unorganized and unplanned urbanization in India. The second section is focused on the Constituent organization of the urban local government. Here the analysis of the urban local government has briefly analysed the Pre 74th amendment phase, where the urban administration had no standard organizational setup across the States. Further, this section has also extensively analysed the post 74th amendment period, where the standard organizational set up across the State came into effect. This section has also looked into the particular kind of urban units, which have been exempted from the traditional administrative setup and are allowed to be administered differently. The third section has analysed the challenges in the process of India's urbanization. This section has also tried to analyse the causes for the chaotic and mismanaged situation of urban administration. In the last section, besides concluding the overall analysis, the way forward has also been suggested.

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I. Introduction

The city is the primary fact of human civilization. Cities have also been considered a symbol of development. In every phase of history, the towns guided the development of kingdoms, empires, or the modern nation concept.[1] For example, even in ancient and medieval times, urban areas were the main centers of various progressive activities. These urban centers paved the way for better economic conditions in countries around the world. As it is a general phenomenon that with the running of time's wheel, new cities rise and the old ones become part of heritage or submerged into dust. However, with the initiation of modern time, the process of industrialization gave a new boost and direction to the whole concept of urban life.[2] With industrialization, individual freedom also came, which supported and strengthened the process of democratization thereby the idea of people's participation got emboldened. Additionally, urbanization presents a composite and different feature of the growing diversity of culture and also the increasing complexity of problems.[3]

From a contemporary perspective, urbanization being a journey from agrarian to industrial society gave a push to the transformation of the informal lifestyle into the formal one. It also determines that how a well-established and efficiently functioning urban setup can work as a catalyst for the all-around development of surrounding underdeveloped regions. Besides bringing equality in diversified societies, it also creates a new composite culture that provides space for individuals to explore their potential to the fullest possible extent. But if the process of urbanization is not guided, well-planned, and efficiently administered then it may lead to choking of the process of development, and under such circumstances every kind of potential would remain underutilized.

[1] Richards Schragger, *City Power: Urban Governance in a Global Age* 18 (Oxford University Press, New York, 2016).
[2] Hans Nagpaul, *Modernisation and Urbanization in India* 38 (Rawat Publications, New Delhi, 1996).
[3] Piyush Tiwari, Ranesh Nair, *et. al.* (eds.), *India's Reluctant Urbanization- Thinking Beyond* 11 (Palgrave Macmillan, Hampshire 2015).

Urbanization also plays a significant role in a country's development. The mechanism for urban governance determines whether the patterns of growth would be sustainable or not. It cannot be a standalone concept. It is a symbol of the various kind of changes going on in a particular society, economy, politics, and the administration. Urbanization signifies a certain phase of the developmental process. The management of the urban settlement determines the standard of life in that urban area. Urbanization can be called a march towards the aspiration of a better life and better opportunities.

In the Indian context, from ancient times onwards there have been many examples of well-developed and efficiently administered urban areas. For example, Kautilya's Arthashashtra has provided a detailed account of the city administration. Besides defining the role of administrative authorities, he also gave a detailed account of the resources available with the city administration.[4] Similarly, in the Gupta period;[5] Sultanate rule;[6] and the Mughal period[7] there were many famous cities which were having a well-organized administrative structure. For instance, during the post-Mauryan period, a chief executive officer used to perform various functions of the city administration. Subsequently, during the Gupta period towns were administered by a council and were having a mechanism for the elected administrative officers. During the Mughal period, municipal administration was vested in a 'kotwal', a city governor, who possessed the powers and duties of the chief of the city police, magistrate, and head of municipal administration.[8] Even in the Roman provincial administration cities were the crucial organizing principle without which the system could not have worked.[9] All this shows that cities have been the oldest artifacts of well-organized and civilized life. Whenever there is prosperity whether it is in a democratic setup or a monarchic system, then there would inevitably be the growth of the big and well-structured urban centers.

The last census (2011) has demonstrated that urbanization in India is gathering momentum. The urban population of India has increased from 286 million in 2001 to 377 million in 2011. This still shows that only 31 percent of the Indian population lives in urban areas, compared with 45 percent in China, 54 percent in Indonesia, and 87 percent in Brazil.[10] India's urban

[4] Vijay Kumar Thakur, *Urbanisation in Ancient India* 230 (Abhinav Publications, New Delhi, 1981).
[5] Gupta Empire ruled much of the Indian subcontinent from 319 to 543 CE.
[6] Also known as Delhi Sultanate and it ruled India from 1206 to 1526 CE.
[7] Mughal Empire spread across much of Indian subcontinent from 1526-1857 CE.
[8] *Supra* note 3 at 197.
[9] David S. Potter, (eds.), *A Companion to the Roman Empire* 253 (Blackwell Publishing, Oxford, 2006).
[10] Isher Judge Ahluwalia, Ravi Kanbur, *et. al*. (eds.), *Urbanisation in India: Challenges, Opportunities and the Way Forwards* 19 (Sage Publications India Pvt. Ltd., New Delhi, 2014).

population is expected to reach 600 million (40 percent) by 2031, and the urban sector's share in the country's gross domestic product (GDP) is expected to increase from its current 66 percent to 75 percent by 2031.[11] This suggests that India will be at the epicenter of urbanization in the coming decades. The sheer scale of the structural transformation presents tremendous challenges as well as opportunities for bridging the rural-urban divide in India.[12] The large urban centers are undergoing rapid long-term urban growth. This growth pattern is further strengthened by the increase in migration from villages and suburbs stimulated by the prospects of higher income and enhanced employment prospects and other socio-cultural opportunities.[13] The total number of urban areas is now 7935 and out of these 4041 are statutory towns[14] and the rest 3894 are census towns[15]. As per the 2011 census, the number of metropolitan cities having a million-plus population has also increased from 35 (in 2001) to 53 (in 2011). Cumulatively, it shows that urbanization in India is getting the required fast pace. But it also needs to be taken care of that with this fast-growing urbanization, various kinds of new challenges also emerge in the urban areas.

Before the enactment of the 74th amendment Act, a well-structured urban development in India was never given due consideration and concern. Besides this, the colonial legacy has also played a big role in undermining the systematic development of India's urban spaces. The colonial rulers failed to prescribe an effective system for the day-to-day management of municipal affairs. The question of administrative capacity and fixation of responsibility and accountability for the performance of municipal functions were barely given attention.[16] During colonial rule, only those urban areas were developed which were required to serve their interests. Not only colonial rulers, but the successive Indian governments also deserve to be blamed for their half-hearted contribution. The post-independence period was demanding serious attention for a systematic, efficient, and effective urban development. But the lackadaisical approach and half-hearted efforts led to such a situation that even in present-day

[11] *Ibid.*
[12] *Ibid.*
[13] John Brotchie, Peter Newton, *et. al*. (eds.), *East West Perspective on 21st Century Urban Development-Sustainable Eastern and Western Cities in the New Millennium* 355 (Ashgate Publishing Ltd., Aldershot, 1999).
[14] Areas with a municipality, municipal corporation, cantonment board or notified town area committees etc. known as statutory town. Available at: http://mohua.gov.in/cms/number-of-cities--towns-by-city-size-class.php, last visited on September 05, 2020.
[15] All the other places which satisfied the following criteria known as Census town:
i) A minimum population of 5,000;
ii) At least 75 percent of the male main workers engaged in non-agricultural pursuits;
iii) A density of the population at least 400 per sq. KM.
[16] *Supra* note 10.

India there is hardly a State which can confidently showcase its model of urban development. No doubt the 74th amendment Act provided a uniformity to the urban local government system, but other aspects of the urban development such as amenities, resource generation, functional autonomy, financial viability, availability and accessibility of quality municipal services, etc. show that still there is a long distance to be covered in that direction.[17]

The modern world is marching towards the democratic way of life and in such circumstances, the urban administration cannot remain aloof from this gradual progress. A democratic setup requires that people's representatives must be the real decision-maker and the whole executive machinery should work under their direction. To bring democracy to the doorstep of the urban dwellers, the 74th amendment Act was enacted by the Parliament.[18] This amendment provided the mechanism for the establishment and functioning of urban local governance. Although twenty-five years have passed since the amendment came into effect, still every aspect of urban life is plagued by grave issues. Considering the relevance of the above-mentioned aspects, the present research paper analyses the constituent mechanism, major challenges, and the way forward to India's urban problems.

II. Constituent Mechanism

Under the Constitution of India, the subjects related to the urban local government were given to the States.[19] Entry 20[20] and 20A[21] of the Concurrent List also enable the State legislature to make law on these entries. Besides the States' exclusive jurisdiction, the Central role has been extended on the special local bodies such as industrial township, port trust authority, and cantonment board. So, from the commencement of the Constitution till the implementation of the 74th Constitutional Amendment Act (hereinafter 74th CAA) the States were given free hand to determine the kind of ULB system they want to maintain. This freedom resulted in the absence of constitutional recognition and clear statutory delineation of the powers, functions, and resources, which led to severe neglect of the urban local government.[22] The ULBs were also lacking uniformity in structure and election. All this led to a disguised and unbalanced

[17] *Ibid*.
[18] 74th amendment Act, 1992.
[19] Entry 5, State List, Seventh Schedule says that Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self-governments or village administration.
[20] Economic and social planning.
[21] Population control and family planning.
[22] *Supra* Note 3 at 198.

development of India's urban spaces.[23] The lack of established autonomy in ULBs had enhanced their dependency on the State governments. The situation was further perpetuated by the absence of long-term planning or guidance. Resultantly, the urban spaces were deprived of the systematic provision of basic amenities. Collectively, all these factors gave way to the parallel unrestricted growth of slums in and around the old and new urban spaces.[24]

To make the course correction and also to bring uniformity and systematization to the governance of ULBs, many efforts were made. For instance, in August 1989, the 65th Constitution amendment bill[25] was introduced in the 'Lok Sabha'[26]. The bill was drafted with the objectives of strengthening and revamping the ULBs. However, the bill was passed in the Lok Sabha but could not get passed in the 'Rajya Sabha'.[27] And later due to the dissolution of Lok Sabha, the bill lapsed. But most of these reform initiatives ended without any specific outcome. Again, in September 1991, the new government (i.e., Narasimha Rao's Government) at the Centre with some modification re-introduced the Municipality Bill in Lok Sabha. And finally, the bill emerged as the 74th Constitution Amendment Act of 1992 which came into force on June 1, 1993. The 74th CAA has inserted a new Part i.e., Part IX-A (the Municipalities) to the Constitution. Part IX-A covers the provisions from Article 243-P to Article 243-ZG. The 74th CAA besides giving the constitutional status to the ULBs has also made it obligatory upon the State Governments to comply with the provisions inserted by this amendment. The 74th CAA introduced the salutary measures such as periodic election; institutions of State Election Commission and State Finance Commission; and reservation for the marginalized sections of the society (i.e., Scheduled Castes, Scheduled Tribes, and Women). For ensuring structural uniformity, the 74th CAA introduced three types of ULBs, namely: Municipal Corporation, Municipal Council, and Nagar Panchayat. Generally, this categorization has been uniformly applied across the country. But to deal with special circumstances, other specialised bodies

[23] DTE staff, "Rewind 2018: Urbanisation creates chaos in India" 28 December 2018, Available at: https://www.downtoearth.org.in/news/urbanisation/rewind-2018-urbanisation-creates-chaos-in-india-62618, last visited on December 10, 2020. [please provide the full details such as author, title etc.]

[24] Emily Rains, Anirudh Krishna, *et. al*., "*Urbanisation and India's Slum Continuum: Evidence on the Range of Policy Needs and Scope*" 2 C-35309-INC-1, *IGC*, Available at: https://www.theigc.org/wp-content/uploads/2018/02/Rains-et-al_Working-paper_cover.pdf, last visited on December 11, 2020.

[25] Titled as "Nagarpalika Bill".

[26] The Lower House of the Parliament of India.

[27] The Upper House of the Parliament of India.

such as notified area committee[28], town area committee[29], cantonment board[30], township[31], port trust[32], and special purpose agency[33]. have been created. Thus, the 74th amendment can rightly be described as the beginning of a new era to establish; revitalize, and strengthen democracy at the urban local level.

The 74th CAA ensured the introduction of structural uniformity of the ULBs. Now in every State, there are three types of ULBs[34] namely: (1) Nagar Panchayat- for an area which is in transition from rural to an urban area; (2) Municipal Council- for an area which although is urbanized but is small in terms of size of its population; and (3) Municipal Corporation- for a large urban area.[35] Besides this, there may be areas where municipalities would not be constituted provided the municipal services are being provided by an industrial establishment in the area and that area may be specified and named as an industrial township by the Governor through public notification.[36]

To introduce the participatory mechanism, provisions for the direct election have been incorporated in the ULBs. For conducting the elections, the municipal area shall be divided into wards that would be counted as constituencies.[37] The State legislature may by law make

[28] It is created for the administration of two types of areas- a fast developing town due to the industrialisation and a town which does not fulfil the criteria set for the municipality but State government consider its importance in this context. So, State government by notification specify the which provisions of the State municipal Act would apply on the notified area committee.
[29] It is setup for the administration of the small towns with semi-municipal authority. It is entrusted with the limited number of functions and created by a separate State Act which governs its composition, functions and other related matters.
[30] It is established for the municipal functioning for the civilian population of the cantonment area. It is created by a Central legislation i.e. The Cantonment Act of 2006. It comes under the jurisdiction and control of the Central ministry of Defence.
[31] This type of ULB is established by the large public enterprises to provide municipal facilities to the staff and workers living in the housing colonies built near the plant. All its administrators are appointed by the enterprise and have no government's role in it.
[32] It is established in the port areas with two objectives- to manage and protect the ports and to provide civic amenities. It is created by the Act of Parliament. Its members consist of both the elected and the nominated ones. Its functions are similar to the municipalities.
[33] These are not the typical municipal bodies, but some of the municipal functions are given to them and they work as autonomous bodies. These agencies can either created by the State legislation by the executive resolution.
[34] Article 243Q, Constitution of India, 1950.
[35] As per Article 243Q (2), these three types of urban areas are specified by the Governor of the State through public notification and determined by considering the following factors in an area: (a) population; (b) density of population; (c) revenue generated for local administration; (d) percentage of population employed in non-agricultural activities (e) economic importance or such other factors Governor may deem appropriate.
[36] Proviso to Article 243Q (1), Constitution of India, 1950.
[37] Article 243R (1), Constitution of India, 1950.

provisions for the election of the chairperson and may also provide for the representation of the following person in the ULBs[38]:

- A person having expertise or experience in the administration of ULBs but would not be having any voting right;
- The member of the Rajya Sabha or State Legislative Council who is registered as a voter in the concerned municipality;
- The member of the Lok Sabha and State Legislative Assembly who is representing the whole or part of the area of that ULBs; and
- The chairpersons of the committees constituted under clause (5) of Article 243S.

The ward committees shall be consisting of one or more wards within the territorial jurisdiction of a municipality, having a population of three lakhs or more[39]. For the composition; determination of the territorial area of the wards committee; and the seat allocation, the State Legislature shall enact a law. The State may also make provision for any other committee in addition to the wards committee. To ensure equitable representation, the provisions of the reservation to the marginalized sections of the society have also been incorporated. The 74th CAA provided for reservation of seats for Scheduled Castes (SCs) and Scheduled Tribes (STs) in proportion to their population in every municipality. It has also made provisions for reservation of seats not less than one-third for the women of the municipal area (including the women belonging to the SCs and STs Communities). The State has also been enabled to make similar provisions for the reservation of offices of the chairperson of the municipalities. The Constitution empowered the States to make the reservation provisions for the other backward section of the society[40]. Concerning the duration of municipalities, the Constitution says that it would normally be having a term of five years but if dissolved earlier than the normal terms then a fresh election would take place only to complete the remainder of the normal term. However, if the remainder of the time is less than six months then no fresh election would take place for the remainder of the time. Thus, a municipality reconstituted after the premature dissolution does not enjoy the full term of five years but only the remainder terms.[41]

The 74th CAA prescribes the minimum age of 21 years for standing in the election of a municipality. A person would be ineligible for election to the municipalities if he is

[38] Article 243R (2), Constitution of India, 1950.
[39] Article 243S (1), Constitution of India, 1950.
[40] Article 243T, Constitution of India, 1950.
[41] Article 243U, Constitution of India, 1950.

disqualified[42] - (I) under any law for the time being in force in the State concerned, or (II) under any law made by the State legislature. If there is any dispute as to the disqualification then it would be referred to such authority as the State legislature may determine. To conduct the elections periodically, Part-XIA provided for a State Election Commission. The Commission would be vested with the power of superintendence, direction, and control of the preparation of electoral rolls and the conduct of all elections to the municipalities.[43] The Act has barred the court's jurisdiction in matters related to the elections. The Act has also clarified that the validity of any delimitation law cannot be challenged in any court. It says that no election to the municipality is to be questioned except by an election petition presented to such authority and in such manner as prescribed by the State legislature.[44] Thus, it can be said that the 74th CAA introduced structural uniformity and regularity in urban governance.

The 74th CAA enabled the State legislature to make any provision subject to the Constitution, which may be necessary to enable the municipalities to function as an institution of self-government. In this regard, the State legislature may devolve such functions, powers, and responsibilities concerning- (a) economic planning, development, and social justice; (b) performance of such functions and schemes as entrusted by the State Government or performance of the responsibilities as has been entrusted by the twelfth schedule.[45] The 74th CAA has also empowered the State legislature to make the law to authorize the municipalities to impose a levy, taxes, tolls or other means of revenue generation; assign such taxes, levies, duties, etc. collected by the State government for such purpose; provide such grant-in-aid to the ULBs from the Consolidated Fund of the State, and provide for the constitution of funds for crediting all money to municipalities.[46]

To maintain the sound financial health of ULBs, the 74th amendment Act made provisions for a State Finance Commission. The Commission shall review the financial positions of the municipalities at the interval of every five years and make recommendations to the Governor concerning: (a) principles governing- the distribution of net proceeds of tax, duties, levies, tolls, etc. between the State government and the municipalities; determination of the taxes, tolls, duties and levies that may be assigned to the ULBs; the grant-in-aid from the Consolidated

[42] Article 243V, Constitution of India, 1950.
[43] Article 243ZA, Constitution of India, 1950.
[44] Article 243 ZG, Constitution of India, 1950.
[45] Article 243W, Constitution of India, 1950.
[46] Article 243X, Constitution of India, 1950.

Fund of the State to ULBs, (b) measures needed to improve the financial position of the ULBs, and (c) any other matter referred to it by the governor in the interest of sound finance of the municipalities.[47] Besides these provisions, the Central Finance Commission also suggests the measures needed to augment the consolidated fund of the States to supplement the resources of the municipalities based on the recommendations made by the Finance Commission of the State concerned.[48] The 74th CAA has enabled the State legislature to make law for the maintenance of accounts of the municipalities and their periodical audit so that financial responsibility can be ensured.[49] The 74th CAA also covered the ULBs falling under the jurisdiction of Union Territories. In this respect, the President of India is empowered to direct the provisions of Part-XIA to be applied with such exemption and modification as he may specify.[50] Here the reference to the Governor would be considered as a reference to the administrator of the Union Territory concerned. However, the Act applies to all the States and the Union Territories but certain areas have been exempted from its application. The Act explicitly says that its provisions would not apply to the scheduled areas and the tribal areas in the States. The Act shall also not affect the functions and powers given to Darjeeling Gorkha Hill Council in the State of West Bengal. But, Parliament may by law extend the provisions of this Act to the Scheduled areas and tribal areas with such modification and exceptions as may be specified.[51]

Planning is another major aspect covered by the 74th CAA. While considering the importance of planning, Lewis Mumford very aptly said, "a city being a stage or the theatre for social action; art; politics; education; and commerce, etc. which helps in making the social drama……only if the stage set is well designed" (Mumford 1937). A well-prepared urban plan has the potential to deal with the challenges created by the new cities as well as the expansion, rejuvenation, and densification of the existing ones.[52] The 74th CAA provides for the district planning committee (hereinafter used as DPC) and the metropolitan planning committee (hereinafter mentioned as MPC). The DPCs shall consolidate the plans prepared by the Panchayats and the Municipalities of the concerned district and would prepare a draft development plan for the district as a whole. The Act directs that the State legislature may

[47] Article 243Y, Constitution of India, 1950.
[48] Article 280, Constitution of India, 1950.
[49] Article 243Z, Constitution of India, 1950.
[50] Article 243ZB, Constitution of India, 1950.
[51] Article 243ZC, Constitution of India, 1950.
[52] *Supra* note 10 at 24.

make provisions for the organization, election, and the functionality of these committees. The Act says that four-fifths of the members of the DPC shall be from the representatives of the Panchayats and municipalities. This representation in the DPC should be in proportionate to the urban and rural populations.[53] The MPCs are responsible for preparing a draft development plan for the concerning metropolitan areas. Similar to the DPC, the State legislature may make provisions for the organization, election, functions, and the manner of the election of the chairperson of the MPCs. The Act lays down that two-thirds of the members of the MPC should be elected by the elected members of the municipalities and the chairpersons of the panchayats in the concerned metropolitan area. In MPC also the representation should be in proportion to the urban and rural population of that area.[54] The Act did not abolish the existing mechanism at once but allowed the continuation of terms of the then-existing ULBs. Additionally, the Act provided one year to amend or repeal the mechanism inconsistent with the Act of 1992.[55]

The Act of 1992 inserted the Twelfth Schedule to the Constitution, which contains eighteen items namely: urban planning including town planning; regulation of land use and construction of the buildings; planning for economic and social development; roads and bridges; water supply for domestic, industrial and commercial purposes; public health, sanitation conservancy and solid waste management; fire services; urban forestry, protection of the environment and promotion of the ecological aspects; safeguarding the interest of weaker sections of society, including the handicapped and mentally retarded; slum improvement and up-gradation; urban poverty alleviation; provision of urban amenities and facilities such as parks, gardens, playgrounds; promotion of cultural educational and aesthetic aspects; burial and burial grounds, cremations, cremations grounds, and electric crematorium; cattle ponds, prevention of cruelty to animals; vital statistics including registration of births and deaths; public amenities including street lighting, parking lots, bus stops and public conveniences; and regulation of slaughterhouses and tanneries. All these functions are local, hence 74th CAA has brought all these within the preview of the ULBs.[56]

The objectives enshrined in the scheme of 74th CAA were of wide amplitude but when it comes to the actual implementation then most of the States have undermined the spirit of the Act. However, all the States have complied with most of the structural aspects such as elections, the

[53] Article 243ZD, Constitution of India, 1950.
[54] Article 243ZE, Constitution of India, 1950.
[55] Article 243ZF, Constitution of India, 1950.
[56] Twelfth Schedule read with Article 243W, Constitution of India, 1950.

constitution of three types of municipalities, enactment of the State municipal Acts, reservation of seats, the constitution of State Election Commissions, and State Finance Commissions, etc. But the same cannot be said about the provisions related to the constitution of wards committees, DPCs, MPCs, etc. There is no consistency on the tenures, powers, and method of the election to the office of Mayor. Additionally, the Commissioners have been vested with all the executive powers and the Mayors have kept just as a titular head.[57] In a complete disregard to the objectives of the Act of 1992, many States have not devolved the revenue powers to the ULBs. The States' reluctance on devolution, is the major cause of the restricted functional autonomy of ULBs. The next section has analysed this aspect in detail.

III. Challenges

The progress in urban areas largely depends on the availability of quality infrastructure and services. ULBs are created to provide an organized structure of governance that can work towards sustainable development and provide basic amenities at all points of time cost-effectively and efficiently.[58] The 74th CAA also incorporated these aims and provided the supporting mechanism for that. But the ground reality is completely different from these aims. State governments rarely gave serious thought to these objectives. The result is unplanned and unregulated urban expansion. The quality of the basic civic amenities presenting a chaotic condition of the urban spaces and exposing the unsustainability of the existing infrastructure of development.[59]

21st century urban India needs 21st century urban governance. What it has currently, is the urban governance that was not good enough even for the 20th century. Most of the cities in India do not have access to basic civic amenities.[60] India's urban issues have various facets, namely: organizational issues; planning issues; revenue crunch; the issue of public infrastructure; lack of basic civic amenities; lack of coordination among various authorities; gap in authority and responsibility; lack of professionalism in working, etc. For a structured analysis, the above-

[57] Chetan Vaidya, "Urban Issues, Reforms and Way Forward in India", 13 WP 4/2009-DEA.
[58] Rumi Aijaz, "Challenges for Urban Local Governments in India" (Asia Research Centre Working Paper 19, 2007), Available at http://eprints.lse.ac.uk/25190/1/ARCWorkingPaper19RumiAijaz2007.pdf, last visited on 15 August 2021.
[59] Evelin Hust and Michael Mann, (eds.), *Urbanization and Governance in India* 44 (Manohar Publishers and Distributors, New Delhi, 2005).
[60] Dr. M. Ramachandran (eds.), *India's Urban Confusion- Challenges and Strategies* 40 (Copal Publishing Group, New Delhi, 2014).

mentioned problems have been categorized under the following three heads: organisational or structural issues; administrative issues; and financial issues, etc.

In a federal model, the urban centers found their existence under three separate governments, namely: the Central government, the State government, and the municipal government. In such a setting the political influence of the municipal representatives finds very little space. This space becomes more restricted when it comes to the implementation of federal and state plans.[61] On the organizational aspect, it can be observed that the complete government structure has not been put in place as has been expected in the Act of 1992. It seems a kind of implementation failure of urban governance. The State government avoided its constitutional liability to implement the Act of 1992 in letter and spirit. Over the years, the State government has been controlling the executive powers through the Commissioner. Consequently, the office of the Mayor has become ceremonial only. The States' interference in urban matters has made people's representatives subservient to the State government's executive authorities.[62]

Besides this, various parastatal agencies created by the State government also have been encroaching upon the authority and autonomy of the ULBs. For example, special agencies for infrastructure development and specific civic amenities (i.e., water, electricity, or gas supply, etc.) are accountable to the State governments. Additionally, the presence of parallel institutions in the municipalities is also another cause of concern. In many states, the special purpose vehicles which are created for the Public-Private Partnership (PPP) models, are becoming a source of encroachment upon the jurisdiction of the municipal authorities. The newly initiated Central government's flagship program 'Smart City Mission' also requires the constitution of a special purpose vehicle with almost working autonomy is also going to create another parallel institution in urban governance. Too many intervening institutions and often with overlapping jurisdictions and sometimes contradictory goals, result in sub-optimal output and outcome.[63] Considering the complex urban problems of India, there is an urgent need to find an alternative mechanism to make the reform process fast. For this purpose, parallel agencies would be needed but there is also a necessity to create a coordinating mechanism. The

[61] Richard Schragger, *City Power: Urban Governance in a Global Age* 82 (Oxford University Press, New York, 2016).
[62] Ramanath Jha, "The unfinished business of decentralized urban governance in India" February 10,2020, Available at: The unfinished business of decentralised urban governance in India | ORF (orfonline.org), last visited on November 27, 2020.
[63] Ragu Dayal, "Setting a template to solve the urban mess" July 11, 2018, Available at: https://www.thehindubusinessline.com/opinion/setting-a-template-to-solve-the-urban-mess/article24391619.ece, last visited on October 12, 2020.

coordination mechanism should ensure the synchronization of these parallel institutions with the municipal authorities.[64] Besides this, when the civic administration is not performing at the optimum level then issues such as- lack of modern and contemporary framework for spatial planning and design for public utilities (e.g. roads, footpaths, bus stops, water and sewerage networks, and waste management, etc.); weak stance in financial sustainability and financial accountability; poor human resource management specifically in terms of the number of staff and their skills and competency; poor organizational design and performance management; and total absence of the platform for citizens' participation arise as a natural consequence.[65] The creation of parallel agencies shows that State governments even after 25 years of 74th CAA, still doubting the capability of the ULBs. This approach is leading towards the disempowerment of the ULBs. It also shows that the State governments are very reluctant in the devolution of their powers to the ULBs.[66]

The Act of 1992 provided an enabling provision where the citizens' participation in the ULBs can be ensured. The provisions for the creation of the wards committee provide such an opportunity. The ward committees can play the role of transmitting the ground-level issues to the ULBs. But unfortunately, for the last twenty-five years, this revolutionary provision has been kept on paper only and very few States have appointed these committees.[67] Even where it is appointed the manner of their appointment has itself made these grassroots institutions ineffective. There are instances where State Governments, instead of appointing a committee for each ward, have appointed a committee for more than one ward. This has created a kind of situation that a ward committee is representing lakhs of people from multiple wards. The present system of the wards committee is lacking the required proximity among the people of wards and their representatives.[68] Although, the introduction of these committees was a good initiative to further the process of decentralization it is yet to deliver the expected results. Hence, the organization of the wards committee needs a complete overhaul to make it an agency for people's participation.

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[64] Mathew Idiculla, "City Plight: Indian states' tight lease on urban governance" November 01, 2018, Available at: https://caravanmagazine.in/government/indian-states-tight-leash-on-urban-governance, last visited on October 18, 2020.

[65] ASIC, "5th ASICS Report" 2 (2017), Available at: www.janaagraha.org/asics/report/press/ASICS-2017-Press-Release-Surat.pdf, last visited on November 27, 2020.

[66] Mathew Idiculla, "The missing tiers" June 14, 2018, Available at: https://www.thehindu.com/opinion/op-ed/the-missing-tiers/article24156744.ece, last visited on October 10, 2020.

[67] *Supra* note 56 at 15.

[68] Parth J. Shah, Makarand Bakore, *Ward Power: Decentralised Urban Governance* 5 (Centre for Civil Society, New Delhi, 2006).

On the administrative side, there are various facets of the problem. The main issues on this aspect are- planning-related issues, lack of coordination among the authorities, inefficient delivery of civic amenities, and lack of sense of responsibility. The process of planning plays a big role in fulfilling the present needs as well as in ensuring the availability of future requirements. While considering the importance of the planning, the Act of 1992 has directed the States to constitute DPCs and MPCs. It was done to create a roadmap for holistic development. The 74th CAA expected that the DPCs and MPCs would prepare a draft development plan which would cover the urban as well as rural development needs of the concerned district. But due to the directive nature of these provisions, many States have not even constituted these committees. And even where these committees have been constituted, the States' authorities are not allowing them to work as per the Constitutional mandate.[69] The measures for increasing their effectiveness have been marked by hesitancy, apprehension, and avoidance.[70] The result is that there is no correlation or connectivity in the development plans of the urban and the rural areas.

The problem is more aggregated by the fact that people are pouring into the cities; cars are pouring onto roads; besides other concerning factors, even the environment looks grim. This all leading to the unplanned growth of cities which indirectly leading to the widespread slum areas adjacent to the new and old urban spaces. Cumulatively, all this is creating a kind of urban development where no proper arrangement of civic amenities is available. The problem is further enraged by the fact that the political opportunism provides the opportunity to the political opponents to manipulate the vote bank of these slums inhabitants by promising them the conversion of their slums into regularised colonies. Hence, it can be observed that these factors are leading to a situation where urbanization instead of becoming the engine of growth is becoming a source of many problems.

An effective administration plays a big role in urban life. Indeed, the more an urban space is well administered, the more its facilities would be organized and systematic. In such an urban area the basic civic amenities would be available at all the time or at least at the time of their need. But the availability of civic amenities cannot be a standalone provision and it correlates with other factors of urban development such as planning, coordination, administration, and

[69] Nina C George, "Give us better civic amenities: Experts" December 27, 2018, Available at: https://www.deccanherald.com/metrolife/give-us-better-civic-amenities-710140.html, last visited on May 18, 2020.
[70] *Supra* note 3 at 203.

financial strength. For example, if there is no system for analysing the cost-effectiveness of municipal services then in the long run financial condition of the municipality is bound to suffer. Similarly, if there is no procedure to fix the accountability and effectiveness of the administration then ultimately the basic municipal functions and services would be sub-standard. Considering these aspects, when we look at India's municipal governance then a bare look gives us an indication that the basic standard of civic amenities is rarely available in its cities. This sub-standardization of civic amenities has become a norm for most of the urban inhabitants in India.[71] The disconnect between the residents and the ULBs is also one of the causes of this problem. This problem is further compounded by the unskilled human resource of the ULBs which is causing the inefficiency of their work culture.

Revenue provides lifeblood to the working of any institution and the functioning of the ULBs is not an exception to this basic rule. Jane Jacob has rightly put the city's growth in the following words- "City regions are not defined by natural boundaries because they are wholly the artifacts of the cities at their nuclei; the boundaries move outwards- or halt-only as city economic energy dictates".[72] Without proper arrangement of financial resources, the administration and other connected aspects are bound to suffer from under-performance and bad administration. While considering the importance of the financial aspect, the 74th CAA has made provisions for resource generation and revenue support to the ULBs. However, the provisions of the 74th CAA are of directory nature and State governments are required to make a law to provide the devolution of the taxation powers to the ULBs. But in reality, State governments are reluctant to make the municipalities financially independent. Consequently, the ULBs are left with very limited taxation or other forms of revenue collection powers. This is further strengthening the existing dependency factor among the ULBs. Consequently, it is encouraging the ULBs to not making the effort which may help them to create new avenues for revenue generation. Besides this, there are also other reasons for this weak financial condition of the ULBs. For example, in India where resources and plan implementation are

[71] Neetu Chandra Sharma, "Lack of infra, access, quality key hurdles for national health policy" March 19, 2019, Available at: https://www.livemint.com/politics/policy/lack-of-infra-access-quality-key-hurdles-for-national-health-policy-1553018075376.html, last visited on November 14, 2020.

[72] Jane Jacobs, *Cities and the Wealth of Nations: Principles of Economic Life* 45 (Random Publishing House, New York, 1984).

largely controlled at the national level and State level then importance to the devolution of financial powers would of little importance.[73]

The role of the State Finance Commission (SFCs) in this context becomes more relevant. The SFC reviews the financial conditions and takes care of the extra funding needs of the ULBs via grant-in-aid and the distribution of the tax receipt. But the problem arises when most of these SFCs formulate the fiscal packages without having due consideration of the functional liabilities of municipalities. Although the Central Finance Commission (CFC) also provides for special grants to ULBs, the amount given under this grant is insufficient when compared to their responsibilities. The ULBs have various ways to generate revenue. For example, it can generate resources through- tax revenues (e.g. property tax, entertainment tax, taxes on advertisements, professional tax, water tax, tax on animals, lighting tax, pilgrim tax, market tax, tolls, octroi, and various cesses, etc.); non-tax revenues (e.g. rent on municipal properties, fees, fines, royalty, interests, user charges, water charges, sanitation charges, sewerage charges and so on); grants (for various Central and State government's schemes and programs); devolution (made based on the recommendation of the SFCs); loans (from State governments and other financial institutions); and other market instruments (municipality bonds). Although a mere glance at these resources creates a presumption that ULBs are having a wide range of financial resources, in reality, due to political reasons, they are imposing the lowest possible rates of taxes. Resultantly, the total revenue generated from these efforts is not enough to provide even the average level of civic amenities. In many states, the governments do not provide adequate funds to ULBs due to political reasons and other reasons including lack of availability of funds. And, if the municipalities want to raise debt from the market, then they usually do not have adequate guarantees or collateral. Moreover, the land assets of the municipalities are heavily encroached on by slum dwellers and they cannot take action due to the reason that the political opponents might escalate the issue and could use it in the next election.[74] Some people say that the slums are part of urbanization but that argument is not sustainable when we look at the highly urbanized countries such as Brazil, which have the lowest slum population of its total urban population. The narrative suggests that the widespread

[73] UN Habitat, "Empowering local Authorities in India" November 20, 2014, Available at: https://unhabitat.org/empowering-local-authorities-in-india/, last visited on November 15, 2020.
[74] RMS Liberhan, "Why Indian states are failing" December 23, 2017, Available at: https://www.dailyo.in/voices/civic-bodies-smart-cities-municipal-polls-infrastructure-cities-villages-towns/story/1/21334.html, last visited on March 01, 2021.

slums in and around India's urban space are a result of misgovernance.[75] So, in the circumstances where the organization lacking coordination and effectiveness, the administration is lacking the efficiency and skills up-gradation and more importantly, there is a lack of financial resources[76], then the basic municipal services are bound to be of below-average standard. Thus, with the above-given analysis it can be said that in such a situation, the overall urban development is bound to suffer miserably.

IV. Conclusion and Suggestions

The rising pace of India's economic development seeks urgent attention to the challenge of widespread mismanagement and unplanned urbanization. Without managing its urban crisis and making special efforts for facilitating holistic urban development, India cannot achieve the fast pace of development. Notwithstanding its low level of urbanization (i.e., 30 percent of the total population), urbanization in India has taken place in a largely unplanned manner. This is also because spatial planning has not been made an integral part of socio-economic planning.[77] Further, in the upcoming decades, the fast-developing Indian economy can be given a boost provided, its urban mess is properly managed and cured. The cities, no doubt is rightly considered as an engine of a country's growth and in the Indian context, this engine needs urgent attention on all the aspect of its urban life. The above-given analysis makes it clear that the present structure of urban governance in India is not sufficient to take the urban development at an excelling pace. Even after twenty-five years of its implementation, the urban management has not got the shot in the arm as was expected by the 74th amendment Act.

The challenges analysed above should not be considered in isolation. On the contrary, their interrelation with each other is the major cause of concern. None of these challenges can be sorted out without resolving the issues created by the other aforementioned challenges. For example, the challenges on the organizational side cannot be dealt with, without making simultaneous arrangements on the administrative and financial side. Hence, the co-relative and connected nature of the problem requires a multifaceted approach to solve India's urban problem. At the same time, some futuristic initiatives would also be required so that a new form of urban initiative can become a model to be emulated on the existing urban settlements.

[75] TCA Sharad Raghavan, "The world of slums" February 12, 2015, Available at: https://www.livemint.com/Politics/7SdXYSUbFrvC9yrlhUidOO/The-world-of-slums.html, last visited on January 10, 2021.
[76] *Supra* note 63.
[77] *Supra* note 10 at 20.

To deal with the challenges, some new and innovative measures would be needing and technology being one of the fastest enablers of development can be employed in transforming India's urban space. Additionally, the best practices of the urban centers from around the world can be utilized wherever suitable.

The above-given analysis clearly shows that there is an implementational failure of the 74th amendment Act. The Act expected that State governments would play the enabling role in the process of decentralization. It was also expected that State Governments by appointing the ward committees would facilitate the process of decentralization. But it has not happened on the ground. However, these issues can be sorted out by composing per ward each committee, as it would not only allow the people to have their representation but it would also provide a connection to the basic grievances of people living in the ward. It would further create a competition among the wards, to put forward the better proposal related to their area. More importantly, the representatives in the municipalities would be having a sensitive attitude towards the resident of the urban area. Another issue that requires attention is the formation and meaningful working of the DPCs and MPCs. These planning committees can help the district and metropolitan area concerned to prepare such development plans which would not only covers the initiatives required for the present time but also help in preparing the futuristic plans for the transitioning areas. And for this, the Rurban (including rural and urban) planning would be of prime importance. It will not only help in creating development at the micro-level but would also impede the rural to urban migration. Further, there is an urgent need to ensure the availability of the district's development-related reliable data, which can become an effective tool for the creation of reality-based plans.

Another major challenge India's urban governance is facing is widespread incoordination. There are a plethora of agencies and many of these agencies are having autonomy in their functioning. So, this creates space for the frequent encroachment of each other's jurisdiction by these agencies. There should be some sort of collaboration among the authorities and agencies working at the ULB level. These collaborative actions may take many forms, which is very much depending on specific context, charge, and goal.[78] Additionally, to tackle this issue there is an unavoidable need for a common coordination authority at the district level which can maintain and bring harmony among the function of all the authorities. The proposed

[78] Kirk Emerson and Tina Nabatchi, *Collaborative Governance Regime,* 82 (Georgetown University Press, Washington, DC, 2015).

coordination authority needs to be a regular and routine feature of the district government setup. Further, this coordination authority should be composed of representatives from other public organizations and other domain experts from outside the public sector. This agency should be made accountable to the representatives of the people in ULBs. Besides this, there is an urgent need to put in place the mechanism for timely checks and accountability. Financial accountability can be ensured by the effective implantation of mandatory annual auditing. Presently, the office of the mayor is mere of a ceremonial nature. By amending Part XI-A of the Constitution, the office of the mayor should be made directly elected one. By incorporating this suggestion, the indirect intervention of the State executive (through municipal commissioner) can be checked and a true people's representative would be in a position to take the required initiatives, and thereby the people would also be able to make him responsible. At present the ULBs lacking a common agency that can remain solely focused on the regulatory aspect and can help in the facilitation of effective and efficient urban service delivery. On the financial aspect, a new body should be constituted which can help in financing the urban infrastructure projects. Although, there is Housing Urban Development Corporation (HUDCO) its domain is restricted to the housing sector only. It is suggested that either the HUDCO's scope should be enhanced with funding options to all kinds of public infrastructure in urban areas or a separate agency for this purpose should be constituted. While recognizing the fact that the growth engines will be developed mainly by private sector investment, '*vision 2020'* emphasizes the need for the State Government to adopt a new role, from being primarily a controller of the economy to a facilitator and catalyst of economic growth.[79] Additionally, there is an urgent requirement for overhauling the State Finance Commissions, their role should be revitalized to bolster the municipal finances. Another most ignored aspect is taxation. It is high time when the taxation base should be strengthened and a transparent mechanism should be evolved so that the resident of the municipal area can see the correlation between the quality of services delivered by municipalities and their rates of taxation. On the revenue aspect of the ULBs, besides the conventional sources, there is an urgent need to look into the more resourceful unconventional methods. For example- issuance of municipal bonds; monetizing the municipal assets; venture capital financing; crowdsource financing; land pooling and employing technology to generate energy from waste cost-effectively, etc should be utilized to strengthen the financial capacity of the ULBs. The public entities which own land in cities can

[79] Nirmala Rao, *Cities in Transition: Growth, Change and Governance in Six Metropolitan Areas* 118 (Routledge, London, 2007).

sell or lease such land and use the proceeds to finance infrastructure investment.[80] The effective combination of conventional and non-conventional revenues resources would help in making the municipalities financially independent. This financial independence would encourage the municipalities to take initiative for delivery of the quality municipal services.

Additionally, municipalities can use following methods of an overall good management of the urban areas- maintenance of financial data related to revenue and expenditure; outsourcing of the municipal services by application of BOT (build operate and transfer) and PPP (public-private partnership); balancing the user charge liability and social justice; linking of GIS (Global Information System) and E-tools for fixation and recovery; provisions for incentivisation to the taxpayers; resource generation must be part of the development planning; outsourcing the functions to the cost-effective service providers; use of cutting edge technology; using the competitive procurement mechanism; rightsizing the institutional machinery; proactive efforts for formulating citizens' charter; organising public representations and hearings for public grievances; proactive disclosure under Right to Information Act, 2005; social audits of public work, expenditure and outcome data; tie-up with private developers for slum rehabilitation and social audit for slum development activities etc.[81]

To make the urban reforms effective, recently the Central government has also initiated some urban rejuvenation programs such as Smart City Mission, Atal Mission for Rejuvenation and Urban Transformation (AMRUT), Heritage City Development and Augmentation Yojana (HRIDAY), and Pradhan Mantri Awas Yojana (PMAY-U), etc. Under these urban rejuvenation missions, the outlays for Smart City Mission and AMRUT are INR 48,000 crores and INR 50,000 crores respectively for five years. A major part of the funds for these missions would be mobilized by the ULBs from private investment. The successful implementation of these missions ultimately depends on the ULBs efficacy in resource mobilization and service delivery. Thus, in these circumstances, the financial empowerment of the ULBs is not a matter of choice but a necessity. The same reality was considered by the Central Finance Commission (CFC), and from the Tenth CFC onwards every CFC has been continuously increasing the central grants for the ULBs. For example, the 13th Finance Commission (FC) recommended

[80] *Supra* note 60 at 21.

[81] Yashwantrao Chawan Academy of Development Administration, "Best Practices in the Financial Management of Urban Local Bodies in India", Available at: https://fincomindia.nic.in/writereaddata/html_en_files/oldcommission_html/fincom13/discussion/report08.pdf, last visited on January 19, 2021.

the allocation of INR 23,111 crores to ULBs to strengthen municipal finance and urban governance in India. Again, taking this forward the 14th FC recommended a grant of INR 87,144 crores to ULBs in all States and Union Territories. Out of this grant amount the 80% is given as Basic Grant and 20% as a Performance Grant. The grant given by the 14th FC is meant to increase the ULBs revenues, ensuring audit of accounts and notification of Service Level Improvement Plans in respect of basic services.[82]

In concluding words, it can be said that the ULBs in India are going through a transition phase where the quality of the service in some ULBs can be found of the standard level and at the same time other ULBs are not even able to pay the salaries of their staff. However, there are grave issues with the overall organization and functioning of the ULBs in India but these can be solved only by empowering every aspect of the ULBs and the major role in this can be played by the State Governments. The State Governments by devolution of three Fs (funds, functions, and functionaries) and allowing the ULBs to take the help and investment from the private sector can be a way forward. And on the people's role, it can be said that citizens of the municipal areas are the real asset, and they can be the change-makers and that can be materialized by deepening their engagement in the city administration. Another way to bring the change in ground reality is, by creating a partnership between the government, community, and the NGOs. The more are the governed closer to the government the more there would be transparency, effectiveness, and efficiency. And all this would lead to urban transformation which would ultimately help in the country's transformation.

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[82] Sunita Sanghi, Ms. Jaya Priyadarshini, et.al., "Financially Empowering Municipalities: Way Forward", Available at: https://niti.gov.in/content/financially-empowering-municipalities-way-forward, last visited on September 23, 2020.

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Analysing Clean Development Mechanism of Kyoto Protocol in Achieving Sustainable Development and its Relevance under Paris Agreement

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Abstract

This paper discusses the environmental implications and role of the carbon market specifically the clean Development Mechanism of the United Nations Framework Convention on Climate Change and its Kyoto Protocol. First, the paper discusses the link between the Kyoto Protocol and CDM and the role of the Paris agreement in relation to clean development mechanism and explains the purpose of CDM i.e. to achieve sustainable Development. Then, the analysis of the operational aspect of CDM its design and methodologies in relation to environmental integrity and ambition is discussed. The paper presents an analysis of the potential pre-2020 and post-2020 carbon credit supply from CDM projects and programmes of activities. It further analyses the limitations and risks of carbon markets. The paper notes that Parties can use the experience gained and lessons learned from the CDM to be used in the new generation of carbon markets post-Kyoto and with the Paris agreement.

I

Introduction

Climate change has emerged as one of the most important environmental issues facing the international community. International concern about climate change has led to United Nations Framework Convention on Climate Change and its Kyoto Protocol. The convention provides a framework for the intergovernmental efforts to address climate change. The 'ultimate objective' of the convention is the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would "prevent dangerous anthropogenic interference with the climate system" within a time frame that allows the ecosystems to adapt naturally, to ensure

that food production is not threatened, and to permit sustainable development.[1] It is maintained by recognising the need eventually to stabilize atmospheric concentrations of greenhouse gases, the objective acknowledges climate change as a problem and helps to legitimise it as a matter of international concern.[2] Since its emergence in the early 1990s, the international carbon market has been a key element of the international climate regime defined by the Kyoto Protocol.[3] However, the degree of support it received and its fortunes over time have been varying substantially over time.[4]One of the major outcomes of the Kyoto Protocol is international market-based mechanisms creating a new commodity: the carbon market. However, now the Koto Protocol will come to an end this year i.e., in 2020 and now is replaced by the Paris agreement, but the linkage of carbon-markets with the Kyoto Protocol and its future under the Paris agreement becomes important to analyses.

II

Kyoto Protocol and Clean Development Mechanism

The Kyoto Protocol was adopted as the first addition to the United Nations Framework Convention on Climate Change (UNFCCC).[5] The protocol provided several means for countries to reach their targets. One means was the international program called the Clean Development Mechanism (CDM), which encouraged developed countries to invest in technology and infrastructure in less-developed countries, where there were often significant opportunities to reduce emissions.[6] Under the clean development mechanism, the investing country could claim the effective reduction in emissions as a credit toward meeting its obligations under the protocol.[7] Although the Kyoto Protocol represented a landmark diplomatic accomplishment, its success was far from assured.[8] However, at the 18th Conference of the Parties (COP18), held in Doha, Qatar, in 2012, delegates agreed to extend

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[1] United Nations Framework Convention on Climate Change, Article 2.

[2]Transition pathways for the Clean Development Mechanism under Article 6 of the Paris Agreement. Options and implications for international negotiators, Freiburg, Germany, available at: https://www.perspectives.cc/fileadmin/user_upload/Transition_pathways_for_the_CDM_2019.pdf (Visited on July 15, 2020).

[3]*Ibid.*

[4]*Ibid.*

[5]Encyclopedia Britannica, available at: https https://www.britanica.com// (last visited on July 15, 2020).

[6] *Ibid.*

[7] *Ibid.*

[8]*Ibid.*

the Kyoto protocol until 2020.[9]The second commitment period of the Kyoto Protocol (CP2) will come to an end on 31 December 2020.[10] The focus and attention have now shifted to the Paris Agreement. Countries will begin to implement their Nationally Determined contributions—in which they outline their mitigation and adaptation ambitions—and have already begun negotiating a new rulebook under the Paris regime.[11]

The CDM was established under Article 12 of the Kyoto Protocol to support projects that reduce emissions in poor countries (so-called 'non-Annex-I countries') and contribute to 'sustainable development'.[12] The mechanism allows rich countries (so-called 'Annex-I' countries) or their firms to purchase certified emission reductions (CERs) from projects in non-Annex-I countries, provided the project employs approaches and technologies approved by the clean development mechanism executive board (CDM EB).[13] CER is only created if the project is approved by the two host countries (one from Annex-I and other from non-Annex –I) and the CDM EB, whose approval is given after the project has satisfied a number of different procedural stages including 'validation', 'registration', and eventually issuance of certified emission reductions.[14] In particular, the emission reductions must be judged by an independent verifier to be real, measurable, and 'additional' to any that would occur in the absence of certified project activity.[15]

The clean development mechanism is also meant to help developing countries achieve sustainable development by, for example, facilitating the transfer and/or development of low-emission technologies.[16] The clean development mechanism thus offers incentives for developing countries to maintain their active participation in the Kyoto Protocol.[17] The certified emission reductions generated by such projects can be used by Annex-I Parties to help meet their emission reduction targets, while the project also helps the non-Annex-I Parties to achieve

[9]*Ibid.*
[10] What is the future of CDM, available at: http://www.edf.org/sites/default/files/document/Potential_Supply_of_CDM_Credits.pd (Visited on July 15, 2020).
[11]*Ibid.*
[12] Gurmit Singh, Understanding Carbon Credits 38 (Aditya Books Private Limited, New Delhi, 2009).
[13]*Ibid.*
[14]*Ibid.*
[15]*Ibid.*
[16]*Ibid.*
[17]*Ibid.*

sustainable development, and thus contribute to the ultimate objective of the Convention.[18] Article 12 of the Convention specify the purpose of CDM which reads:

> The purpose of the clean development mechanism shall be to assist Parties not included in Annex-I in achieving sustainable development and in contributing to the ultimate objective of the Convention and to assist Parties included in Annex-I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.[19]

Thus, CDM has to balance two objectives reflecting two different positions – one of the industrialized countries (generation of cost-effective CERs), and the other of developing countries (promotion of sustainable development).[20]

III

Paris Agreement a Foundation of New Generation of Market Mechanism

The landmark accord, signed by all 196 signatories of the UNFCCC, effectively replaced the Kyoto Protocol.[21] The conference of parties (COP 21) or the Paris Climate Conference led to a new international climate agreement but non-binding, applicable to all countries, aiming to keep global warming below 2°C, in accordance with the recommendations of the Intergovernmental Panel on

Climate Change (IPCC).[22] The Paris agreement is enhancing the implementation of the United Nations Framework Convention on Climate Change (UNFCCC) including the objective of the Convention and it aims to strengthen the global response to the threat of climate change, in the context of sustainable development.[23]Paris agreement further recognises that some Parties choose to pursue voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation and adaptation actions and to

[18]*Ibid.*
19 *Ibid*
[20] *Ibid*
[21]COP-21: The Key Points of the Paris Agreement, *available at:* https://www.diplomatie.gouv.fr/en/french-foreign-policy/climate-and-environment/2015-paris-climate-conference-cop21/cop21-the-paris-agreement-in-four-key-points/ (Visited on July20, 2020).

[22]*Ibid.*
[23] *Id.* Article 2(1).

promote sustainable development and environmental integrity.[24]Under the Paris agreement, a mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development is hereby established under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement for use by Parties on a voluntary basis. It shall be supervised by a body designated by the Conference of the Parties serving as the meeting of the Parties to this Agreement.[25]

Article 6 of the Paris Agreement lays the foundation for a new generation of market mechanisms that can provide cost-efficient solutions for countries reaching their mitigation targets as identified in the Nationally Determined Contributions (NDCs).[26] This new generation of market mechanisms builds upon the experiences and lessons learned from the first generation of market-based mechanisms under the Kyoto Protocol (KP): Joint Implementation (JI) and the Clean Development Mechanism (CDM).[27] Article 6 of the Paris Agreement contains three separate mechanisms for "voluntary cooperation" towards climate goals: two based on markets and a third based on on-market approaches.[28] The first mechanism would allow a country that has beaten its Paris climate pledge to sell any overachievement to a nation that has fallen short against its own goals.[29] The second mechanism would create a new international carbon market, governed by a UN body, for the trading of emissions reductions created anywhere in the world by the public or private sector.[30] This new market is sometimes referred to as the "Sustainable Development Mechanism" (SDM). It would replace the Clean Development Mechanism (CDM), which operated under the predecessor to the Paris Agreement, known as the Kyoto Protocol, which gave developed countries legally binding emissions targets that applied from the start of 2008 until 2012.[31]

[24] *Id.* Article 6(1).
[25] *Id.* Article6 (4).
[26] Supra note 21.
[27] Supra note 2.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

IV

An Analysis of the Operational Aspects of the Clean Development Mechanism

(i) Project Eligibility under the Clean Development Mechanism

The kind of projects that are eligible under CDM should provide environmentally additionality and sustainable development.[32]

(a) Environmentally Additionality: The concept of 'additionality' of the emission reduction achieved by the CDM project lies at the heart of CDM rules.[33] Article 12 of the Kyoto Protocol states that projects must result in "reductions in emissions that are additional to any that would occur in the absence of project activity".[34] In terms of environmentally additionality, the CDM projects must lead to real, measurable, and long-term benefits related to the mitigation of climate change. The additional greenhouse gas reductions are calculated with reference to the additional baseline.[35]

Despite a long debate by researchers and interest group representatives about the concept of additionality, negotiators in the UNFCCC process were unable to agree on an interpretation of the additionality criterion.[36] They, therefore, repeated the wordings of the Kyoto Protocol in the Marrakesh Accord of 2001 which state that 'a clean development mechanism project activity is additional if anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered clean development mechanism project activity'.[37]Conference of Parties/Meeting of Parties was not able to agree on the technical definition of additionality.[38]The executive board was left with the task to define detailed rules for additionality.[39] The Conference of Parties/Meeting of Parties has repeatedly stressed that key additionality rules defined by the executive board are not mandatory; it has not cancelled any additionality rules specified by the executive board.[40]

Accordingly, the purpose of the additionality requirement includes:

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[32] Supra note 12 at 61.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] David Freestone and Charlotte Streck (eds.), Legal Aspects of Carbon Trading Kyoto, Copenhagen and Beyond 248-256 (251) (Oxford University Press, New York, 2009).
[37] *Ibid.*
[38] *Ibid.*
[39] *Id*. at 251.
[40] *Ibid.*

(b) To protect the environment integrity: The importance of 'environmental integrity' has already been made clear by the first Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP-1) when adopting the Marrakesh Accords.[41] In decision 2/CMP.1, the Parties emphasized that 'environmental integrity' is to be achieved through sound modalities, rules, and guidelines for the mechanisms, sound, and strong principles and rules governing land use, land-use change, and forestry activities, and a strong compliance regime'.[42] CMP.3 demanded that the EB, the main administrative body in the CDM, strive to take concrete actions to improve, and where possible simplify the operational aspects of the CDM such as review processes, ensuring that its environmental integrity is not affected.[43]Similarly, CMP.4 encouraged the EB 'to approve, more methodologies with broad applicability conditions, in order to increase the availability of different technologies and measures, ensuring ease of use without jeopardizing the environmental integrity of the clean development mechanism'.[44]

(c) To ensure sustainable development in non-Annex-I countries: The Protocol specifies that the purpose of the CDM is to assist non-Annex-I Parties in achieving sustainable development.[45] However, there is no common guideline for the sustainable development criterion and it is up to the developing host countries to determine their own criteria and assessment process.[46] The criteria for Sustainable Development may be broadly categorized as:[47]

1. Social Criteria: The project improves the quality of life, alleviates poverty, and improves equity.[48]

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[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44]Decision-/CMP.4 (2008) 'Further guidance relating to clean development mechanism', para 33. Developing countries view that low cost mitigation projects would be undertaken under CDM, thus bestowing early benefits upon Annex-I Parties and leaving host nations with high cost-options under the future emission mitigation region. Anil Agarwal et. al. (eds.), Global Environmental Negotiations-1 78 (1999). Additionality partially addresses this problem because it's considered that lowest cost projects with high returns will not qualify because they would have received investment in any case.
[45] Supra note 12 at 61.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*

2. Economic Criteria: The project provides financial returns to local entities, results in a positive impact on the balance of payments, and transfers new technology.[49]

3. Environmental Criteria: The project reduces greenhouse gas emissions and the use of fossil fuels, conserves local resources, reduces pressure on the local environments, provides health and other environmental benefits, and meets the energy and environmental policies.[50]

At the time of project approval by the host country, it must provide a written confirmation that the project activity assists the host developing country in achieving sustainable development.[51] The CDM Rules under the Marrakesh Accords allow the non-Annex-I Parties to establish their own standards and criteria for determining whether a proposed project activity contributes to their sustainable development priorities or not.[52] Further, it provides that if the project participants or the host Party consider the environmental impacts of a project significant, an environmental impact assessment of the project be conducted in accordance with the environmental impact assessment [EIA] procedures of the host Party.[53]

During the 'activities implemented jointly' pilot phase, very few countries hosting the projects had developed sustainable development as an explicit criterion of the projects, and thus very few countries hosting these projects have developed criteria to evaluate sustainable development contributions of these projects.[54] Moreover, it is pointed out that some non-Annex-I Parties do not have the technical and institutional capacity, and resources to establish their own standards or criteria for determining whether a proposed project contributes to their sustainable development priorities (for example, some Parties, including those in both Annex-I and non-Annex-I, have not yet incorporated the concept of sustainable development into their national development strategies).[55]

Moreover, it is stated that the bilateral structure of the CDM would limit international involvement in the process of evaluating the contributions of the CDM projects towards

[49] *Ibid.*
[50] *Ibid.*
[51] CDM Annex, para. 40 (a); Bonn Agreements, para VI (3) (1).
[52] CDM Annex, para. 37(c) and Appendix B, para.2 (e).
[53] *Ibid.*
[54] Cathleen Kelly and Ned Helme, "Ensuring CDM Project Compatibility with Sustainable Development Goals" Centre for Clean Air Policy 4 (2000).
[55] R.K. Dixon (ed.), United Nations Framework Convention on Climate Change Activities Implemented Jointly Pilot Phase: Experiences and Lessons Learned 45 (Springer, Netherlands, 1999).

sustainable development, and would thus reduce the credibility of sustainable development evaluations.[56] In fact, the bilateral structure of the CDM project would give the Annex-I countries the opportunity to exercise their 'muscle power' to include lax criteria for sustainable development. Lastly, competition among non-Annex-I Parties to attract CDM investments may create an incentive to set very low standards to keep project costs low.[57]

To overcome the above problems, it has been proposed that the COP reach a decision on a list of types of projects that would be prohibited from receiving credit under the CDM.[58] Under the Marrakesh Accords, however, the COP did not draw such a tentative list but merely called upon the Annex-I Parties to 'refrain' from undertaking nuclear projects as eligible projects under the CDM.[59]

However, there is no definition of a 'project' under the Kyoto Protocol or the CDM Rules. Article 12(5) of the Protocol merely mandates, in vague terms, that the projects undertaken should be voluntary, should promote sustainable development, and should lead to emission reductions that would have occurred without the project.[60] Only land use, land-use change, and forestry (LULUCF) activities (except afforestation and reforestation projects) are excluded from the CDM.[61] Under the CDM Rules, the term 'project activities'[62] is used, indicating the inclusion of projects that are not physical in nature.[63] In addition, such a liberal interpretation of the term 'project activities' would bring to the forefront the problem of determination of environmental additionality in such projects.[64]

[56] Supra note 12 at 5.
[57] *Ibid.*
[58] Preamble to Decision 17/CP.7.
[59] *Ibid.*
[60] COP-7 Report, Decision 17/CP.7, Draft Decision - /CMP-1, para.7 (a). UN Doc. FCCC/CP/2001/B/Add.2 [hereinafter Decision 17/CP.7].
[61] *Ibid.*
[62] Project activities refer to the projects undertaken by the Annex-I Parties in developing countries, pursuant to Article 12 of the Kyoto Protocol.
[63] For instance, in the Decision 17/CP.7, Annex [hereinafter the CDM Annex] alone, the term project activities is used at paras. 4, 5, 22, 23, 27, 37, 39, 45, 48 and 55. By the liberal interpretation of the above term the states have hinted at the inclusion of policies, plans and programmes as being eligible under the CDM.
[64] *Ibid.*

V

An Analysis of the Institutional Aspects of the Clean Development Mechanism

There are three approaches, which have been envisaged for structuring the CDM machinery.[65]

(i) The Portfolio Approach

The portfolio approach stresses the multilateral character of the CDM.[66] The basic idea behind the approach is to 'shield' host countries from direct buying and selling CERs.[67] The CDM investments are channelled through a global Fund created especially for this purpose.[68] All projects are registered with the Fund, which is controlled by the Executive Board.[69] Correspondingly, all CERs accrue to the Fund. Investors buy CERs from the CDM itself, which channelizes the monies received to the host countries that have submitted 'bundles' or portfolios of projects to the CDM for certification.[70] Thus, financial contributions to the CDM are simply the receipts from CERs sold to Annex-I Parties.[71] These receipts are channelled back to the countries providing the CERs.[72]Under this arrangement, investors are projected from risks of non-materialization of credits, they can participate with a small amount of capital, and there is no direct link between the investment and the carbon credits accruing from projects.[73]It is argued that this approach would promote an equitable distribution of CDM mitigation projects.[74] The portfolio approach offers a number of relatively straightforward options to ensure that all geographical areas benefit under the CDM, for example, through a requirement that a certain percentage of a portfolio must be based on geographically balanced production of CERs.[75] In terms of the

[65] Jose Goldemberg (ed.), Issues and Options: The Clean Development Mechanism 68 (New York: UNDP, 1998).
[66] *Id.* at 55.
[67] *Ibid.*
[68] Sujata Gupta and Tariq Banuri, Clean Development Mechanism: An Economic Analysis 84 (Asian Development Bank Manila, 2000). In the multilateral approach, the investor and the host Party do not interact directly through the market. Instead, the investor places investment funds at the disposal of the centralized body (presumably the Executive Board), which in turn identifies the potential host as well as a suitable CDM project, subject of course to the approval of the host country government. Ibid.
[69] *Ibid.*
[70] Supra note 12 at 55.
[71] *Ibid.*
[72] *Ibid.*
[73] Supra note 65 at 84.
[74] *Ibid.*
[75] *Id* .at 55-56.

sources of the funds, the multilateral approach would attract resources.[76] Thus the approach builds on a foreign assistance framework along the lines of GEF.[77]

(ii) The Bilateral Approach

Under the bilateral approach, companies or governments from Annex-I Parties invest directly in projects in the developing countries and receive credits for doing so, as originally conceived for joint implementation, but under the rules agreed and administered by the Executive Board.[78] Under this approach, the CDM is designed to ensure that investor and the host countries (and their respective private sectors) are given the maximum amount of choice to determine the nature of CDM projects, their financial contributions, and the resulting sharing of CERs;[79] with minimal interference from a centralized, international bureaucracy.[80] Thus, the CDM machinery merely comprises a clearing-house mechanism, which puts investors in touch with the interested hosts to reduce transaction costs, and serves as an independent certification process to generate environmental integrity and business confidence in the system.[81] In terms of the sources of funds, the bilateral structure attracts predominantly private resources, which overlap with foreign direct investment.[82]

This approach cannot identify a role for the CDM in arranging funding of certified project activities mentioned under Article 12(6) as project development and finance are to be market-driven. In short, the CDM is merely viewed as a flexible mechanism whose function is to reduce Annex-I compliance costs by generating cheap emission reduction 'offsets' overseas.[83]

The bilateral approach, typified by the joint implementation provisions of Article 6, with its inequities may work to the determent of sovereignty and interests of the developing countries.[84] The developing countries accepted the CDM because it sanctions a multilateral form of joint implementation that respects host country priorities and national sovereignty (this

[76] *Ibid.*
[77] *Id*. at 85.
[78]The CDM would define certain rules and exercise scrutiny over certification, but the development and implementation of CDM projects, and distribution issues relating to benefits and risks, would be dealt with in a contractual manner on a project-by-project basis by the Parties and entries involved in the project.
[79]The credits are owned by the concerned Parties.
[80] Supra note 60 at 55.
[81] *Ibid.*
[82]The predominant role of private investment would reinforce the inequitable distribution of CDM projects, with major chunk of these projects going to ten to twenty developing countries which have the infrastructure, markets and government support to benefit from the CDM projects.
[83]Supra note 60 at 55.
[84]*Ibid.*

may be achieved by allowing the host countries to offer portfolios of projects that already form part of their sustainable development strategies, rather than devising new CDM projects that they fear may be investor-led).[85] Further, it is feared that uncontrolled private sector partnerships with the Annex-I counterparts may lead to the introduction of inappropriate technologies or hazardous technologies in these countries.[86] It could even constrain their economic growth (by, for example, committing them to preserve forests when they may need land for growing food).[87]

(iii) The Unilateral Approach

Under the unilateral approach, entities involved in the agreement are from the host country.[88] The certified credits from the CDM project accrue initially to the investing Party, which later sells them in the open market.[89] The approach emphasizes the market orientation of the CDM process, creating in effect a new market, in which the non-Annex-I Parties may have a comparative advantage over the Annex-I Parties.[90]

VI

Structure of Clean Development Mechanism

Under Article 12 of the Kyoto Protocol, the Preamble to the CDM calls upon the Parties to be guided by the principles contained in Articles 2, 3, and 4 (7) of the Climate Change Convention.[91] However, the text merely reaffirms these principles and does not assert them in any way that could create an obligation for the industrialized countries to restrict their over-use of common atmospheric space.[92] The Rules governing the CDM [the CDM Rules] have taken shape based on the Kyoto Protocol, the political agreements reached at the resumed session of the COP-6 known as 'Bonn Agreements', and the legal agreements reached at COP-7 collectively named the "Marrakesh Accords".[93]Before the Kyoto Protocol entering into force,

[85] *Ibid.*
[86] *Id.,* at 55-56.
[87] *Ibid.*
[88] Supra note 65 at 85.
[89] *Ibid.*
[90] *Ibid.*
[91] David Freestone and Charlotte Streck (eds.), Legal Aspects of Carbon Trading Kyoto, Copenhagen and Beyond 213-230 (217) (Oxford University Press, New York, 2009).
[92] *Ibid.*
[93] *Ibid.*

Parties to the Convention through the 'Marrakesh Accords' agreed to facilitate the prompt start of the CDM by adopting its 'Modalities and

Procedures 'and by establishing the CDM Executive Board. The CDM has therefore been operational since 2001.[94]

(i) Conference of Parties/ Meeting of Parties

The Kyoto Protocol stipulates that the CDM shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/MOP) and be supervised by an Executive Board of the CDM.[95] The COP/MOP is thus the overall governing body of the CDM. Under the prompt start phase of CDM... the Conference of the Parties of the Climate Change Convention (COP) assumed the responsibilities of COP/MOP.[96] However, when the Protocol entered into force the COP/MOP took over authority and responsibility.[97] The COP/MOP reviews the annual reports of the Executive Board and provides guidance to the Board on its operations.[98] In addition, the COP/MOP assists in the funding arrangements of CDM project activities, as necessary, and reviews the regional and sub-regional distribution of DOEs and distribution of CDM project activities.[99]

(ii) Executive Board

The CDM is supervised by the Executive Board, which itself operates under the authority of the Parties.[100] The Executive Board is composed of 10 members including one representative from each of the five official UN regions (Africa, Asia, Latin America, and the Caribbean, Central Eastern Europe, and OECD), one from the small island developing states, and two each from Annex-I and non-Annex-I Parties.[101] The Executive Board will accredit independent organizations – known as operational entities – that will validate proposed CDM projects, verify the resulting emissions reductions, and certify those emission reductions as CERs.[102] Another key task of EB is the maintenance of a CDM registry, which will issue new CERs,

[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid*
[99] *Ibid.*
[100] Supra note 12 at 56.
[101] *Ibid.*
[102] *Ibid.*

manage an account for CERs levied for adaptation and administration expenses, and maintain a CER account for each non-Annex-I Party hosting a CDM project.[103]

(iii) Functions of the Executive Board

Executive Board is the main administrative body to ensure that environmental integrity should not be affected.[104] The EB supervises and administers the CDM under the authority and guidance of the COP/MOP, to which it is accountable.[105] The EB has a broad range of competence when supervising the implementation of CDM according to Article 12(4) of the Kyoto Protocol.[106] The EB also has the mandate to issue CERs. Issuance requires verification and certification by a DOE other than the one which validates the project, that the emission reductions as set out in the project design document have taken place in the verified period.[107] The DOE then requests the EB to issue a certain number of CERs.[108] The issuance is considered final unless three or more members of the board or a State Party involved in the project request a review.[109] The EB is further responsible for ensuring access to information and transparency of the CDM process for clarifying and interpreting the decisions of the COP/MOP, and for preparing annual reports, technical notes, and decision papers for review and adoption by the COP/MOP.[110] It approves or rejects new methodologies for baselines and monitoring plans, and is responsible for the accreditation and suspension of the DOEs[111] which support the EB in governing the CDM. Upon requests by the DOEs, the EB decides whether to register a proposed project as a CDM project or to request its review.[112] Registration by the EB is the formal UN acceptance of a DOE validated project as a CDM project activity. [113]

(iv) Designated Operational Entities

A Designated Operational Entity (DOE) under the CDM is either a domestic legal entity or an international organization which is accredited and designated (on a provisional basis until

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[103] *Ibid.*

[104] David Freestone and Charlotte Streack (eds.), Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond, 272-294 (274) (Oxford University Press, New York, 2009).

[105] *Ibid.*

[106] *Ibid.*

[107] *Ibid.*

[108] *Ibid.*

[109] *Ibid.*

[110] *Ibid.*

[111] DOEs are private, domestic entities or international organisations in the CDM project cycle. They are on the 'extended arm' of the EB and perform either validation of proposed projects (i.e., assessment whether a potential project meet all the eligibility requirements of the CDM) or verification or certification of emission reductions (i.e., assessment of whether and how much the project has achieved in GHG reductions.

[112] Supra note91.

[113] *Ibid.*

confirmed by the COP/MOP) by the Executive Board to perform three key functions viz.,to check for completeness and forward to the Board proposed new methodologies; to validate and subsequently request registration of the proposed CDM projects activity using an approved methodology, to verify emission reduction of a registered CDM project activity, certify as appropriate and request the Board to issue CERs accordingly.[114]

(v) Designated National Authorities

The CDM modalities and procedures state the need for a country to establish a Designated National Authority (DNA) in order to participate in CDM project activities.[115] The main tasks to be carried out by the DNA are defined in the CDM modalities and procedures which includes viz., to provide written approval to the project participants of voluntary participation of the Party to the CDM project activity; in case of host Party, include in the written approval, a confirmation that the CDM project activity assists it in achieving sustainable development.[116]

VII

Realities and Risks of Carbon Markets

The inclusion of carbon markets in the Kyoto Protocol can also be seen as the participation of developing countries to take part in mitigation efforts of climate change.[117] This can also be seen as an attempt by the industrialized countries to respond to the threat of rapid anthropogenic climate change.[118]Despite these successes, they have also been criticized for various following reasons:

(i) Carbon markets have not resulted in the emission reductions envisaged by proponents and that they have not helped developing countries sufficiently achieving sustainable development.[119]

(ii) Once an emission cap has been set, industries regulated by a cap-and-trade system either receive emission allowances via auction or for free or through some combination of the two...when disturbing emission allowances for free, two main approaches have been followed so far: grandfathering[120] and

[114] Supra note 65 at 218.
[115] *Ibid.*
[116] *Id.* at 219.
[117] *Ibid.*
[118] *Ibid.*
[119] *Ibid.*
[120] The allocation of emissions allowances according to an entities historical emissions.

benchmarking.[121] 'Grandfathering is problematic because it undermines the 'polluter pays'. Free distribution is problematic because allowances represent a considerable asset that can yield windfall profits for regulated industries.[122] 'Benchmarking' - distributing allowances on the basis of the performance of the most efficient installation in a given sector does not violate the 'polluter pays' principle and provides a fairer means of allocating allowances.[123]

(iii) CDM project refines the host country government to confirm that the project assists in achieving sustainable development goals, but leaves determination for what constitutes sustainable development to the discretion of that government.[124] National authorities have little incentive to reject projects that have no or only a few sustainable development benefits, however, as this results in lost revenues for their country.[125] Indeed, studies examining the sustainable development benefits of CDM projects suggest that the contribution of CDM to sustainable development is low.[126]

(iv) Verifies of CDM projects – designated operational entities (DOEs) – are acquitted by the CDM Executive Board. DOEs are paid directly by project developers. This may undermine their independence in conducting their verification functions. In the past two years, the CDM Executive Board has temporarily suspended the accreditation of four DOEs.[127] This suggests that there are deep-rooted problems in the validation and verification process.[128]

(v) Another critical aspect of the CDM is carbon leakage. . . Similar to the issue of carbon leakage is the concern that the energy reduction generated by the valid

[121]The allocation of emission allowances on the basis of an emission performance benchmark, usually expressed as tones of GHG per production.
[122]For example, in ETS's first phase free distribution and over allocation resulted in profits of € 6-8 billion for EU's for largest power producers, which attributed the monetary value for the allowances they received.
[123]Gareth Sweeney, Rebecca Dobson, et.al. (eds.), Global Corruption Report: Climate Change 130-143 (130) (Earth scan, 2011).
[124] *Id.* at 136.
[125]*Ibid.*
[126]*Ibid.*
[127]The Board found either that DOE personnel lacked competence, that DOEs did not appear to have undertaken independent technical reviews or that the verifying companies did not follow internal review or audit procedures adequately to ensure project quality.
[128]The capacity of personnel has been cited as significant problem. Id. at 137.

CDM project can lead to increased energy consumption elsewhere.[129] These are systematic flaws that can be addressed only by design changes.[130]

(vi) The idea of mandatory environmental and sustainability impact assessment for all CDM projects has been seen as an infringement of the sovereignty of the potential host states.[131] As a result, the final language of the CDM in Kyoto is weak, requiring nothing more than an 'analysis of environmental impacts only if the host country makes it mandatory for the project to be approved'.[132] The CDM Modalities and Procedures do not provide for the situation in which the host country does not have any laws on EIA.[133]

(vii) Yet no common indicators or international standards have been accepted for measuring sustainable development benefits.[134] Experience has shown that host countries have not quite willing to approve CDM projects with little or no added sustainable value.[135] Although some countries such as China, India, and Brazil have different sets of criteria for sustainable CDM projects, they fail to include a verifiable indicator to measure the outcome, or do not have means for monitoring or enforcing the sustainability benefits.[136]

(viii) Challenges exist with regard to ensuring environmental integrity. Although the Modalities and Procedures for the CDM demand that 'environmental integrity' is to be achieved through sound modalities, rules, and guidelines, for the mechanisms, sound and strong principles of rules governing LULUCF activities, and a strong compliance regime, it remains unclear what is meant by the term and whether it understood in terms of additionality or does it require other environmental benefits or at least the absence of other environmental damages, such as H_2O quality or biodiversity.[137]

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[129] Benjamin J. Richardson, Bouthillier, et. al. (eds.), Climate Law and Developing Countries: Legal and Policy Challenges for the World of Economy 235-261 (238) (Edward Elgar Publishing Ltd., UK, 2009).
[130] *Ibid.*
[131] *Id.* at 239.
[132] *Ibid.*
[133] *Ibid.*
[134] *Id.* at 250.
[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*

VIII

Conclusion

The clean development mechanism of the Kyoto Protocol obligates industrialised countries with emission constraints to receive credit for financing projects that reduce emissions in developing countries.[138] The Kyoto model of the global carbon trading system is essentially over. However, carbon markets are not. The challenge now is to determine how they can work under the Paris agreement. The CDM was not designed to achieve global mitigation and cannot in its current form fulfill the requirement under Paris Agreement to achieve overall mitigation in global emissions. Thus, extending CDM under Article 6 of the Paris Agreement would not provide the necessary emission reductions to meet the commitments under the Paris agreement.[139] However, CDM has been surprisingly effective in mobilising thousands of mitigation projects in developing countries and has also been able to reform itself continuously. Nevertheless, it has been criticised for its weak environmental integrity, high transaction costs, and complex governance. New market mechanisms under the Paris agreement (NMM) have been proposed to avoid these shortcomings.[140] One of the major criteria for project eligibility under the clean development mechanism is environmental additionality and ensuring sustainable development. Despite long discussions, negotiators in the UNFCCC process were unable to agree on an interpretation of additionality and also Conference of Parties could not agree on an interpretation of additionality criteria.[141]The other important criteria for project eligibility are to ensure sustainable development. However, the main drawback is that there is no common guideline for sustainable development criterion and it is up to the developing host countries to determine their own criteria relating to sustainable development and assessment process. [142] The CDM's design is considered to be insufficient under a more ambitious climate

[138]Available at: https://www.sciencedirect.com/topics/economics-econometrics-and-finance/clean-development-mechanism (Last visited on July 10, 2021).

[139] Erickson, Peter, *et. al.* "Net climate change mitigation of the Clean Development Mechanism" *72 Energy Policy* 146-54(2014), *available at:* https://doi.org/10.1016/j.enpol.2014.04.038 (Visited in July, 10 2021).

[140] Richart G. Newell, William A. Pizer, *et.al.,* "Carbon Markets: Past, Present and Future" 6 Annual Review of Resource Economics191-215 (November, 2014), Available at: https://www.annualreviews.org/doi/full/10.1146/annurev-resource-100913-012655 (Visited on July 11,2021).

[141] Supra note 12.

[142] *Ibid.*

regime as it is not designed to deliver an overall mitigation in global emissions.[143] While the CDM provides a good experience to inform the design of cooperative approaches under the Paris agreement, there is significant scope for improvement while applying in Paris agreement. In order to achieve the Paris Agreement goals of reducing the temperature of the planet, global emissions need to go down.[144] Article 6.4(d) of the Paris agreement specifically states that the Paris Agreement mechanism shall aim to deliver an overall mitigation in global emissions.[145] However, under the current CDM design, Business as Usual (BAU) in non-Annex I Parties is increasing, and a mechanism that simply shifts such BAU increases from non-Annex I to Annex I Parties does not reduce global emissions.[146] Evidence indicates that the two main characteristics related to CDM project eligibility and crediting – additionality and baselines – are difficult to define with certainty. Many project activities approved by the CDM as "additional" have in fact been found to be non-additional. The additionality criteria seem to be erroneous, as, for some existing CDM project activities, emission reductions would have been achieved even in the absence of the CDM, which demonstrates the perverse incentive to defer abatement in order to maximize profit from the sale of CERs.[147]

[143]Kristin Qui, *Environmental Defense Fund: The Future of the Clean Development Mechanism under a New Regime of Higher Climate Ambition, available at:* file:///C:/Users/HP/Desktop/Future%20of%20CDM.pdf (Visited on July 11, 2021).

[144] *Ibid.*

[145] *Ibid.*

[146] *Ibid.*

[147] (i) The proponents of hydroelectric dams in Brazil (three large dam projects, the Santo Antônio, Jirau and Teles Pires hydroelectric power plants), claimed that these projects required revenue from CDM credits to attract investment. At the same time, the proponents told potential investors that they would earn a profit if they invested in the dams, thus raising the likelihood that the dams did not require carbon revenue and were therefore not "additional." The dams are now operating, even though the current value of the carbon credits is zero. Since the CDM projects are generating no revenue, any emissions reductions attributable to the dams would have happened without the projects; (ii) Hydro Fluoro Carbon (HFC-23) is an unwanted waste gas from the production of hydro chloro fluoro carbon-22 (HCFC-22) (a GHG and an ozone-depleting substance with a global warming potential of 11,700). HCFC-22 plants produced significantly less HFC-23 during periods when no emission credits could be claimed compared with periods when HFC-23 destruction could be credited under the CDM. Moreover, the total amount of HCFC-22 produced appears to be determined mainly by CDM rules. This suggests that the claimed emission reductions may partly not be real and that the CDM provides perverse incentives to generate more HFC-23, illustrating the incentive to increase projected baseline emissions to earn more revenues.

Cited in: Kristin Qui, *Environmental Defense Fund: The Future of the Clean Development Mechanism under a New Regime of Higher Climate Ambition, available at:* file:///C:/Users/HP/Desktop/Future%20of%20CDM.pdf (Visited on July 11, 2021).

Allowing the use of such credits to meet post-2020 commitments, such as those under the Paris Agreement means that Parties will be allowed to claim reductions towards their NDCs when emissions are not actually reduced. Legal uncertainty of the CDM executive board is another concern. After 2020 CDM Executive Board arguably has no legal authority to issue CERs, and also may not have authority to issue CERs now. The Kyoto Protocol and its Doha Amendment specify two commitment periods during which Annex I countries must meet their Quantified Emissions Limitation and Reduction Commitments. The first period was from 2008-2012.[148] In 2012, The Doha Amendment established the second commitment period as 2013-2020, but it has not yet entered into force.[149] Thus, CDM CERs may not be able to be legally used now or after 2020. The parties have to find a solution for this as there is a number of CDM projects which are operative at present in many countries including India.[150] Uneven geographic distribution of CDM projects is also another major issue as most of the issued (Certified Emission Reductions) CERs originate in China, India, and Brazil. This disparity in the distribution of CDM projects between emerging economies and countries such as less developed countries and other developing countries has raised questions about the seriousness of mitigation with the problem of climate change. Limiting CDM post-2020 will not help in achieving the ambitious target of lowering temperature under the Paris Agreement.[151] Despite these challenges, it would be a mistake to ignore lessons learned from the CDM. It is important that Article 6.4 of the Paris Agreement improves the CDM design to incentivize projects that are truly additional, deliver an overall mitigation in global emissions, and promote a market with a balanced supply and demand to allow financing for sustainable development and mitigation.[152]

The CDM is the only currently available market mechanism under the UNFCCC that is already operational while the new market mechanisms introduced by Article 6 will need several years to be fully operationalised.[153] The Clean Development Mechanism (CDM), a product of the

[148] Kyoto Protocol, Article 3.7

[149] Kyoto Protocol Doha Amendment Article 3, paragraph 1.

[150] Erickson, Peter, Michael Lazarus et. al., "Net climate change mitigation of the Clean Development Mechanism" 72Energy Policy 146-54 (2014), available at: https://doi.org/10.1016/j.enpol.2014.04.038 (Visited on July 11, 2021).

[151] *Ibid.*

[152] Lessons from Clean Development Mechanism Critical to Implementation of Paris Agreement, available at: https://newsroom.unfccc.int/news/lessons-clean-development-mechanism-implementation-paris-agreement (Visited on July, 12 2021).

[153] Supra note 2.

Kyoto Protocol, is one such market instrument that can help the industry as well as climate.[154]The situation may change in 2021 when market mechanisms mandated under the Paris Agreement come into operation.[155]While the CDM has no expiration date and could, in theory, remain operational indefinitely, a number of developments may impact its operational status after 2020.[156] However, since the late 2000s the CDM lost international support due to criticisms regarding the additionality of registered activities, lacking sustainable development (SD) co-benefits, inequitable regional distribution and transaction costs being too high, and regulation overly complex.[157] The future of registered CDM activities is being negotiated in the context of the rules, modalities, procedures, and guidelines for Article 6 of the Paris Agreement.[158]Article 6 of the Paris Agreement (PA) lays the foundation for a new generation of market mechanisms that can provide cost-efficient solutions for countries reaching their mitigation targets as identified in the Nationally Determined Contributions (NDCs).[159] This new generation of market mechanisms should build upon the experiences and lessons learned from the first generation of market-based mechanisms under the Kyoto Protocol (KP): Joint Implementation (JI) and the Clean Development Mechanism (CDM).[160]

[154]Available at: https://indianexpress.com/article/opinion/columns/how-markets-can-serve-climate-conference-madrid-paris-agreement-6108636/ (Visited on July12, 2021).

[155] *Ibid.*
[156] Supra note 10.
[157] Supra note 129.
[158] *Ibid.*
[159] *Ibid.*
[160] *Ibid.*

CHILD WELFARE LAW IN INDIA AND NORWAY: A COMPARATIVE ANALYSIS

Parnil Yodha*

Abstract

Child Welfare Law is that the civil law that is meant to deal with abuse and neglect that a child may experience within the family. This abuse covers physical abuse, emotional abuse, and neglect; whereas, sexual abuse within the family is dealt with by the criminal law (Protection of Children from Sexual Offences Act,2012; in case of India).In a study undertaken by the Ministry of Women and Child Development (2007) called 'A study of Child Abuse in India' in 13 states of India, two out of every three children in India reported to have been physically abused while every second child reported being facing emotional abuse[1]. This paper tries to find out if an effective child welfare law exists in India by taking the Norwegian Child Welfare Act, 1992 as the parameter. Scandinavian countries, especially Norway, have effective Child Welfare Laws comprising a convenient reporting mechanism and readily available as well as accessible counseling services.

Introduction

Children need care and protection to develop into self-sustaining and healthy adults and responsible citizens. The United Nations Convention on the Rights of the Child, 1989 (UNCRC) was the first international treaty to deal with child rights comprehensively. Article 6 of the United Nations Convention on the Rights of the Child, 1989 (UNCRC) says recognises that every child has the inherent right to life, survival, and development. Article 27 of the United Nations Convention on the Rights of the Child, 1989 (UNCRC) recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development[2].

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[1]Government of India, Report: *A study of child abuse* (Ministry of Women and Child Development, 2007).

[2]United Nations Human Rights Office of the High Commissioner, *available at*: http://www.ohchr.org/en/professionalinterest/pages/crc.aspx (Visited on February 8, 2019)

At the same time, children also have a mind of their own. They also have opinions and wishes. Their opinions must be considered before any decision is made affecting them. Article 12 of the United Nations Convention on the Rights of the Child, 1989 (UNCRC) obligates the States to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child. Articles 13 and 14 of the United Nations Convention on the Rights of the Child, 1989 (UNCRC) recognises that every child has the right to freedom of expression; this right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice, and the States have been obligated to respect the right of the child to freedom of thought, conscience, and religion. Article 18 of the United Nations Convention on the Rights of the Child, 1989 (UNCRC) makes it clear that the basic concern of the State must be the best interests of the child[3].

Having said that, the theory is far from reality; Child abuse is rampant. Child abuse can take several forms i.e., physical, psychological, or emotional, sexual abuse, and neglect. In this paper, since we are dealing with Child Welfare Law; therefore, we will cover physical abuse, emotional abuse, and neglect faced by children within the family only. This is so because Child Welfare Law (CWL) is that part of the civil law that is meant to deal with abuse and neglect that a child may experience within the family. This abuse covers physical abuse, emotional abuse, and neglect; whereas, sexual abuse within the family is dealt with by the criminal law (Protection of Children from Sexual Offences Act, 2012; in case of India).

As per the Report of the Consultation on Child Abuse Prevention by World Health Organisation (Geneva, 29-31 March 1999), *"Child Abuse or maltreatment constitutes all forms of physical and/or emotional abuse, ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation; resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power".* Further, it defined physical abuse, emotional abuse, and neglect as follows:

"Physical abuse of a child is that which results in actual or potential physical harm from an interaction or lack of an interaction, which is reasonably within the control of a parent or

[3]Ibid.

person in a position of responsibility, power or trust. There may be a single or repeated incident."

"Emotional abuse includes the failure to provide a developmentally appropriate, supportive environment including the availability of a primary attachment figure so that the child can develop a stable and full range of emotional and social competencies commensurate with her or his personal potentials and in the context of the society in which the child dwells. There may also be acts towards the child that cause or have a high probability of causing harm to the child's health or physical, mental, spiritual, moral, or social development. These acts must be reasonable of responsibility, trust, or power. Acts include restriction of movement, patterns of belittling, denigrating, scapegoating, threatening, scaring, discriminating, ridiculing or other non-physical forms of hostile or rejecting treatment."

"Neglect is the failure to provide for the development of the child in all spheres: health, education, emotional development, nutrition, shelter, and safe living conditions, in the context or resources reasonably available to the family or caretakers and causes or has a high probability of causing harm to the child's health or physical, mental, spiritual, moral or social development. This includes the failure to properly supervise and protect children from harm as much as is feasible.[4]

In the USA and European countries, physical punishment by parents is considered as a form of physical abuse. It is common knowledge that if you hit or beat your child in the US, the child can call the police. However, in India, our culture is such that physical punishment by parents or other senior members of the family is considered as essential at times to discipline children. The Committee on the Rights of the Child in its Forty-second session held in 2006 at Geneva interpreted 'corporal' or 'physical' punishment in its General Comment No.8 (2006) as any punishment in which physical force is used and intended to cause some degree of pain or discomfort however light. Most involve hitting, smacking, slapping, or spanking children with hand or with an implement- a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In addition, there are other non-physical forms of punishment that are also cruel

[4] World Health Organisation, Report of the Consultation on Child Abuse Prevention (29-31 March 1999, WHO, Geneva), *available at* : http://apps.who.int/iris/handle/10665/65900 (Visited on Feb 10, 2019)

and degrading, and thus, incompatible with the Convention. These include, for example, a punishment which belittles, humiliates, denigrates scapegoats, threatens, scares, or ridicules the child.[5]

In a study undertaken by the *Ministry of Women and Child Development (2007)* called '*A study of Child Abuse in India*' in 13 states of India, out of the 12,447 child respondents, an overwhelming majority (69.0%) reported physical abuse in one or more situations. Among different age categories, a higher percentage of physical abuse was reported among younger children (5-12 years). About 60.35 percent of young adults reported being physically abused by parents. Two out of every three children were physically abused. Out of those children physically abused in family situations, 88.6 percent were physically abused by parents. About 58 percent of working children faced physical abuse either within the family or at the workplace, whereas 22.9 percent of these children faced physical abuse in both situations. Over 50 percent of children in eight states reported corporal punishment in school, including those states where the government had banned corporal punishment through notification. As far as emotional abuse is concerned, every second child reported facing emotional abuse. Though an equal percentage of both girls and boys reported facing emotional abuse, but around 70 percent of the girl child respondents reported to be doing domestic chores as compared to boys. Around 48.4 percent of the girl child respondents wished they were boys. In a whopping 83 percent of the emotional abuse cases, parents were found to be the abusers.[6]

In this paper, the author has chosen Norwegian law as the parameter for an array of reasons. First and foremost, Norway was the first country in the world to ever have a Child Welfare Act which was in 1896. Norway almost always tops the Human Development Index (HDI) rankings that are released by the United Nations Development Programme (UNDP). Norwegian Child Welfare Services is a family- and welfare-oriented system with several functions: protecting, preventing, supporting, and equalising. A study shows that approximately 40 percent of the Norwegian parents had agreed to be referred or had asked for help from Child Welfare Services themselves. Besides, three-quarters of the parents reported considerable confidence in the

[5]United Nations, Report: *General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)* (UN Committee on the Rights of the Child, March 2007) , *available at*: https://www.refworld.org/docid/460bc7772.html (Visited on July 8, 2021)

[6]*Supra* note 1

services they received. One out of five parents said that the services their child received improved the economic situation of the household.[7]

Norway Child Welfare Services represent a ‘‘need based’’ service, which means that all reports of concerns are assessed by front-line staff in the municipalities. The central legislative framework for the provision of CWS is the Child Welfare Act (CWA) of 1992, whose functions are to protect children from abuse and neglect and to increase the opportunities for children with poor living conditions (sections 1-1 and 4-4). The CWA applies to all children between the ages of 0-18 years; however, services can be given to children up to 23 years.[8]

Norway is a country that declared the United Nations Convention on the Rights of the Child, 1989 along with its two optional protocols; namely, Optional Protocol on the sale of children, child prostitution & child pornography (2000), and Optional Protocol on children in armed conflict (2000) as Norwegian law by virtue of enacting the Human Rights Act, 1999 (Act of 21 May 1999 No.30 relating to Strengthening of the Position of Human Rights in Norwegian Legislation)[9].

Indian Legislative History

The Indian constitution in its Article 15(3) confers the power upon the State to make special provisions for children. Article 39(f) of the constitution of India states that childhood and youth are to be protected against exploitation and against moral &material abandonment. In fact, legislation in this area existed in India much before independence, and since then many of the states constituting the Indian union have enacted their own laws on the subject. In order to achieve certain uniformity among the various statutes, a central act on children called the Children Act, 1960, was enacted to serve as a model for the various state acts. The aim of the Children Act, 1960, was to provide for the "care, protection, maintenance, welfare, training, education, and rehabilitation of neglected or delinquent children and for the trial of delinquent children”. The statute distinguished between neglected children and delinquent children. The former was to be dealt with by a child welfare board and the latter, by a juvenile court.[10] Section

[7]Bente Heggem Kojan, “Norwegian Child Welfare Services: A Successful Program for Protecting and Supporting Vulnerable Children and Parents?”, 64(4) ASW 443-458 (2011). *available at*: http://dx.doi.org/10.1080/0312407X.2010.538069 (Visited on February 11, 2019)
[8]Ibid.
[9]Human Rights Act 1999, Norway, *available at:* http://lovdata.no/dokument/NL/lov/1999-05-21-30 (Visited on Feb 20, 2019)
[10] Shahana Dasgupta, “Child Welfare Legislation in India: Will Indian Children Benefit from the United Nations Convention on the Rights of the Child”, 11(4) Mich. J. Int'l L. 1301 (1990) .

2(l) of the said Act defined 'neglected child' as: "A child who was found begging; or was found without having any home or settled place of abode or any ostensible means of subsistence or was found as destitute, whether he is an orphan or not; or had a parent or guardian who was unfit or unable to exercise or does not exercise proper care and control over the child; or lived in a brothel or with a prostitute or frequently went to any place used for the purpose of prostitution, or was found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life.[11]

The Children Act, 1960 was replaced by the Juvenile Justice Act, 1986 which though substantially followed the scheme of the former, yet just substituted the word 'child' by 'juvenile'. When India signed and ratified the United Nations Convention on the Rights of the Child, 1989 (hereinafter, CRC) in December 1992, it was considered essential to adopt the uniform cut off age of 18 years for both girls and boys in conformity with the definition of child in the CRC. The Juvenile Justice Act, 1986 was repealed and replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 which came into force on 1st April 2001. An important change was introduced in the constitution of the Juvenile Justice Board, which was to deal with children in conflict with the law. It was constituted by a bench of one magistrate and two social workers. This clearly was a big shift from the legal to the social orientation of the judicial body. In case of a difference of opinion, the two social workers could override the single judicial magistrate. Thereafter, the Juvenile Justice (Care and Protection of Children) Act 2015 was enacted to provide for the care, protection, welfare, development, and rehabilitation of two categories of children; namely, children in conflict with law and children in need of care and protection.[12]

Norway's Child Welfare Law

The fundamental principles that the Child Welfare Services follow in Norway include: 1) The best interests of the child must be kept in mind before deciding on the measure to be incorporated, 2) A child must be given the opportunity to participate at every stage, especially when the decision is being made in respect of their personal matters and 3) The biological family provides the best care and protection to a child. Thus, contrary to what the Indian

available at: http://repository.law.umich.edu/mjil/vol11/iss4/9 (Visited on February 11, 2019).

[11]The Children Act, 1960 (Act 60 of 1960)

[12]Ved Kumari, *The Juvenile Justice (Care and Protection of Children) Act 2015: Critical Analyses* 4-5 (Lexis Nexis, 1st edn., 2015).

national media have people believe, the order of removal of the child out of his/her home (known as the care order) is made only as a matter of the last resort. It is pertinent to mention here that the Norwegian Child Welfare Service provides assistance to children and parents who are facing challenges or difficulties within the family itself. The sole purpose of providing such assistance is to promote a positive change with regard to the child or in the family, as the case may be.

The Children Act, 1981

The first act that is needed to be discussed is the Children Act 1981that lays down the duties and obligations of the parents towards the child. Under this Act, the child is entitled to care and consideration from those who have parental responsibility. Parental responsibility shall be exercised on the basis of the child's interests and needs. Those who have parental responsibility are under obligation to bring up and maintain the child properly. They shall ensure that the child receives an education according to his or her ability and aptitude. Besides, very importantly, the child must not be subject to violence or in any other way treated so as to harm or endanger his or her mental or physical health.[13]As the child develops and matures, the parents (or the guardian, as the case may be) are bound to listen as well as to pay due regard to the opinion of the child before making decisions for the child on personal matters. Moreover, as the child reaches the age of 12 years, great importance must be attached to the child's wishes and opinions on all personal matters including the question of which of the parents he or she wishes to live with. This is called the child's right of co-determination i.e. the child and the parents must make decisions collectively.[14]However, parents are legally obliged to steadily extend the child's right to make his or her own decisions as he or she gets older and until he or she comes of age. This is called the child's right of self-determination i.e., the child must be allowed to make decisions on his/her as he/she becomes of making decisions.[15] Under the law, the children who have reached the age of 15 have a right to determine the question of choice of education that he/she wants to pursue, and the question of applying for membership of or resigning from associations.[16]

[13] The Children Act, 1981(Act 7 of 1981), s.30; available *at:* https://lovdata.no/dokument/NLE/lov/1981-04-08-7 (Visited on February 14, 2019)
[14]*Id. S*. 31
[15] *Id.* S. 32
[16] *Ibid*.

The Child Welfare Act, 1992

The most significant law in Norway on child welfare is the Child Welfare Act, 1992 (hereinafter, the CW Act). Section 1-1 of the CW Act says that the purpose of the said Act is to ensure that children and youth who live in conditions that may be detrimental to their health and development must receive the necessary assistance and care at the right time.

As per Section 1-2 of the CW Act, its provisions regarding services and measures apply to all persons 'staying' in Norway. This implies that the CW Act applies to all children who are 'staying' in Norway, temporarily or permanently, irrespective of their background, residency status, or citizenship status. Thus, it will be correct to say that the application of the CW Act is quite wide.

The CW Act applies in respect of all children under the age of 18. Besides, measures implemented before the child has reached the age of 18 may be maintained or replaced by other measures dealt with in this Act until the child has reached the age of 23, only if the child consents.[17]

Any person who is concerned about a child can send a notification of concern to the Child Welfare Services (hereinafter, CWS) in the municipality wherein the child resides if he/she thinks that the child is in need of assistance due to the conditions at home or even due to other reasons. A child itself, a parent, a concerned neighbour, a school counsellor/ teacher, or a health professional can make such notification by making a telephone call, or by writing a letter to the CWS. The phone call or the letter, as the case may be, can be anonymous too. However, it must state three things, namely: What the problem is, who does it concern and how can the CWS contact the person in question. Besides, the CWS may even take suo motu notice of any child who may be suffering neglect, behavioural issues, social or emotional problems. The CWS is bound by law to receive and take a note of such call or letter, as the case may be. The CWS is obliged under law to examine and assess the notifications that it receives at the earliest opportunity, and within 1 week at the latest to determine as to whether the individual notifications are required to be followed up with investigations.[18]The child welfare service shall give a response to any person who has sent a notification to the child welfare service. The

[17]The Child Welfare Act, 1992 (Act 100 of 1992), S.1-3; *available at*: https://www.regjeringen.no/en/dokumenter/the-child-welfare-act/id448398/ (Visited on February 11, 2019)
[18] *Id.* S. 4-2.

response shall be sent within 3 weeks of receipt of the notification. A response may be omitted in cases where the report is obviously unfounded, or where other special considerations argue against responding. The response shall confirm receipt of the notification.[19]

Thereafter, if the CWS is satisfied that there is a reasonable cause to assume the existence of the circumstances that provide a basis for providing assistance, it is legally obliged to investigate the matter at the earliest opportunity. The investigation must be completed as soon as possible and within 3 months at the latest. In special cases, though, the time limit may extend to 6 months. An investigation is completed when the child welfare service has made a decision to implement measures or it has been decided to drop the case. It is important to note here that if the time limits are exceeded, the county governor may impose a fine on the municipality. If necessary, the CWS may engage experts during the investigation that may even demand to speak with the child alone in a separate room. If there is suspicion that the child is being mistreated or subjected to other serious abuse at home, the CWS may order that the child be taken to a hospital or elsewhere for examination. The expert's report shall also be assessed by the Commission on Child Welfare Experts before it is used as the basis for a decision by the CWS to drop a case.[20]

After the completion of the investigation, if the CWS is of the opinion that the child is in particular need of assistance due to conditions at home or otherwise, it is bound under law to initiate measures to assist the child and the family. The county social welfare board may if necessary, decide that the measures such as a place at a kindergarten or other suitable day-care facilities are to be implemented by issuing the parents with an order to this effect.[21]In addition to that, if the CWS is also of the opinion that it is necessary to provide long-term coordinated measures or services, it is required to prepare individual plans to provide comprehensive assistance for the child. The child welfare service must cooperate on the plan with other agencies from which the child receives assistance for the same.[22]

When a decision is made to provide assistance measures, the CWS is required by law to draw up a time-limited plan of measures. It is further required to closely monitor the progress of the child and the parents, and assess whether the assistance provided is appropriate, and if relevant,

[19] *Id.* S. 6-7a.
[20] *Id.* SS. 6-9, 4-3.
[21] *Id.* S. 4-4.
[22] *Id.* S. 3-2a

whether new measures are necessary, or whether there are grounds for taking the child into care. The plan of measures is to be evaluated on a regular basis.[23]

If the parents fail to ensure that a child who is disabled or in special need of help receives the treatment and training required, the county social welfare board may decide that the child shall receive treatment or training with the assistance of the child welfare service. [24]

A care order i.e., an order to remove the child out of his/her home is only made as the last resort after all the other measures to provide assistance fail. Moreover, a care order can even be evoked if the county social welfare board is satisfied that the parents will be able to take the proper care of the child.[25]

Structure

The responsibility for the provision of services occurs on two levels. Although the CWS in Norway is enacted legislatively on a national level, the day-to-day activities are operated on a local level. The central government child welfare authorities consist of the Ministry, the Office for Children, Youth and Family Affairs, and the county governors. The central government child welfare authorities are headed by the Ministry. The county governor is the central government child welfare authority at the county level. The county governor is obligated to supervise child welfare activities in the individual municipalities. The county governor shall also ensure that the municipalities receive advice and guidance.[26]

The Norwegian Directorate for Children, Youth, and Family Affairs (Bufetat) is a centralised authority, which is responsible for the recruitment and provision of out-of-home care, such as foster homes and institutions. The local CWS called the municipalities are responsible for performing those functions under the Act which are not assigned to a central government body. In each municipality, there shall be a child welfare administration headed by a person who is responsible for functions under this Act. The administration shall perform the day-to-day child welfare work, including providing advice and guidance, preparing cases for consideration by the county social welfare board, implementing & following up child welfare measures[27] and performing the day-to-day child welfare work, and are responsible for guidance, accepting, and

[23] *Id.* S. 4-5
[24] *Id.* S. 4-11
[25] *Id.* S. 4-21.
[26] *Id.* SS. 2-2, 2-3
[27] *Id.* SS. 2-1

evaluating referrals, investigating children's situations and also acting as organisers, coordinators, and providers of most of the direct services.[28]

The municipality must closely monitor the conditions in which children live, and it must create measures to prevent neglect and behavioural problems. The child welfare service has the particular responsibility for bringing to light neglect and behavioural, social, and emotional problems at a sufficiently early stage to avoid lasting problems, and for instituting measures to this end.[29]

Indian Child Welfare Law

The Juvenile Justice (Care and Protection of Children) Act 2015 (hereinafter, the JJA 2015) is the only and the primary legislation that can be said to cover the Indian child welfare law. The Preamble to this Act says that the purpose of it was to consolidate and amend the law relating to children in conflict with law i.e. juvenile delinquents and the children in need of care and protection (discussed later) by catering to their basic needs through proper care, protection, development, treatment, social integration and by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of the children and their rehabilitation.[30] It becomes quite apparent by the use of words 'social integration' 'adjudication' 'rehabilitation and 'disposal of matters' that the JJA 2015 focuses more on the juvenile delinquents and the approach is more about adjudication than providing assistance as is particularly required under a child welfare law.

The JJA 2015 uses the phrase 'child in need of care and protection' and gives twelve categories of children that this phrase covers:

(i) A child without any home or settled place of abode and without any ostensible means of subsistence

(ii) A child found working in contravention of labour laws for the time being in force or is found begging, or living on the street

(iii) A child resides with a person (whether a guardian of the child or not) and such person-

[28] *Supra* note 7

[29] Supra note 17.

[30] The Juvenile Justice (Care and Protection), 2016 (Act 2 of 2016)

a) Has injured, exploited, abused, or neglected the child or has violated any other law for the time being in force meant for the protection of child
b) Has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out
c) Has killed, abused, neglected, or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited, or neglected by that person

(iv) A mentally ill or mentally or physically challenged child or a child suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee

(v) A child having a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child

(vi) A child who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him

(vii) A child who is missing or run-away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed

(viii) A child who has been or is being or is likely to be abused, tortured, or exploited for the purpose of sexual abuse or illegal acts

(ix) A child found vulnerable and is likely to be inducted into drug abuse or trafficking

(x) A child being or is likely to be abused for unconscionable gains

(xi) A child victim of or affected by an armed conflict, civil unrest, or natural calamity

(xii) A child facing an imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardians, and any other persons are likely to be responsible for solemnisation of such marriage[31]

Although the word 'abuse' has not been preceded by any qualifying adjective; yet it can be assumed that clause (iii) of sub-section 14 of Section 2 of the JJA 2015 covers emotional abuse as well as physical abuse within the meaning of the word 'abuse'. Thereby, it can be said that a child who has been physically or emotionally abused or neglected is also a 'child in need of care and protection' within the meaning of the JJA 2015.

[31] *Id.* S. 2(14)

The Child Welfare Committee, which is constituted under Section 27 of the JJA 2015, has the exclusive powers to dispose of all cases in respect of the children that may be in need of care and protection.[32]A number of specified persons can produce a child in need of care and protection before the Child Welfare Committee as per Section 31 of the JJA 2015. These include any police officer; inspector appointed under any labour law; public servant; Childline services; or any NGO; or any other recognised agency; child welfare officer; or probation officer; or any nurse, doctor, or management of a nursing home, hospital or maternity home. Children themselves may also appear before the Committee. Moreover, virtually, any person may take charge of a child in need of care and protection and produce them before the Committee as this list includes "any social or a public-spirited citizen" within its ambit.[33] However, the big flaw here is that there is no convenient reporting mechanism to report abuse or neglect directly to the concerned authority. It would not be possible for a child to appear before the Committee by himself and report abuse or neglect because a child may not be aware of how & whom to approach, or may not be able to travel on his own. This becomes particularly important if the child is living under the control of his parents or guardian at home where, unlike any childcare institution, no inspection otherwise gets done. It is pertinent to mention here that under Norwegian law, even a child can report abuse or neglect to the Child Welfare Service by phone or letter, and the CWS is legally obliged to receive and take note of the notification.

Moreover, the child may not out of fear discuss any abuse or neglect he might be facing at home with anyone**.** The professionals, like teachers, doctors, school counsellors, and the like, that generally come into contact with children must be taught as to what behavioural changes in the child could be a sign of emotional/physical abuse or neglect, and the reporting must be made mandatory. But the JJA 2015 is silent on that.

Under the JJA 2015, the Child Welfare Committee may, in its discretion, even take suo motu cognizance of cases of abuse or neglect and reach out to the children, but only if the decision is made by at least three of its members. Whereas, under the Norwegian law, the CWS has the particular responsibility under the law for bringing to light neglect and behavioural, social, and emotional problems at a sufficiently early stage to avoid lasting problems, and for instituting measures to this end. The CWS is under a duty to not just closely monitor the conditions in

[32] *Id.* S. 29
[33] Supra Note 12.

which children live but has been made responsible for creating measures to prevent neglect and behavioural problems. In this way, the JJA 2015 does not make any authority legally bound to bring up at an early stage the problems- behavioural, social, emotional - and neglect that a child might be facing. Compared to the Norwegian law, under the JJA 2015, no authority has been given the particular responsibility to monitor the conditions in which children live and no authority has been made responsible for creating measures to prevent neglect and behavioural problems. It will be correct to say that the JJA 2015 absolutely lacks the preventive approach.

Further, under Norwegian law, the CWS is obliged to examine and assess the notifications and decide within 1 week at the latest as to whether the individual notification is required to be followed up with the investigation. Even the time for conducting the investigation is fixed under Norwegian law, and if the time gets exceeded, then a fine can be imposed upon the CWS. But no time limit for the completion of the inquiry or for providing relief has been provided.

The Child Welfare Committee under the Indian law is required to conduct two inquiries, one for age determination and the second for determining if the child before it is indeed in need of care and protection.[34]In terms of Section 36, the Committee may initiate the inquiry in relation to the child either on their production before them or on receipt of information about a child in need of care and protection. At that moment, the Committee is required to pass an order specifying the place where the child will stay during the period of inquiry and give directions for the preparation of the social investigation report. The social investigation report is required to be completed within 15 days. The Committee is required to dispose of the inquiry within 4 months from the date of 1st production of the child. Section 37 provides the list of final orders that the Committee may pass while disposing of the case of a child in need of care and protection. This section requires the Committee to choose the final order based on the social investigation report and the wishes of the child where the child is capable of having a view.[35] Upon inquiry, the Committee, after taking into consideration the Social Investigation Report and the child's wishes in case the child is sufficiently mature to take a view, after declaring that a child is in need of care and protection can pass one or more orders which include:

If the Committee concludes that the restoration to the family is in the best interest of the child:

[34] *Ibid*

[35] *Ibid* .

- restoration of the child with/without the supervision of Child Welfare Officer or designated social worker

If the Committee concludes that the restoration to the family is not in the best interest of the child:

- Placement of the child with a fit person for long term or temporary care
- placement of the child in Children's home or Specialised Adoption Agency temporarily or permanently
- Placement of the child with a fit person for long term or temporary care
- Foster care orders
- Sponsorship orders
- Declare the child to be legally free for adoption

Besides, Committee may pass an order for after-care support that is a child care institution on completion of 18 years of age may be provided with financial support in order to facilitate child's reintegration into the mainstream of the society.[36] This passing of aforesaid orders by the Committee after taking into account the social investigation report seems more like a judicial pronouncement and decision making based on facts & evidence rather than providing assistance by individual plan-making to the family and the child to initiate a positive change similar to what has been provided in the Norwegian law. Thus, the approach of Norwegian law is way more holistic and comprehensive than the JJA 2015.

Major Flaws in Indian Law

1) There is a lack of a convenient reporting mechanism for the children under Indian law to report abuse or neglect directly to the concerned authority because the child cannot appear before the Committee by himself, and he/she may not be able to travel on his own. Whereas, under Norwegian law, a child can easily report abuse or neglect to the Child Welfare Service by phone or letter, and the CWS is legally obliged to receive and take note of the notification.
2) Reporting by the professionals like teachers, counsellors and the like is not mandatory of child physical/emotional abuse or neglect under Indian law.

[36] Supra note 30 at s.37,46

3) Under Indian law, a suo motu note of the abuse/neglect can be taken only if the decision is made by at least three of its members. Whereas, under the Norwegian law, the CWS has been put under a duty to closely monitor the conditions in which children live as well as made responsible for creating measures to prevent neglect and behavioural problems in children.
4) The Indian law lacks the approach of providing individual plans for each child in need since the needs of each child are different and depend upon his/her circumstances.

Conclusion

A child welfare law, in simpler terms, is a civil response to abuse and neglect that a child might face within the family. It is particularly indispensable in the present times when two out of every three children are said to be physically abused. Every second child is said to be facing emotional abuse by parents[37].

A shortcoming of the JJA 2015 is that it focuses more on juvenile delinquency and the approach is more about adjudication and rehabilitation of delinquents than providing assistance to a child and his family to bring about a positive change through the initiation of measures including the making of individual plans for the child in need as is particularly needed under a child welfare law.

Though the JJA 2015 definitely makes a commendable attempt at giving a comprehensive definition of a child in need of care and protection which can be assumed to encompass emotional abuse as well as physical abuse and neglect; yet it miserably fails on account of proving a convenient direct reporting mechanism. Neither does it make the noting down of the complaint mandatory. It is not rocket science to infer that it will not be possible for a child to appear before the Child Welfare Committee on his own and report abuse or neglect because a child may not be aware of how & whom to approach, or may not be able to travel on his own. Some easy way of contacting the concerned authority should have been provided. The professionals, like teachers, doctors, school counsellors, and the like, that generally come into contact with children should have been taught as to what behavioural changes in the child could be a sign of emotional/physical abuse or neglect, and the reporting must be made mandatory.

[37]Supra Note 1.

Another loophole worth contemplating is that the JJA 2015 does not make any authority legally bound to bring up at an early stage the problems- behavioural, social, emotional - and neglect that a child might be facing. Neither does under the JJA 2015 makes any authority responsible to monitor the conditions in which children live as well as to creating measures to prevent neglect and behavioural problems. Further, no time limit for the completion of the inquiry or for providing relief has been provided under the JJA 2015. In a nutshell, the JJA 2015 absolutely lacks the preventive approach to abuse.

This passing of aforesaid orders by the Committee after taking into account the social investigation report seems more like a judicial pronouncement and decision making based on facts & evidence than providing assistance and the child to initiate a positive change within the family. Thus, the JJA 2015 falls short of a holistic and comprehensive approach.

The Administrative Tribunals Conundrum: A Fig leaf for 'Executive' Adjudication?

Dinesh*

Abstract

The constitutional introduction to tribunals in India has led to escalating legal tensions between the judiciary and executive owing to doctrines of rule of law, judicial review, and independence of adjudicators. The doctrine of separation of powers further enhances the rigor of the tussle. The administrative law traditions in Common Law are settling and are in amorphous 'stage' unlike Civil Legal setups that adopted the discipline earlier. The 'stage' places enhanced duty over Common Law Courts to reconcile the differences owing to Common Law conventions and principles for easing the tensions. This article surveys the shifting approach of the Supreme Court of India with regard to the Tribunals in India. The proposed merits of the tribunals are critically analyzed. A selective overview of global solutions to the common 'legal tensions' is provided. The discussion concludes with suggestions for better working of the system.

A. INTRODUCTION

In India, the tribunal system existed[1] even much before the enactment of *the forty-second amendment*[2] to the Constitution.[3] The 42nd amendment, besides providing other provisions has

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[1] The ITAT or the Income Tax Appellate Tribunal was constituted in early 1940s, post-independence 1947 onwards, apart from tax-based tribunals such as for Sales Tax etc., various Industrial and Rent Control Tribunals were also established.; *Please also refer*, Arvind Datar, *Tribunalisation of Justice in India*, ACTA JURIDICA 288 (2006).

[2] *See*, the Constitution (Forty-fourth Amendment) Bill, 1976 and post-enactment the Constitution (Forty-second Amendment) Act, 1976.

[3] *See generally*, *Bharat Bank Ltd.* v. *Bharat Bank Employees' Union, AIR 1950 SC 188*. The Case signifies the existence of issues with regard to jurisdiction of Tribunals and Courts much before their *constitutional introduction*. The Case also enunciates various essentials for distinguishing between a Tribunal and Court. The

excluded the High Court's jurisdiction from the matters specified for the tribunals.[4] This has adversely brought a big change in respect of the constituent powers of the High Courts. Consequently, it gave rise to the conundrum concerning the tribunals' institutional position on the one side and the High Court's jurisdiction on the other.[5] However, the exceptional circumstances[6] of the *amendment* are now a matter of history but the legal changes introduced by it are still gaining relevance.[7]

The tribunals were constituted as an "*alternative institutional mechanism*" in India.[8] The phrase "*alternative institutional mechanism*" though not in specific relation to tribunals, could be attributed to Bhagwati's, J (as he then was) minority judgment in *Minerva Mills* decision.[9] The minority opinion held that the doctrine of judicial review is the *vital principle* of the Basic Structure while referring to the possibility of *"alternative institutional mechanisms"* for judicial review.[10]

Constitution Bench in the Case dealt with the legal availability of the Special Leave Petition from the decision of Industrial Tribunals before the Supreme Court of India.

[4] *See*, The First Law Commission of India, "*Reform of Judicial Administration*" (Report Number 14, Volume 2, 1958) 691-692. The Commission referred the Supreme Court decision in *Veerappa Pillai* v. *Raman and Raman Ltd., AIR 1952 SC 192 [196],* while recommending against the curtailment of the writ jurisdiction of the High Courts.; *Please also refer*, *Swaran Singh Committee Report*, (1976) 2 SCC (JOUR) 45. The report upon which the basic premise of the *forty-second amendment* was based is not so detailed as against the Report of the Law Commission of India. The Committee recommended doing away with writ jurisdiction of High Courts in the matters dealt with by *Tribunals*. Furthermore, the Report recommended curtailment of Article 32 powers of the Supreme Court of India in certain matters transferred to *Tribunals*. In the matters dealt with by the *Tribunals*, only Special Leave powers of the Supreme Court of India were considered desirable by the Committee.

[5] *See*, *S.P. Sampath Kumar* v. *Union of India, (1987) 1 SCC 124; R.K. Jain* v. *Union of India, (1993) 4 SCC 119; L. Chandra Kumar* v. *Union of India, (1997) 3 SCC 261; Madras Bar Association* v. *Union of India, (2010) 11 SCC 1; Madras Bar Association* v. *Union of India, (2014) 10 SCC 1; Madras Bar Association* v. *Union of India, (2015) 8 SCC 583; Rojer Mathew* v. *South Indian Bank Ltd., (2020) 6 SCC 1*; *Madras Bar Association* v. *Union of India, 2020 SCC OnLine SC 962;* etc.

[6] *See generally*, Granville Austin, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE (OUP, 1999) 370-390.

[7] *See*, Arun K. Thiruvengadam, "Chapter-23 Tribunals", in Sujit Choudhry, Madhav Khosla, et.al. (eds.), *Oxford Handbook of the Indian Constitution* (OUP, 2016) 412-431, 419. The Janata government was short of numbers in Rajya Sabha i.e., the Upper House to be able to undo all the legal changes made during emergency. Thus, the government adopted a selective approach in proposing agreeable amendments.

[8] *See*, Arvind P. Datar, COMMENTARY ON THE CONSTITUTION OF INDIA VOLUME II (Lexis Nexis, 2007) 1799.; *Also refer*, K.C. Joshi, *Service Tribunals under Administrative Tribunals Act*, 28 JILI (1986) 207.

[9] *See*, *Minerva Mills* v. *Union of India, AIR 1980 SC 1789 (Bhagwati, J Minority Opinion).* The Constitution Bench in this Case decided upon the challenges to the forty-second amendment. The issues pertaining constitutional introduction of '*tribunals*' under 'Part-XIVA' to the Constitution of India, 1950 were not discussed as were not in challenge owing to non-creation of such bodies by the time the bench pronounced its decision. The focus of the bench was more on Sections 4 and 55 of the Amendment inserting Articles 31C and 368 (4) & (5).

[10] *Kesavandanda Bharathi* v. *State of Kerala, AIR 1973 SC 1461*. The Supreme Court of India in this case earmarked certain '*basic features*' of the Constitution of India that shall be considered as part of the inviolable and unamendable 'Basic Structure' to the Constitution of India.

The roots of the minority decision in *Minerva Mills* were sown much earlier.[11] It was also observed that the categorical abrogation of the doctrine is unallowable.[12]

This *inter-alia* prompted the legislature to enact a statute establishing administrative tribunals that indirectly excluded[13] the High Court's power of judicial review and supervision. The statute was challenged and the Constitution Bench in *SP Sampath Kumar Case*[14] was constituted by Bhagwati, CJ (as he then was), being master of the roster[15], to decide the validity of the statute.

B. SHIFTING APPROACHES OF THE SUPREME COURT OF INDIA TOWARDS TRIBUNALIZATION

In *SP Sampath Kumar*, the bench incorrectly[16] discussed the abovementioned minority opinion and put forwarded the "*worthy successor*" theory. The bench also welcomed the institution of tribunals as a substitute replacement for the High Courts with some prospective modifications for making them *worthy* of being such a substitute.[17] With this theory, the newly constituted administrative tribunals were seen as claiming parity with the High Courts and thereby creating legal tensions.[18]

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[11] *See*, Bhagwati, J decision rendered in, *Siemens Engineering & Mfg. Co.* v. *Union of India, AIR 1975 SC 1785 [1788].* The *obiter dicta* in decision supported the idea of tribunals replacing the courts with the caution of former exercising the powers in fair and reasoned manner.

[12] *Supra* n.9, Minority opinion in *Minerva Mills Case*.

[13] *Refer*, 'Section 28' of the Administrative Tribunal Act, 1985.

[14] *See*, *SP Sampath Kumar* v. *Union of India, (1987) 1 SCC 124.*

[15] This Constitutional Convention was affirmed in *Shanti Bhushan Case* in 2018. *See*, *Shanti Bhushan* v. *Supreme Court of India, (2018) 8 SCC 396 [441]*.

[16] *Supra* n.7, Arun K. Thiruvengadam. As Arun puts it, the five-judge bench completely ignored various precedents citing essentiality of the power of Judicial Review of the High Courts. The precedents could be cited as, *Sangram Singh* v. *Election Tribunal, (1955) 2 SCR 1 (5 Judges); Re Powers, Privileges and Immunities of State Legislatures, Special Reference No 1 of 1964, AIR 1965 SC 745 (7 judges); Kesavananda Bharati* v. *State of Kerala, (1973) 4 SCC 225 (13 judges); Indira Gandhi* v. *Raj Narain, (1975) Supp SCC 1 (5 judges); Minerva Mills* v. *Union of India (Majority decision), (1980) 3 SCC 625 (5 judges).*

[17] *Supra* n.14, decision in *SP Sampath Kumar Case*.

[18] *See*, the number of judgments in which the working of the tribunals was challenged, *J.B. Chopra* v. *Union of India, (1987) 1 SCC 422; Amulya Chandra Kalita* v. *Union of India, (1991) 1 SCC 181; Dr. Mahabal Ram* v. *Indian Council of Agricultural Research, (1994) 2 SCC 401; Sakinala Harinath* v. *State of Andhra Pradesh, (1993) 3 ALT 471; M.B. Majumdar* v. *Union of India, (1990) 4 SCC 501; State of Orissa* v. *Bhagwan Sarangi, (1995) 1 SCC 399; R.K. Jain* v. *Union of India, (1993) 4 SCC 119.* The major tensions arose over the status of tribunals against the High Courts. Tribunals in most of them being held as bound by the decision of the High Court. The doubts raised on their parity with High Courts them being creatures of statutes though based upon constitutional provision. The minor tensions also arose on the structural issues like the safeguards against executive interference, legal ability and standing of the '*alone*' administrative member to be able to deliver the adjudication of the tribunal.

To deal with this issue, a seven-judge bench in the *L. Chandrakumar* case cautiously decided against the tribunals' parity with the High Courts and made the tribunals subject to the High Court's power of supervision and judicial review.[19] The bench emphasized the desirability of tribunals in the 'supplementary' role but dumped the idea of them acting as substitutes of the High Courts. The decision was ill-criticized as creating an additional layer of appeal and holding violable power as inviolable.[20]

It is to be noted that the High Court's power of judicial review is neither an appeal nor a regular judicial affair, but a prerogative remedy vested with the Common Law Courts.[21] Further, the Common Law-based doctrine of "judicial review" is different from the newly evolved "merits review".[22] In the latter, which is prevalent in the Commonwealth of Australia, even the policy decisions could be reviewed substituting the intent and consideration applied by the original decision-maker.[23] But the former, engrained to the *ultra vires doctrine*, reviews the adherence to constitutional and legal standards and interprets legislative intentions in case of ambiguities with applicable restraints.[24]

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[19] *L. Chandra Kumar* v. *Union of India, (1997) 3 SCC 26.*

[20] *Refer*, Eighteenth Law Commission of India, "*L. Chandra Kumar be revisited by Larger Bench of Supreme Court*" (Report Number 215, 2008). The report goes to great length in explaining the violability of the power of the High Courts under Article 226 to the Constitution of India. Though without much legal substantiation of the claims made to buttress the proposal of reconsideration of the *L Chandrakumar* Case rendered by the bench of more than seven judges of the Supreme Court. This approach of the Commission goes directly in the teeth of its earlier reports. *For illustration refer*, First Law Commission of India, "*Reform of Judicial Administration*" (Report Number 14, Volume 2, 1958) 691-692.; *Please also refer*, *infra* n.30.

[21] *See generally*, J. H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (OUP, 2019) 145-65.

[22] Peter Cane, ADMINISTRATIVE TRIBUNALS AND ADJUDICATION (Hart, 2009) 227.

[23] *See*, Section 43(1) of the Administrative Appeals Tribunal (AAT) Act, 1975 [Commonwealth of Australia].

[24] *See,* the nine-judge bench decision in, *Mafatlal Industries* v. *Union of India, (1997) 5 SCC 536.* The decision explains the restraints to be observed by the Court while exercising the power of Judicial Review.; *See also*, Paul Craig, "Chapter-17 Competing Models of Judicial Review", in Christopher Forsyth (ed.), *Judicial Review and The Constitution* (Oxford Portland Oregon, 2000) 373- 374. Professor Craig dismisses the doubts raised upon the doctrine of judicial review on the basis of the alleged threat it poses to the "Parliamentary Sovereignty" in United Kingdom by enunciating the sufficient checks based on Common Law that act as guidance for the doctrine. The chapter could be seen as part of the ongoing debate between Professors Paul Craig and Christopher Forsyth regarding the traditional and modified ultra vires based upon specific and general legislative intent models and the alleged increased abilities of the Courts in the traditional *ultra vires* model. Though, in the context of India, the debate is just of academic relevance, as the doctrine of judicial review is constitutionally entrenched without having the presence of the principle of "Parliamentary Sovereignty" but a polity based upon "Constitutional Sovereignty".

Post *L. Chandrakumar*, the major changes in approach could be observed in the constitution bench decision of the Court in *Madras Bar Association* or *R Gandhi* or "*MBA 1*"[25] Case. The bench called for the possible exploration of the newly reformed United Kingdom-based model of streamlining the issues existing with the tribunals. The focus shifted from examining the legal validity of the '*creation of tribunals*' as substitutes of High Courts to the qualifications, appointment methods, and other structural issues. This approach of the Court like *L Chandrakumar* shows broad acceptance of the tribunals as desirable institutions owing to the '*pendency'* argument. In "*MBA 1*" the bench also issued certain directions to streamline the National Company Law Tribunals (NCLT) and its appellate tribunal (NCLAT). Here the court also clarified that while exercising judicial review the Court shall review the appointments and other pertinent issues of these bodies.

In another constitution bench decision (i.e., MBA 2)[26] the Court while declaring the *National Tax Tribunal* (NTT) and its parent statute as unconstitutional, reiterated the inviolability of the High Court's power of judicial review. For the first time in history, the Court tested the validity of a statute that is not a Constitutional Amendment law, against the doctrine of Basic Structure.[27] The position taken by the Court in the '*MBA 2*', was based on *Separation of Power, Rule of Law, Independence of the judiciary,* and *the power of judicial review* and thereby signaled the intolerable stand of the court against the violations of these *doctrines*. But later, in "*MBA 1(II)*"[28] while deciding the issue of non-adherence to the directions issued by the Court in '*MBA 1*' the court only invalidated the provisions of the new legislation but not the tribunal. The decision revived hopes for the legally tenable stay of tribunals that appeared almost shattered after the decision in '*MBA 2*'.

The tribunal issue came into focus again when the Court in *Gujarat Urja*[29] case sought the Law Commission of India to present a report considering the desirability of direct statutory appeals before the Supreme Court of India. The Law Commission in its report proposed that the direct

[25] *Madras Bar Association* v. *Union of India, (2010) 11 SCC 1.*
[26] *Madras Bar Association* v. *Union of India (2014) 10 SCC 1.*
[27] *See*, MP Singh, *Separation of Powers between the Courts and the Legislature*, 3 JOURNAL OF THE CAMPUS LAW CENTRE 31 (2015).; Also refer, *Madras Bar Association* v. *Union of India (2014) 10 SCC 1, 218.*
[28] *Madras Bar Association* v. *Union of India, (2015) 8 SCC 583*.
[29] *Gujarat Urja Vikas Nigam* v. *Essar Power Limited, (2016) 9 SCC 103.*

appeals could be done away with by instituting division benches in each High Court dealing with appeals from statutes erstwhile providing direct appeals to Supreme Court. The Commission also accepted *ill-criticism* in its earlier report, hailing and accepting the inviolability of the High Courts' power of judicial review.[30]

The report of the Commission was discussed by the Court in its Constitution Bench decision in the *Rojer Mathew* case.[31] The bench in *Rojer Mathew* supported and reiterated the suggestion of the Commission of doing away with the direct appeals to the Supreme Court and constituting Division Benches of the High Courts for the same.[32] The suggestion found merit as this increases geographical access[33], as the tribunals under the study had limited benches. Apart from enhancing the experience of the High Court judges before their elevation to the Supreme Court.[34] Further, a major development that *Rojer Mathew* brought was the specific application of the doctrine of '*judicial primacy*' as applicable to judicial appointments to the composition of appointments' panel of tribunals.[35] Another paradigm shift observable from the *Rojer Mathew* is the direction to

[30] *Refer*, Twenty First Law Commission of India, "*Assessment of Statutory Frameworks of Tribunals in India*" (Report Number 272, 2017) at pages 7, 94; paras 1.21, 10.2 respectively.

[31] *Refer*, *Rojer Mathew* v*. South Indian Bank, (2020) 6 SCC 1.* Available at, <https://www.sci.gov.in/pdf/JUD_4.pdf> (Last Accessed 20th September 2020).

[32] *Id*., *Para* 218 at 172.

[33] Here, it may be reminded that in *SP Sampath Kumar case,* even the '*welcoming*' bench, called for parallel presence of tribunals at all the places of permanent benches of the High Courts.

[34] *Supra* n.31, *Rojer Mathew* decision. The suggestion *inter-alia* was directed to be implemented within six months from the date of decision i.e. 13th November 2019. Though the government brought *the Tribunals Reforms (Rationalisation and Conditions of Service) Bill, 2021 (Bill 19 of 2021)* only on 13th February 2021 that pending the consideration of the House of People due to end of Session was promulgated in the form of an Ordinance.; *See*, *the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 (No.2 of 2021)* 4th April 2021. The Bill proposes and the Ordinance amended the 'Section 184' to *the Finance Act, 2017* adding a provision of '*casting vote*' vested with the Chairperson of the '*Search cum Selection Committee*' for appointments to Tribunals. Also, the mandatory requirement of Chairperson being Chief Justice of India or her nominee was added as proposed in *Rojer Mathew* and *MBA 3*.

[35] *Id*., *Rojer Mathew* decision. The application of "*primacy of judiciary*" in judicial appointments by the bench in *Rojer Mathew* could be referred to be based upon the '*MBA 2*' decision authored by Khehar, CJ (as he then was) citing the constitutional convention referred in the Lord Diplock's opinion in Privy Council case of *Hinds* v*. R, (1976) 1 All ER 353 (PC),* where the same safeguards and conditions were made necessary to apply to the forum replacing the jurisdiction that was exercisable by courts, erstwhile. Though the bench in *Rojer Mathew* also referred the "*fourth judges' case"* or the NJAC decision*, Supreme Court Advocates-on-Record Assn.* v*. Union of India, (2016) 5 SCC 1,* again authored by Khehar, CJ (as he then was) but this time without citing the *Hinds convention*.

the government to constitute '*National Tribunal Commission*' (*NTC)* based upon the concept-note presented by Senior Advocate Arvind Datar, who was amicus curiae in the matter.[36]

The approach of the Court in *Rojer Mathew* particularly in the separate and part dissenting decision of the DY Chandrachud, J (as he then was) could at best be called *reprimanding*. To understand the approach, the words of the Court need reproduction[37]:

> "336. *We find that though the decision in R Gandhi was delivered in 2010 and in Madras Bar Association in 2014, the same anomalies have persisted. An attempt has been made to dilute judicial independence by a creeping assertion of executive power. This is unconstitutional.*"

The exasperation of the Court was reiterated in "MBA 3" decision[38] as a sequel[39] to *Rojer Mathew* indirectly reprimanding the executive for its inaction in the following words:

> "*1. That the judicial system and this Court, in particular, has to live these déjà vu moments, time and again (exemplified by no less than four constitution bench judgments) in the last 8 years, speaks profound volumes about the constancy of other branches of governance, in their insistence regarding these issues. At the heart of this, however, are stakes far greater: the guarantee of the rule of law to each citizen of the country, with the concomitant guarantee of equal protection of the law……..*
>
> *57. The Government is, accordingly, directed to strictly adhere to the directions given above and not force the Petitioner-Madras Bar Association, which has been relentless in its efforts to ensure judicial independence of the Tribunals, to knock the doors of this Court again.*"

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[36] Apart from the concept note, the report of the Parliamentary Standing Committee was also made the basis for creation of NTC. *See*, Parliament of India, "*The 107th Report of the Department Related Parliamentary Standing Committee on Personnel, Public Grievance, law and Justice on the issue of Demand for Grants*" (2021).; Interestingly, the amicus curiae in *Rojer Mathew,* in his earlier publication disfavored the idea of tribunals as adjudicators outside the judicial hierarchy. *See*, Arvind P Datar, Tribunals: A Tragic Obsession, INDIA SEMINAR (2013). Available at, <https://india-seminar.com/2013/642/642_arvind_p_datar.htm> (Last accessed 20th January 2021).

[37] *Supra* n.31, *Rojer Mathew* decision, *Para* 336 at 226.

[38] *See*, *Madras Bar Association* v. *Union of India, 2020 SCC OnLine SC 962* (3J decision dated 27th November 2020).

[39] Opening remarks of the judgment (*MBA 3*) cites it as a sequel to *Rojer Mathew decision*.

The displeasure of the bench in *'MBA 3'* was specifically due to the fact that despite its repeated assertions about instilling safeguards for protection of the independence of the tribunals, the government appeared to have done very little in acceding or implementing the same. While firmly reiterating its earlier directions, the three-judge bench in *'MBA 3'*, even allowed certain discounts to the Government. *For illustration*, the five-judge bench in *'MBA 1'* specifically prohibited the presence of members of the Indian Legal Service as 'Judicial Members' at Tribunals. But the bench in *'MBA 3'* allowed such personnel to be eligible for 'Judicial Members' positions. Accepting the argument of the Attorney General, citing the binding[40] acceptance of such proposal by the *SP Sampath Kumar* bench, being earlier in time[41] and of equal strength[42] to *'MBA 1'* bench. Noteworthy is the fact that no challenge to the presence of members of the Indian Legal Service as 'Judicial Members' was made before the *SP Sampath Kumar* bench. Hence, the silence of the bench in *SP Sampath Kumar* on the (non)issue in itself could not be referred to as acceptance. As already discussed, the legal footing of the decision in *SP Sampath Kumar* is itself not very firm.

Contrastingly, the specific issue against the presence of members of the Indian Legal Service as 'Judicial Members' was raised and disposed of by the *'MBA 1'* bench with binding directions. Recently, the Government readily accepting '*MBA 3*' bench's authorization of such personnel, framed and promulgated eligibility Rules.[43] But the same enthusiasm appears lacking to implement the suggestions like the constitution of the National Tribunal Commission (NTC) that was suggested way back in 2019 by the *Rojer Mathew* bench. The new rules paves way for the presence of retired bureaucrats as 'Judicial Members'. This would only substantiate the criticism against tribunals as forums primarily for post-retiral benefits and secondly for justice.[44] Observably the zeal and haste in the framing of the abovesaid Rules as well as in implementing the leverage gained in *'MBA 3'*, appears missing *inter alia* for implementing suggestions like 'NTC'.

It could be said that the initial '*welcoming'* approach of the Supreme Court in *SP Sampath Kumar* turned to '*cautious'* in *L. Chandrakumar*. The '*cautious'* approach shifted to '*directory'* in

[40] *Refer*, *Sundeep Kumar Bafna* v. *State of Maharashtra, (2014) 16 SCC 623.*
[41] *Id.*
[42] *Id.*
[43] The Government of India, Ministry of Finance (Department of Revenue), "The Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) (Amendment) Rules, 2021" *Notification No. G.S.R. 458(E) (30th June 2021)*.
[44] *Supra* n.36, Datar. *See*, last para of the Article by Datar.

the *MBA* series of decisions, providing specific directions to the Government concerning the constitution of tribunals. And with the recent batch of decisions starting *Rojer Mathew*, the approach could well be classified as *reprimanding* or *exasperated*. This shifting approach of the Supreme Court with relation to the creation of '*tribunals as justice institutions*' in India could be classified as desperate attempts in reconciling the increasing legal tensions. The shift in approach, post-*L. Chandrakumar* infers that tribunals are here to stay, but puisne judiciary shall thwart any attempt in the direction of tinkering with the Independence of Judiciary.

C. REVIEWING THE PROPOSED MERITS OF THE TRIBUNALS

Amongst all the acclaims[45] for the Tribunals as an *alternative institutional mechanism*, the most prominent could be summarized into the following three classifications- *firstly*, cheap and expedient justice; *secondly*, being highly specialized and *thirdly*, easily accessible. The classifications could also be seen from the utilitarian '*efficiency*' criteria between courts and tribunals. These three justifications shall be dealt with on the basis of reasoning and analysis of their logical merits and demerits.

1. CHEAP AND EXPEDIENT JUSTICE ARGUMENT

The word 'cheap' in a positive economic connotation could mean something that costs less than expectations. The traditional formalistic 'civil' system of Courts has mandatory procedural and fee requirements which make the process appear cumbersome and cost-ineffective to an ordinary litigant. The Tribunals were proposed to have less formalistic procedures as well as the freedom to decide their own procedures. The proactive inquisitorial nature of proceeds further reduces costs on evidence and representation. Arguably, an inquisitorial forum in contrast to an umpire-like forum in adversarial proceeds plays a proactive role in the proceeds aiding better evidence collection and representation for parties. Sometimes, this procedural openness also proposes that the mandatory requirements of legally trained and bar-enrolled advocates representing the parties could be done away with before these forums if the forum so decided.

[45] *Supra* n.20. The claims of the reports of the Law Commission citing justifications in favor of tribunals against courts were primarily based upon *Franks Committee Report* of United Kingdom.; *See*, Sir Oliver Franks, "*The Report of the Committee on Administrative Tribunals and Enquiries*" (1957). [United Kingdom]; *For further reference please see*, Jag Griffith, *Tribunals and Inquiries*, 22 MOD. L. REV. 125 (1959) 125-145.

Thus, leading to added savings upon the representation cost also. But all this cost-effectiveness comes at the cost of reduced procedural safeguards that ensure legal control to prevent decisional malice. Such flexibility is less desirable when no uniform Procedural Code for such administrative adjudicators is available. As the minimum procedural standards may not remain uniform across such adjudicatory forums leading to confusion and the possibility of miscarriage of justice.

The tribunals are justified on the ground that while granting these procedural discounts they adhere to the basic principles of natural justice.[46] The procedure before Courts are indeed formal and considered time-consuming and cost-taking but ensures that rule of law is followed in letter and spirit. But replacing such tested formal procedures of law, though 'cost-taking', by letting tribunals adopt un-coded principles of natural justice or leeway to choose their own procedures on the basis of 'economic' justification appears problematic. This '*discount on justice*' also appears costly when litigants as taxpayers indirectly pay the additional cost for the creation of parallel infrastructure for increasingly constituted '*cost-effective'* Tribunals. The money could have been well spent bolstering court infrastructure for reducing the burden on overburdened courts.

Alternatively, the financial burden of this parallel infrastructure could be prevented by integrating tribunals within the judicial hierarchy as special courts or divisions within courts. The premise of this argument appears true in the light of the recent *rationalizing* attempts by the government by *amalgamating*[47] various tribunals or disbanding[48] them all together and vesting the appellate powers with the Special Division of Courts.[49] Further, researchers cast doubts over the expediency of tribunals, as well.[50]

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[46] By following the twin-maxims for Natural Justice and Procedural Fairness, *"Audi alteram partem"* and *"Nemo judex in causa sua".*

[47] *See*, the Finance Act, 2017 (Act 7 of 2017).

[48] *Supra* n.34., the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 (No.2 of 2021).

[49] *In fact*, the Tribunal Reforms (Rationalisation and Conditions of Service) Bill, 2021, on which the above-mentioned Ordinance is based, in its Statement of Object and Reasons mentions about the failure of some tribunals to lead to faster justice delivery and having costed the exchequer heavily.

[50] *See*, Amulya Purushothama and Padmini Baruah, "*Report on Approaches to Justice in India Diversification and Efficiency: A Case Study of the Karnataka Appellate Tribunal*", Daksha India (2017). Available at, <https://dakshindia.org/Daksh_Justice_in_India/24_chapter_03.xhtml> (Last accessed 20th January 2021). The report raises serious doubts in its study on *Karnataka Appellate Tribunal (KAT)* citing a larger number i.e. 33% of the decisions rendered by the Tribunal being reversed by the High Court of Karnataka due to lacking fulfilment of procedural requirements.

If procedural flexibility is to be considered as the important feature for tribunals then there should exist some uniform Administrative Procedure Code (APC) delineating the niceties of flexibility, maintaining the uniform legal rigor. This APC could also ensure non-interference of the executive in the day-to-day functioning of Tribunals, in case the tribunals stay in the present institutional form though with assistance from 'NTC'. Alternatively, the 'APC' could aid the integration of Tribunals within the judicial hierarchy as Special Courts providing a different set of flexible non-formalistic but uniform procedures.

2. SPECIALIZATION ARGUMENT

The prefixes like a technical, expert, special, etc. are affixed to the non-judicial members available as part of the bench at tribunals performing parallel adjudication with judicial members. Their presence at the bench is justified citing time effectiveness. Against scenario, in which they appeared as an expert witness in the time-taking formalistic system of courts. The amalgamation and rationalizing exercise by the Finance Act in 2017, undertaken by the government forming either generalist tribunal or re-vesting the courts with the power of these tribunals, casts doubt over the merits of the facility of specialized justice.[51]

Apart from the *independence aspect* owing executive's alleged interference of the tribunals, the *presence* of non-legal members as part of the adjudicative bench of the tribunals has been the main source of *legal tensions*. The constitution bench decision in the much older *Bharat Bank Case* sets the position straight in this respect.[52] As per the decision, the lead difference between a quasi-judicial and judicial body is the former's possibility of adjudicating non-legal issues and the certainty of non-application of legal decisional criteria by the former. Though the quasi-judicial bodies may also have disputes presented through shreds of evidence just like the regular courts.

Applying the above distinction, if the administrative tribunals are to base their decisions upon the '*law*' as the *decisional criteria* then irrespective of their nomenclature, they ought to be called judicial bodies and not quasi-judicial. But in case the *decisional criteria* are based upon extra-legal or pragmatic policy considerations, etc. then their existence as quasi-judicial bodies is justified. In

[51] *See*, P. Cane, ADMINISTRATIVE TRIBUNALS AND ADJUDICATION (Hart, 2009) 126-127.
[52] *Supra* n.3, *Bharat Bank* decision. Following the English King's Bench precedent and Lord Justice Scott opinion in, *Cooper* v. *Wilson, [1937] 2 K.B. 309* [United Kingdom].

such a scenario, the extra-legal determination by the expert or technical members can also be justified. But when the primary *decisional criteria* are based upon law then the presence of experts as adjudicators is certainly problematic.[53] In the last situation, the experts could aid the legally trained adjudicators through their non-binding advisory opinions as *Lay Members*. The obligation for providing legal reasoning could be placed on *Judicial Members* in case they divert from the expert advisory opinion so provided by lay members. This would ensure both, ready presence of experts and the preservation of legal requirements.

3. EASILY ACCESSIBLE ARGUMENT

The geographical benches of most of the administrative tribunals are not present at the place of permanent or circuit benches of the High Courts.[54] The direction in the *Rojer Mathew* decision for accepting the Law Commission's suggestion[55] regarding the constitution of division benches of High Courts instead of direct appeals to the Supreme Court also asserts against the non-easy accessibility of the tribunals. Further, it is economically unpragmatic for the exchequer to constitute geographical benches throughout India for each and every administrative tribunal. Despite that most of the statutory tribunals are usually constituted with exclusionary or ouster or privative clauses in their statutes. The legal position regarding privative clauses is fairly settled that they are allowed but strictly interpreted.[56] Thus, these bodies lacking residuary jurisdiction could not decide the holistic aspects of a dispute involving legal issues pertaining to matters outside their statutory jurisdiction thereby causing a legal dilemma.[57] This not only affects the accessibility of justice but also increases the cost for a litigant seeking justice from Court as well as from these bodies.

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[53] *See supra* n.50. The Report cited the presence of technical members as part of adjudicatory bench as possible cause of the high reversal rates owing to the lack of legal knowledge by technical members leading legal-procedural infirmities.

[54] *Supra* n.33. As against the suggestion in *SP Sampath Kumar* decision of having at least a circuit bench of the tribunal at the places of permanent benches of the High Courts so as to enhance the geographical access.

[55] *Supra* n.30.

[56] *See*, MP Jain, *Judicial Response to Privative Clauses in India*, 22 (1) JILI (1980) 1-37.

[57] *See*, *Dhulabhai* v. *State of Madhya Pradesh and Anr., AIR 1969 SC 78*.; This *dilemma* recently in the context of 'Debt Recovery Tribunals' has been dealt by the Bombay High Court at Para 23 at 169-172 in *Bank of Baroda* v. *Gopal Shriram Panda, 2021 SCC OnLine Bom 466 [CRA 29/2011 decision dated 25th March 2021]*. Available at, <https://www.livelaw.in/pdf_upload/drt-civil-courts-sarfaesi-bombay-hc-391232.pdf> (Last accessed 30th March 2021).

The position of vacancies before these bodies also poses a major setback to their accessibility. Most of the tribunals lacking any unified organized administrative agency. Moreover, they do suffer a great number of vacancies rendering the majority of their benches dysfunctional.[58] In the case of dysfunctional benches, it becomes difficult for a geographically and economically disadvantaged litigant to access justice through these forums. The geographical argument also poses questions on geographical independence, when tribunals are situated within the same building as the primary decision-maker, against whose interests, they may adjudicate the claims.[59] With amalgamation taking pace, arguments for geographical justice grow stronger, when tribunals are merged with tribunals at far-off places as against the place of sitting of the original tribunal.

D. COMPARATIVE GLOBAL APPROACHES TO THE ADMINISTRATIVE ADJUDICATION

Administrative Law in the Common Law world was initially shadowed by Professor Dicey's[60] notions of it being against the Common Law doctrine of Rule of Law and courts being sufficient adjudicators.[61] The development of the discipline of Administrative Law though could not be restricted by these notions even in the United Kingdom i.e. considered as the originator of the Common Law.[62] The discipline could be simply expressed as dealing with the legality of the affairs between the administration and the administrated. By the time Administrative Law and the concepts started developing in Common Law World, the Civil Legal Systems had fairly imbibed the discipline.[63] But the Common Law world struggled to find the solutions to the peculiar aspects

[58] *For illustration please see*, Bhadra Sinha and Amrita Nayak Dutta, "Armed Forces Tribunal has 19,000 pending cases, but here's why this is least of its problems" *The Print E-edition*, 18th March 2021. Available at, <https://theprint.in/judiciary/armed-forces-tribunal-has-19000-pending-cases-but-heres-why-this-is-least-of-its-problems/624020/> (Last accessed 20th March 2021).

[59] *For example*, the DRAT (Debt Recovery Appellate Tribunal) Chennai, situated at 4th Floor, Indian Bank Circle Office, 55 Ethiraj Salai, Chennai, Tamil Nadu 600008. The same Building houses the Circle Office of the Indian Bank and is named after the same.

[60] *See generally*, AV Dicey, INTRODUCTION TO THE LAW OF THE CONSTITUTION (MacMillan, 1885).

[61] Albert Venn Dicey, *The Development of Administrative Law in England*, 31 LQR 148 (1915). In this piece published much later to the original book (1885) cited above, Professor Dicey adopted a mild view about administrative law's consistency with rule of law. Though maintained that the ordinary common law-based courts be sufficient for redressing disputes of any nature.

[62] *Id*.; *Also refer*, William A. Robson, JUSTICE AND ADMINISTRATIVE LAW: A STUDY OF THE BRITISH CONSTITUTION (MacMillan and Co., 1928) 158-159.; *Refer Supra* n.21 (Baker) 161-164.

[63] With codification trend, by end of 20th Century many civil legal systems unlike common legal systems (with exception of United States having federal and state *Administrative Procedure Codes* or APAs) adopted a *codified administrative code* conforming to their statute based legal traditions. Though the exception of France amongst

of the discipline within the traditional common law-based setup. The Common Law-based nations such as the United States of America (USA), Canada, Australia, United Kingdom, etc. all faced *legal tensions* owing to the reconciliation of Common Law doctrines with the requirements of the discipline of Administrative Law.

The New Deal supporters in the USA achieved a historical compromise settling the legal tensions. The tensions emerged from seeking a complete ban on 'agency adjudication' outside courts. The compromise allowed 'agency adjudication' with legal control over them through mandatory procedural requirements mentioned in the federal Administrative Procedure Code of 1946.[64] In Canada, the legal position could best be explained through the opinion[65] of the Chief Justice of the Canadian Supreme Court. That considered the administrative tribunals as a legislative creature of a statute for implementing the 'policy purposes' of the government. Thus, them being separate from courts who unlike them enjoy constitutionally entrenched independence. The adjudicatory independence standards for such policy adjudicators thus allowed to be depending upon the standards prescribed through the parent statutes.[66]

The administrative adjudicatory institutions headed by the Commonwealth's *Administrative Appeals Tribunal* (AAT) in Australia are considered as part of the executive following the constitutional doctrine of Separation of Powers. These tribunals perform an uncommon 'Merits Review' that unlike 'Judicial Review' do not require mandatory decisional criteria based upon the application of the law. Rather the merits review is based upon fact-based analysis of the merits of the *policy*.[67] Though the lack of logic or reasoning behind the executive's policy could not be

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Civil Law nations that adopted such Code in 2015 and was earlier like Common Law countries was developing the administrative law based on the decisions of the Administrative Courts, an uncommon phenomenon mostly observable in common law. See, Dominique Custos's, "Chapter 17 The 2015 French code of administrative procedure: an assessment", in Susan Rose-Ackerman, Peter L. Lindseth, et. al. (eds.), *Comparative Administrative Law II Edition* (Edward Elgar, 2017) 284.

[64] *See*, McNollgast, *The Political Origins of the Administrative Procedure Act*, 15(1) JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 180 (1999) 182, 183.

[65] *Ocean Port Hotel* v. *B.C. (GM, LQ), 2001 SCC 52* [Canada].

[66] *See*, David J. Mullan, *Ocean Port Hotel and Statutory Compromises of Tribunal Independence*, 9 CANADIAN LAB. & EMP. L.J. 193 (2002). Much revered Late Professor Mullan argued against the comparison so made according prominence to statutes over the common law conventions requiring independence of adjudicators.

[67] *Australian Broadcasting Tribunal* v. *Bond*, *(1990) 170 CLR 321, 341* [Commonwealth of Australia]. The opinion of Mason, CJ (as he then was) explains the distinction well by providing the unallowable expansive fact-based interpretation under judicial review that could create legal tensions owing to Separation of Powers doctrine are sorted when executive bodies perform such fact-based review. *Available at*,

challenged under Judicial Review due to the Separation of Powers. As such analysis requires Court to step into the shoes of the policymaker considering the factual analysis of the circumstances, weighing the pros and cons of the policy. But the absurdity of such policy could be reviewed by the reviewer performing the *merits revi*ew with the leeway of even substituting the decision of the original decision-maker.

In the United Kingdom post the Tribunals, Courts, and Enforcement Act, 2007 (TCEA) the tribunals' appointments are considered as part of the combined judicial structure, and thus Judicial Appointments Commission or JAC headed by the Lord Chancellor[68] oversee the overall independence of these bodies. Post creation of combined Her Majesty Courts and Tribunals Service or HMCTS in 2011 the administrative assistance also became more organized and streamlined. It is the HMCTS, upon the logic of which appears, the proposed NTC, a proposed autonomous institution in India is based. At HMCTS bureaucrats render administrative assistance to manage various administrative and non-adjudicatory affairs of Courts and Tribunals. Though HMCTS is not the only agency of this sort. In France also, the High Council of Administrative Tribunals and Administrative Courts of Appeal (CSTA) aid and assists the Conseil d'état i.e. the highest administrative court and the courts below. CSTA also oversees various appointments as well as the disciplinary matters. The overall functional control of the CSTA is in the hands of the judges of Conseil d'état and the elected representatives of the subordinate administrative judges thereby maintaining the independence of the structure from the executive government's control.[69]

Hence, amongst institutions across the globe, tensions exist within the legal setups. The peculiar solutions devised to mitigate these *tensions* differ according to the overall setup of institutions and their inter-connections, maintaining functional synchronization and harmony to keep the system working. A successful legal transplant of a solution from one system into another requires not only common history that for India and UK may be possible due to colonial inheritance. But also requires the synchronization of the ability to modify according to particular requirements of the borrowing setup.[70] It is difficult for India to adopt Civil Legal Traditions based

<https://www.ato.gov.au/law/view/document?DocID=JUD%2F170CLR321%2F00002> (Last accessed 2nd April 2021).; *Also refer supra* n.23.

[68] *See*, Gary Slapper et. al., THE ENGLISH LEGAL SYSTEM (Routledge, 2017) 637-638.

[69] *See*, Zia Akhtar, *French Constitution, Droit Administratif and the Civil Code*, 19 EUR. J.L. REFORM 224 (2017) 232.

[70] Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160 (2004) 168.

solutions within its legal structure. As Indian structure is genealogically based upon Common Law.[71] The Common Law doctrines such as *Rule of Law*, *stare decisis*, *res judicata*, *Judicial Review*, *ultra vires*, etc. faced issues with the administrative adjudicators and India is not an exception to this. Though such adjudicators are well established in Civil Law based nations. This places the duty upon the Common Law Courts to reconcile the tensions so arose. Until now, the Courts in India have well performed this duty of reconciliation of developing administrative institutions within Common Law doctrines.[72] The duty enhances with the ever-increasing pace of *privatization* and *globalization.* With the trend, more *private entities* are performing the public functions erstwhile performed by the administration. And the administration now confining itself only to the regulatory role. Moreover, the questions regarding the performance of public functions as well as the involving Public Law element with these *entities*, need to be reconciled with the constitutional and statutory rights of governed.[73]

E. SUGGESTIONS AND CONCLUSION

The not so rigid doctrine of Separation of Powers in the Indian context forms the basis of the doctrine of Independence of Judiciary which requires the judicial wing to be separate from the executive.[74] Apart from the conflict with traditional principles of Common Law, the main problem that arose with the establishment of tribunals is of the 'legal control' and the fairness requirements

[71] *See*, Joseph Minattur, *French Administrative Law*, 16(3) JOURNAL OF THE INDIAN LAW INSTITUTE 364 (JULY-SEPTEMBER, 1974) 375.

[72] *See*, *Hope Plantations Ltd.* v. *Taluk Land Board, (1999) 5 SCC 590, 608.* The case could be cited as example of reconciliation, with regard to application of the doctrine of *res judicata* to the decisions of the tribunals the Supreme Court of India, referring the origins of the *doctrine* based upon '*public policy*' and '*justice*', allowed its application to such decisions.

[73] *See*, The recent three-judge bench judgment of the Supreme Court of India authored by D.Y. Chandrachud, J in, *Rapid Metro Rail Gurgaon Ltd.* v. *Haryana Mass Rapid Transport Corporation Limited & Ors., 2021 SCC OnLine SC 269 (26th March 2021)*. Available at, <https://main.sci.gov.in/supremecourt/2021/1500/1500_2021_35_1501_27232_Judgement_26-Mar-2021.pdf> (Last accessed 30th March 2021). The court here directed a private company operating rapid metro services in a state within the domain of 'public law' based writ remedy holding the operation of rapid metro for general public convenience vesting a public character over the functions of the private company. Thus, making the private limited amenable to 'public law' based writ remedy. Such innovative solutions by Common Law Courts to the problems of modern globalising world are need of the hour and Courts are well adapting to the same.

[74] *See supra* n.27, MP Singh.; *Also refer*, Article 50 to the Constitution of India, 1950. The article puts a duty upon the "state" in India to ensure separation of judiciary from executive. This distinguishes Indian conception of the *doctrine* from the French conception seeking separation of disputes involving administration to be adjudicated only by Administrative Courts and not Judicial Courts. The French pre-revolution (1789) notorious experience of "*unfair*" *Parlements* i.e., the province based appellate courts manned by French nobility, could be cited as one of the reasons for the same.

in the *adjudication process*. The *adjudication* being different from *decision-making*[75] requires reasoned deliberations upon the matter in the determination by a *body* which must be different and preferably unconnected to the original decision-maker. The independence requirements for such a *body* could be established through *legal control* established by a common administrative code or APC setting the *justiciable procedural requirements*. The power of Judicial Review vested in the Common Law Courts ensures perennial justiciability of such APC thereby creating an additional layer of *judicial control* over adjudication by tribunals, though within the restraints of the *doctrine*.

For the disputes based on 'administrative policy', they need not require the *decisional criteria* based upon *law*. If the basic decisional fairness is ensured through *administrative procedural code*, then the adjudicative forum could induct even non-legally trained personnel as adjudicators. For them, *policy requirements* and well-guided discretionary criteria based upon utilitarian pragmatic considerations could even be regarded as the correct decisional criteria. The 'efficiency' arguments in favor of such bodies could then be justified in explaining their existence within the domain of the executive. The uniform administrative procedural code or APC could ensure that these bodies have sufficient 'legal-control' for fairness in decision making. The APC shall confirm that bodies with 'non-legal' decisional criteria having non-legal experts being legally untrained could perform their functions well with a model fairness guidance ensured by the Code. The US's APA could provide the direction in achieving that goal as the Code has sustained almost seventy-five years of its existence within a Common Law based legal setup.

If the purely non-legal adjudication criteria are not possible then the intervention limits of the non-legal expert adjudicators could be determined through making their opinions advisory with a duty casted upon the legally trained adjudicators to provide legal reasons in case the expert advice is not accepted in the final adjudication. This could act as a sufficient safeguard without compromising the specialization and expediency aspect as experts shall be available as advisory part of the bench of the tribunals. Hence, if the tribunals are to be established with a duty to act judicially and with final decisional criteria based on "law" then non-legal experts could not share the bench as adjudicators.

[75] The original decision-making could be unreasoned or with abridged reasons in accordance with the powers vested with the decision maker. But no such inherent binding duty exists, for providing reasons unless otherwise mandated.

Further, there is a need for holistic debate on the merits of Tribunalization. The undemocratic exceptional circumstances of the national emergency that led the *forty-second amendment* to sail through without passing the rigor of democratic debates and discussions by the free and unhindered opposition also support that contention. Though the Courts have attempted to undo most of the damages through their opinions and directions in a catena of cases discussed but the core idea of Tribunals as a substitute of Courts still haunts the basic principles of Common Law followed by India. There could be a reconsideration of the idea of tribunals so conceived as bodies performing "merits review" based upon non-legal aspects as *decisional criteria.* That could mitigate most of the *legal tensions* with their existence. Further, allowing the review by senior policy experts as decision-makers could satisfy the specialization needs. The Common Law-based Australian example could act as the vantage point for such reform. Though as a caution even the merits-reviewers are legally trained judges in the Australian legal setup.

However, the broad structural issues relating to independence and appointments to these bodies have started streamlining but the majority government in the Westminster model would have to show political will for the reforms. The proposed establishment of *NTC* could at best be called a patchwork solution to broad structural issues pestering the whole legal setup but is indeed a welcome step.

The major set of reforms shall require complete overhauling of the system as well as creating a greater number of specialized courts and not tribunals. Merging the parallel tribunal infrastructure by instituting Administrative Divisions within the system of regular courts coupled with the procedural flexibility ensured through APC, appears most reasonable. This shall better protect the 'judicial primacy' in appointments as well as the independence of functioning in rendering administrative justice. As the judges of the Courts are administratively under the control of the puisne judiciary and judicial primacy is ensured in their selections. This shall also be cost-effective for the exchequer and prevent parallel tribunal infrastructure. But these big reforms are not possible without the much bigger political will to achieve a harmonized functional setup. The way tribunals are working currently, the setup certainly smells of the executive's desire to control the adjudicatory functions traditionally performed by courts. This desire is well observable through blatant disregard of the various directions of the Court for setting and managing the Tribunals, leading to a shift in the approach of the Court. The *reprimanding* shift could pave way for the

Court in further delineating the functional niceties by setting up some monitoring committee to ensure that the directions rendered have been positively adhered to.