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A SHIFT FROM ADR TO ODR IN CYBER DISPUTES

*Jinia Kundu**

INTRODUCTION

> *"In promoting access to justice, a modern civil justice system should offer a variety of approaches and options to dispute resolution. Citizens should be empowered to find a satisfactory solution to their problem which includes the option of a court-based litigation but as part of a wider menu of choices"*[1].

India has a long tradition and history of such methods being practiced in the society at grass roots level (*Panchayat*). Panchayats resolve disputes both of commercial and non-commercial nature. We also have Lok Adalat and other latest dispute resolution system of arbitration, conciliation, and mediation which are serving Indian peoples from a long time but when the dispute arises on the internet than we find that all these methods of dispute resolution becomes week and mockery due to the very fundamental nature of the internet itself. First the global character of the internet undermines the notion of territoriality, one of the foundations of traditional locus based system of dispute resolution. Since the internet does not correspond to the jurisdiction of any sole existing sovereign entity, territorially defined laws and therefore rules are difficult to apply to the internet and the activities of internet users. So to remove all this problems we have only one mechanism in hand and that is of Online Dispute Resolution (ODR).

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[1] Law Reform Commission Report, Alternative Dispute Resolution: Mediation And Conciliation, (LRC 98-2010) November, 2010, available at http://www.lawreform.ie/_fileupload/Reports/r98ADR.pdf (Last visited on January 29, 2012).

ADR & ODR: THE CONCEPT

ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution[2]. ADR is an umbrella term for processes, other than judicial determination, in which a dispute is resolved between parties by using alternative means such as arbitration[3], conciliation[4], negotiation[5], mediation[6], etc. All ADR procedures, except negotiation, include the presence of a neutral person capable of providing an unbiased opinion who acts as a facilitator or decision maker. The advantages of arbitration trial is that there is no jury trial, panel/arbitrator will have substantive expertise, confidential proceeding, finality of judgments, lower costs, less delay, discourages class action and other litigation, damage awards, if any, more likely to match alleged harm.

On the other hand online dispute resolution relates to resolving disputes on the Internet. It is happening in many forms and forums across Canada, the United States, Europe and other countries. The Online Dispute resolution (ODR) market appears international in terms of geographic distribution of ODR enterprises. While the first ODR enterprises were set in North America, the number of projects developed on other continents, especially in Europe and Asia, is growing. The first Australian ODR sites were launched in 2002. In 2003 and 2004, new projects were launched in Sri Lanka[7] and the Philippines.[8]The term ODR refers to an array of dispute resolution procedures. Some are fully automated, others, although they take place exclusively online, involve a human neutral. With the rapid development of the Internet and electronic commerce, dispute resolution

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[2] National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms*, September 03,2000, available at http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F32F341DBE097801FF)~1Report8_nadrac2.pdf/$file/1Report8_nadrac2.pdf (Last visited on January 30, 2012).

[3]It means by an agreement the parties submit to all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. In arbitration proceedings the award is the decision of the Arbitral Tribunal.

[4]It is a process by which discussion between parties is kept going through the participation of a conciliator. In conciliation proceedings the decision is that of the parties arrived at with the assistance of the conciliator.

[5]Negotiation describes any communication process between individuals that is intended to reach a compromise or agreement to the satisfaction of both parties. Negotiation involves examining the facts of a situation, exposing both the common and opposing interests of the parties involved, and bargaining to resolve as many issues as possible.

[6]Mediation means the attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and make those in conflict agree on a fair result. Mediation differs from arbitration in which the arbitrator acts much like a judge but in an out-of-court less formal setting but does not actively participate in the discussion.

[7] See Info Share, available at http://www.info-share.org/doc_view.php?record_id=1&cat=2_0.

[8] The Cyberspace Policy Center for Asia-Pacific and Philippine MultiDoor Courthouse, available at: http://www.disputeresolution.ph/about.asp (Last visited on January 30, 2012).

mechanisms are needed to help resolve disputes between parties located anywhere in the world in a manner that is fair, expeditious and cost effective.

Many authors break up the development of ODR into three different stages: the first lasted until about 1995 (the elementary stage), the second dated from 1995 to 1998 or 1999 (the experimental stage), and the third to the present (entrepreneurial stage)[9]. As the network grew, "flaming"[10] and other violations of "netiquette"[11] emerged. Some online mechanisms were used to deal with these conflicts, but there were no organized dispute resolution institutions devoted specifically to ODR. Even the term ODR had not yet been invented at this stage. The second stage coincided with the growth of the Internet, particularly as a medium for commerce[12]. As companies began exploring the Internet's commercial opportunities, interest grew in domain names, and many disputes arose between trademark owners and domain name holders. In fact, the more the Internet was used for any purpose, the more disputes arose. The third stage is the most recent phase, during which commercial entities began to show interest in online dispute resolution. This stage has involved the commercialization of ODR systems. This has coincided with a new interest on the part of governmental and international institutions in ODR.

Websites such as Cybersettle[13], SettlementOnline[14]and clickNsettle[15] offer services that are entirely online and focus primarily on negotiating monetary settlements. These websites serve as a neutral arena to exchange settlement offers where an aggrieved individual initiates a claim by logging onto the service's secure website and setting a deadline for resolution, which is typically 30 to 60 days. The service then emails the other party to let him or her know that a settlement offer has been proposed and also gives them access to the website. The party can either accept or decline to participate. They decide to participate; he or she logs onto the website and submits a demand. Computer software automatically compares the demand with the settlement offer and

[9]Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*91 (Jossey-Bass, San Francisco, (2001).

[10] The term "flaming" refers to the process of sending repeated nasty messages to individuals or about individuals on the Internet – see: Joshi Pradyna, "Flamers Make for Unease on Net", Milwaukee J. Sentinel, Apr. 15, 1996, at 9.

[11]"Netiquette" means common courtesy online and the informal "rules of the road" of cyberspace – see: Netiquette Home Page, online: <http://www.albion.com/netiquette/>.(Last visited on January 30, 2012).

[12]Colin Rule, *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass, San Francisco, September 2002) at 301

[13]See Cybersettle, at http://www.cybersettle.com

[14]See SettlementOnline, at http://www.settlementonline.com

[15]See clickNsettle, at http://www.clicknsettle.com

emails both parties to let them know whether they are within the "range" of settlement or whether there has been any movement towards settlement.

Cybersettle and Settlement Online both allow three rounds of bidding. The cyber-negotiation starts off with the initiating party entering settlement offers ranked for the first, second, and third rounds and expiration dates for those rounds. Computer software then emails the other party explaining that a settlement offer has been made and requests the other party to put forth counter offers for the first, second, and third rounds. Computer software then compares the offers and counteroffers for each round to ascertain whether the parties have reached a settlement. If the software determines that a settlement has not been reached, then their offers remain confidential and future bargaining positions are unaffected.

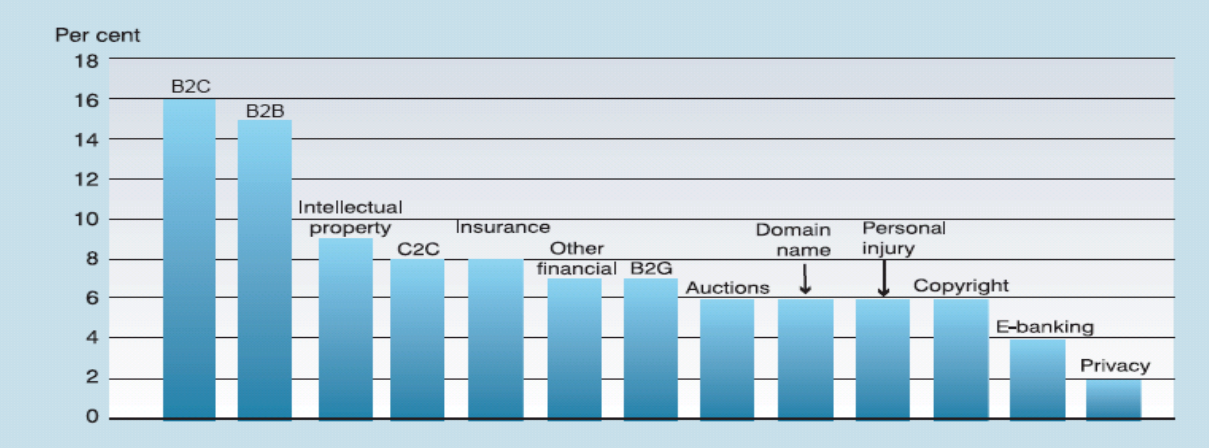

Table 1: Types of services offered by ODR providers[16]

Table 1 (mentioned hereinafter) elucidates the various types of services offered by the ODR providers relating to business to business (B2B), business to consumer (B2C), consumer to consumer (C2C), intellectual property, insurance, etc. ODR services provided entirely free of charge are quite exceptional.[17] The survey conducted by Tyler and Bretherton showed that user fees, which can take a number of forms such as: administration and filing fees, hourly rates, a percentage of

[16] United Nations Conference on Trade and Development, "E-Commerce And Development Report 2003 (Internet edition prepared by the UNCTAD secretariat): Chapter 7: Online dispute resolution: E-commerce and beyond", online: <http://www.unctad.org>

[17] Mediate-net, Cybertribunal, Online Ombuds and The Virtual Magistrate have also offered ODR for no cost, usually on a pilot basis, supported through philanthropic or academic funding. These services usually cease once the initial funding is exhausted.

settlement reached, or a per round bidding fee (in automated negotiation only), have been the predominant funding mechanism for ODR. Membership, advertisement/ subsidy, grants etc are other sources of ODR.

IMPORTANCE OF ONLINE DISPUTE RESOLUTION

While ADR has moved dispute resolution away from litigation and the courts, online dispute resolution extends this trend even further. If ADR represents a move from a fixed and formal process to a more flexible one, ODR – by designating cyberspace as a location for dispute resolution – moves ADR from a physical to a virtual place[18]. ODR can combine "the effectiveness of ADR with the comfort of the Internet."[19] Receiving advice online, with the potential benefits of decision support systems, will reduce costs due to a lower reliance on support from lawyers or mediators. Further, because these advices are available online or at least through the use of computers systems, such advice will be timely. The backlog in seeing lawyers or mediators will be less critical. According to Hörnle, it must be localized on a broad spectrum of dispute resolution mechanisms[20], with at the one end proceedings using hardly any online technology and at the other end proceedings heavily relying on online technology.

ADR / ODR CONTINUUM

ADR with basic electronic feature, such as e-mail communication or electronic submissions	ADR with Internets features, such as tele- or video conferences	ODR conducted entirely over the Internet, no face to face interactions

[18] Arno R. Lodder and John Zeleznikow, *"Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*" 10 Harv.Negotiation Law Review 287 (2005).

[19] Ibid.

[20] Julia Hörnle, *"Online Dispute Resolution – The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration*", available at: http://www.bileta.ac.uk/02papers/Hörnl_e.html (Last visited on January 14, 2012).

ADVANTAGES OF ONLINE DISPUTE RESOLUTION

1. **Convenience:** The main advantage of ODRs is that to resolve the disputes parties are not required to travel long distances. Numerous online transactions take place between parties situated in different countries. It may be time consuming and expensive as well if both the parties have to cover distances for litigation. Some dispute settlement mechanisms are available twenty four hours a day.

2. **Low Cost:** Litigating a dispute can be very expensive. Majority of the expenses are spent on hiring an advocate. Parties opting for ODR may not have to consult an advocate at all. For example if both the parties know the range within which they need to settle their dispute then they may employ a settlement mechanism type of ODRs to solve their dispute. To supplement it can save their travelling expenditure, long distance calls, teleconferencing etc.
3. **Legitimate to online Users:** If the parties perceive that online dispute resolution models address their disputes more effectively, more equitably, and more legitimately, the advantage of taking the dispute to the non-virtual world will disappear[21].Everyone would opt for online dispute resolution for the Redressal of their dispute.

4. **Avoidance of Complex Jurisdiction Issues:** A key advantage of resolving disputes through the use of cyber-mediation over land based legal systems is that it avoids the issue of whether a particular court has jurisdiction over the dispute. Since disputants can bind themselves to resolution through an agreement, jurisdictional issues can be avoided altogether.

LACUNAS OF ONLINE DISPUTE RESOLUTION

1. **Loss of Human Factor:** ODR loses the dynamics of traditional mediation because it takes place at a distance and in front of computer screens, and hence it cannot match the effectiveness and richness of the face-to-face communication that are the heart of offline mediation and other traditional dispute resolution. In Internet disputes, there are great distances between the parties psychologically. Large barriers to creating an open dialogue: there is typically no prior connection or any personal contact between the parties, they generally do not have an ongoing

[21] Robert C. Bordone, *Electronic Online Resolution: A System Approach-Potential Problems And A Proposal*, 3 Harv. Negotiational Law Review, 137 (1998).

relationship, nor is there any hope of a future relationship. Thus, the effectiveness of cyber-mediation is challenged directly by the lack of an established relationship or personal connection.

2. **Security and Confidentiality:** There are various ways of eavesdropping[22], or surveillance, on the internet which is a significant security and confidentiality concern. Usually traditional mediation does not create physical records. ODR creates more electronic records (ultimately also physical ones) when compared with ADR. One may fear that the other party may print out and distribute it without the knowledge of other party. This concern may impede the advancement of open and honest exchanges in ODR.

3. **Lack of Accessibility:** Lack of accessibility is another lacuna of ODR. For making ODR possible each party to the dispute must possess their own computer, sufficient hardware and software and a proper account for online communication. Accessibility to internet is easily available but any party may not own a computer. For example one may access internet in an internet cafe to make an online purchase and is displeased with the item's condition. The problem here lies is that this person may face inconvenience to get back to the café and it may be possible that he lacks knowledge regarding effective online communication which would disadvantage him with online mediation or arbitration. Continuous internet access is required to solve a dispute which may vary from few hours to some weeks. This may pose problem for those having limited access.

4. **Difficulty of Enforcing Arbitral Agreements:** To ensure the legitimacy of the ODRs process, parties engage in arbitration must believe that the decisions rendered are enforceable. The US Supreme Court has supported ADR by enforcing arbitration decisions.[23] Not only does ODRs have to ensure enforceability of arbitral awards to gain legitimacy, ODRs need to reassure internet users that they will have the equivalent of their day in court.

[22]Eavesdropping is the unauthorized real-time interception of a private communication, such as a phone call, instant message, and videoconference or fax transmission. The term *eavesdrop* derives from the practice of actually standing under the eaves of a house, listening to conversations inside.

[23] Benjamin G. Davis, '*The New Thing: Uniform Domain Names and Number*'. Journal of International Arbitration, Vol 17, 132-133 (2000).

5. **Lack of Transparency:** There is often a paucity of details provided about their governing structures (e.g. lines of ownership; officers' credentials), plus a paucity of readily available case-history information (e.g. how many cases handled; how resolved; what reasoning applied).

6. **Limited Range of Disputes:** Some disadvantages are specific to the method of cyber-mediation chosen. For example, fully automated cyber-mediation can only be used to resolve specific types of disputes and, even then, can only handle disputes where the amount of the settlement is the only unresolved issue. For fully automated cyber-mediation to work properly, it would seem that the parties would need to have undertaken initial discussions, agreed to the basic facts surrounding the dispute and have determined that one of the parties is responsible for damages. The parties have to agree to limit further discussions to the single issue of an appropriate amount of monetary compensation and thus limiting the final stage of negotiations.

7. **Limited Language Options:** Most allow only for the use of English. Language barriers are also challenging in a cross-cultural context whether it be in traditional ADR or an ODR. Some expressions or idioms may not translate correctly from one party in one country to someone in another. "Somebody may dash of quickly an email message without thinking but recipient can take the message very seriously. This can create misunderstandings and even full blown arguments"[24].The impact of an email can be underestimated.

8. **Failure:** Their frequent failure to provide adequate assurance of their independence and impartiality *vis-à-vis* businesses as most of the services are private, for-profit enterprises that rely, at least in part, on business sponsorship; at the same time, few services seem to include consumer representatives in their governing bodies.

9. **Legal Issues:** The introduction of information technology into the dispute resolution process raises a number of legal issues. The precise nature of these issues and the manner which they are treated may vary from one system to another. Contracts concluded by electronic means, including dispute resolution agreement raise a number of legal issues. Other legal problems may arise in the course of the proceedings.

[24]See HELIE, John, "*Technology creates opportunities and risks*", available at http://www.mediate.com/articles/ helie2.cfm (Last visited on January 18, 2012).

10. **Inappropriateness of the Internet Medium:** An online mediation/ negotiation/arbitration may be impracticable when too many parties are involved. A multiparty negotiation, mediation, or arbitration online will be difficult to control. A high number of participants will make the third party neutral's task almost impossible. It will be hard for the discussion to stay focused since given the asynchronous character of email, participants can all send messages simultaneously. It is best for ODR as was suggested by Blake Edward Vandegarde, to keep the parties involved at a minimum[25]. However, in the future, it will be easier to have ODR in multiparty disputes through the use of videoconferencing and faster modems.

CONCLUSION

This is an era in which change is not only occurring rapidly but at an accelerated pace[26]. Today's ODR mechanisms are said to be early harbingers of the future global dispute resolution landscape in the Digital Age.[27]Change, particularly change which brings higher and higher levels of online activity, is likely to accelerate the need for mechanisms to resolve disputes. The history of the Internet is a chronicle of innovation by improvisation, from its genesis as a national defence research network, to a medium of academic exchange, to a hacker cyber-subculture, to the commercial engine for the so-called "New Economy." ODR is faster and less costly than either court proceedings or traditional ADR. Since the parties can adapt the process to meet their specific needs, disputes can be resolved as quickly and economically as the circumstances permit. ODR involves no public hearings and every step of the process is private.

Some weaknesses of ODRs are problems with software standardization and compatibility; loss of physical and visual components of in-person communication; reduced urgency of coming to an out-of court settlement; problems with dealing with consumers with low levels of literacy; difficulty in establishing guarantees of security and confidentiality; need to authenticate the parties; risk of many frivolous complaints; difficulty in maintaining a balance between cost concerns and the integrity of

[25]Blake Edward Vandegarde, '*Alternative Dispute Resolution becomes Online Dispute Resolution',* December 2000, available at: www.ukans.edu/~cybermom/C1J/vande/vande.htm (Last visited on January 21, 2012).

[26] Ray Kurzweil, '*The Law of Accelerating Returns'* available athttp://www.kurzweilai.netarticles/art0134.html?printable=1(Last visited on January 30, 2012).

[27] Many authors have suggested that the spectrum of dispute resolution mechanisms will soon encompass a full range of "virtual" options made possible by the current revolution in information technology – see for instance: Thomas J. Stipanowich, *"Contract and Conflict Management"* Wis. L. Rev. 831.(2001).

the process. Despite all these lacunas there are positive aspects of ODR as well. The main advantage of ODRs is that to resolve the disputes parties are not required to travel long distances. It is less expensive as compared with court litigation and traditional ADR and also avoids complex jurisdiction issues.

SUGGESTIONS

Some suggestions for effective ODR system are as follows:

- **Accessibility:** ODR schemes should facilitate their easy use by consumers;
- **Impartiality:** ODR schemes should operate without bias, promoting business interests;
- **Independence:** ODR schemes should operate independently of vested business interests;
- **Confidentiality:** confidentiality and privacy must be maintained. All information provided by the parties must be secured and maintained even after Redressal of their grievances;
- **Transparency:** ODR schemes should provide readily accessible information about all aspects of their services especially there must be disclosure of costs and funding, no hidden charges should be imposed upon the parties;
- **Effectiveness:** There should be mechanisms to ensure business compliance with ODR outcomes;
- **Accountability:** Accountability for ODR providers;
- **Fairness/integrity:** ODR schemes should observe due-process standards ensuring, inter alia, that each party to a dispute has equal opportunity to express their point of view;
- **Flexibility:** ODR schemes should permit adaptation of their procedures to suit the circumstances of the particular dispute at hand; recourse to courts by consumers should not be precluded unless by prior and equitable agreement;
- **Affordability:** ODR schemes should be affordable for consumers, particularly in light of the amount of compensation being sought.

- **Qualification:** Qualifications and responsibilities of the neutrals must be mentioned so that only efficient and deserving person may sit as neutrals. He must act according to the best interest of the parties.
- **Effective Laws:** The European Union Recommendations on Online Arbitration (1998) and Online Mediation (2001) and ABA's Recommended Best Practices for Online Dispute Resolution Service Providers are some of the best-known general sources for ODR.
- **Speed:** ODR schemes should be run quickly and efficiently.

CARTELS WITH SPECIAL REFERENCE TO INDIAN CEMENT CARTEL CASE

*Ms. Nargis Yeasmeen**

INTRODUCTION

For most countries, Competition Law is a relatively recent phenomenon. In early 1950's, only ten jurisdictions has Competition Laws. But today more than 110 jurisdictions do, and more than 80 of these systems have commenced since 1980.[1]

Competition is an essential phenomenon of any market, because monopoly has various disadvantages which can be overcome only by the competition. There are many problems in a monopolistic market, few are mentioned here. In a monopoly, the price of the product is generally determined by the monopolist, and hence consumers may be subjected to price discrimination. The monopolist may charge different prices from different buyers.[2] The most important disadvantage of monopoly is that the choices of the consumers are lowered, thereby forcing the consumers to choose from limited products and to pay any arbitrary prices charged by the monopolist. On the other hand, Competition ensures freedom of trade and prevents abuse of economic power and thereby promotes economic democracy.[3] Black's Law Dictionary defines Competition as "the effort of two or more parties, acting independently, to secure the business of the third party by the offer of

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[1] U.N Conference on Trade and Development, Directory of Competition Authorities, available at http://www.unctad.org/en/docs/c2clpd56_en.pdf

[2] Vinod Dhali (ed.),*Competition Law Today: Concepts, Issues and the Law in Practice(*Oxford University Press, New Delhi, 2007)

[3] G.R.Bhatia,"*Combating Cartel in Markets – Issues& Challenges"* available at http://www.competition-commission-india.nic.in/speeches articles presentations/GR.BhatiaArticle.pdf (last visited on 11.08.2014)

the most favourable terms; also the relations between different buyers or different sellers which result from this effort."[4]

Competition Law which came into force on 1st September, 2003, regulates the competitive spirit among different firms and enterprises. Besides dominance and abuse of dominance, the chief components of Competition Law are some anti-competitive agreements. These types of agreements are generally entered into by those groups of producers or companies identifying themselves as a group forming cartels. They are generally a close and a secretive group. These are formal and explicit agreements among competing firms. Cartels generally occur in an oligopolistic industry (the number of sellers is small because of barriers to entry) and the products being traded are usually commodities. One of the most significant and legally important issues in the field of Competition Law is the regulation of Cartels. Cartel activities prevent consumers and other market stakeholders from enjoying the benefits of a free and fair market. In this connection it can be said that, cartels are considered to be a serious threat to competition as it has harmful effects on competition to a large extent. The main aim of cartelization is to increase member's profits among competing firms. Though cartels are being prosecuted and punished vigorously nowadays, but still it persists and has not decreased. A number of cartels have been prosecuted in recent years, like the Sugar Cartel, Vitamin Cartel and the Indian Cement Cartel decided by the Competition Commission of India. Thus the researcher's endeavor in this paper shall be to deal with the various facets of cartelization and to analyze an important case in which heavy penalties has been imposed by the Competition Commission of India.

In this project, the researcher has discussed the meaning of cartels, the ways they are being prosecuted in different jurisdictions, (especially EU, US, as their anti-trust laws came earlier than the laws in other jurisdictions) and the different types of activities which are considered as cartel activities. The most viable way to understand cartels are by analyzing some case laws, and in this regard the *Indian Cement Cartel Case* is by far considered the most important fundamental case on this subject.

The researcher has primarily used the doctrinal method of research. The Legal Text books on the Competition Law of India, EU, and the Sherman Act are the primary sources. While relevant text, articles, case laws, as well as internet are the secondary sources.

[4] Black's Law Dictionary, Pg 284.

For the purpose of this project, the researcher has divided the entire project into four chapters. They are as follows:

MEANING/DEFINITION OF 'CARTEL'

Cartel has been defined under various jurisdictions, which are mentioned below. It has been defined under Section 2(c) of the Competition Act, 2002[5] .The EC Treaty defines cartels under Article 81(1).[6] A general definition of Cartel is also given in Black's Law Dictionary.[7] Cartels are prohibitive in nature and are considered as a supreme evil under all laws and jurisdictions. Under the Sherman's Act, 1890, it is prohibited in the US jurisdiction. In a famous case of ***Verizon Communications v. Law Officers of Curtis v. Trinko, LLP,***[8] the US Supreme Court referred cartels as the supreme evil of Anti-Trust. The dangerous nature of Cartels has been also elucidated by the European Union XXXIInd Report, 2002 on Competition Policy, which pointed out that cartels are said to diminish social welfare, create allocative inefficiency and transfer wealth from consumers to the participants in the cartel by modifying output and/or prices in comparison with market-driven levels.[9]

Going by the above discussion, we can very well understand that cartel practices reduce or abolish competition, lead to monopolistic pricing and that the monopolistic price exceeds the competitive price. Higher prices mean diminished consumption, the extent of the decrease being determined by the responsiveness of demand to price changes.[10]

ANTI-CARTEL LEGISLATION IN VARIOUS JURISDICTIONS

For the purpose of this project, the researcher is going to compare the anti-cartel legislations in India, US and EU. These countries are selected by the researcher as they are the most emerging,

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[5] "Cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale, or price of, or trade in goods or provision of services."

[6] " All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention , restriction or distortion of competition within the internal market."

[7] "A cartel is a combination of producers of any product joined together to control its production, sale, and price, so as to obtain a monopoly and strict competition in any particular industry or commodity".

[8] 540U.S.398 (2004)

[9] Paragraph 26

[10] Klaus E Knorr, "*The Problems Of International Cartels and Intergovernmental Commodity Agreements"*, available on http://heinonline.org pdf (last visited on 11.08.2014)

developing and Newly Industrialized Countries (NICs) reflecting on their similarities in terms of market nature, economic impact and potential market challenges.

INDIA

In India, section 3(3) of the Competition Act, 2002 deals with enterprises that are engaged in the supply of identical or similar goods or services or constitutes a cartel and which engage in certain anti-competitive agreements.[11] All these agreements which are anti-competitive are considered to have *an appreciable adverse effect on competition.* The agreements which are considered to be anti-competitive are as follows:[12]

- Agreements fixing purchase or sale prices;
- Agreements which limit or control production, supply, markets, technical development, investment or provision of services;
- Agreements sharing markets;
- Agreements resulting in bid rigging or collusive bidding

The Competition Act, 2002 is equipped better than the MRTP Act as it defines cartels, and also imposes suitable penalty/punishment to all those who enter into cartels. Section 48 of the Competition Act, 2002 lays down provisions for punishments whoever commits any acts which are in contravention to the provisions of the act. Section 27 of the said act further lays down that whichever company does any act which is anti-competitive; penalty will be imposed on them. But the Competition Act, 2002 has also imposed certain exemptions for certain kinds of cartels as in the case of joint ventures. Joint ventures are generally exempted as they are beneficial for expanding the market, better availability of technology, increasing the production and sharing expertise; which aims at more and better welfare of the consumers. The proviso to Section 3(3) of the Competition Act, 2002 provides that any agreement which is entered into by virtue of joint venture and which increases the efficiency in distribution, production, storage, supply, control or acquisition of goods and services are exempted from the operation of Section 3(3) of the Act.[13] Section 3(5) of the Competition Act, 2002 also lays down that in the exercise of intellectual property rights, the owners of such rights may impose conditions on their licenses which tend to reduce/eliminate competition.

[11] Competition Law in India, *Policy, Issues, and Development* by T.Ramappa
[12] Ibid
[13] Competition Law Today, "*Concepts, Issues, and the Law in Practice"* by Vinod Dhall

The authority who is entrusted to achieve the objects of the Competition Act is the Competition Commission of India. The Director General of the Commission (DG) shall start an investigation and furnish report (on the order of the Commission) once the Commission is satisfied that there occurs a prima facie case of a cartel.[14] It is pertinent to mention here that the DG has all the powers of a civil court and also the power of search and seizure.[15] One of the pillars of the cartel laws are that punishments must be balanced with leniency in support of those persons who come forward and accept the evil doing i.e. cartelization. But the Competition Act, 2002 has no such effective provision for leniency, though the Competition Commission has framed the lesser penalty regulation, 2009, [read with Section 27(b), Section 46 and64] which is still in its nascent form. But certain conditions must be fulfilled before the imposition of such lesser penalty. They are[16]:

- Full and true disclosure (disclosure is vital) regarding the alleged violation by any producer, trader, seller, and distributor included in the cartel;
- The Competition Commission must not have received the report of the Director General before such disclosure by the cartel participant;
- Till the termination of the proceedings, the person disclosing the information must co-operate with the Commission.

The Competition Commission shall keep all information confidential and shall not disclose unless required by law, or there has been a public disclosure by the applicant.[17]

UNITED STATES

Discussions about the relationship between European and US Competition policy today focus extensively on the standards for evaluating the conduct of dominant firms[18]. In both the jurisdictions there are possibilities of anti-competitive behaviour. Cartels can be brought under Section 1[19] or Section 3 of the Sherman Act, 1890, as the Sherman Act is the main anti-trust legislation in the

[14] Murtuza Bohra, "*The increasing role of Economic Evidences in Prosecution of Cartels"* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933810 (lat visited on 11.08.2014)
[15] Ibid
[16] See Regulation 6 of the CCI (Lesser Penalty) Regulations, 2009.
[17] Ibid
[18] Randel D. Heeb, William E Kovacic…et al, *"Cartels as Two-stage Mechanism: Implications for the Analysis of Dominant Firm Conduct"* available at http://heinonline.org (last visited on 11.08.2014)
[19] Section 1 of the Act provides: every contract, combination in the form of trsut or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

United States. This act prohibits some anti-competitive activities like price-fixing, market allocation, and bid-rigging. With various case laws, US have evolved two main principles i.e. *rule of reason* and *per se illegality*. Under the *rule of reason* the practices are beneficial to the competition in the market. And under the *per se* rule certain practices are considered to be illegal without giving any further proof, for example, horizontal price-fixing, bid-rigging, horizontal market and customer allocation are some *per se* illegal practices. The Anti-trust division in US thought that putting a person behind the bars is the best way to prevent cartel, so in 2004 under the Sherman Act, they increased the maximum term of punishment from 3 years to 10 years.[20] In US, the Anti-Trust Division has certain leniency programs, which they framed in 1978 and revised it in 1993. There are two types of corporate immunity, they are Type 'A' and Type 'B'. Type 'A' is available to those entities that provide information before the investigation starts, and Type 'B' is available t those who provide information either after the commencement of the investigation or which does not fall under Type 'A' immunity. Those entities that obtain leniency programs under the policies are exempted from imprisonment under the anti-trust laws, but they may be subjected to civil penalties or tried under private suits.[21] The US Policy also provides individual leniency, reports illegal anti-trust activities on the fulfillment of certain conditions, such as, the individual must come with specific information to the Commission, before the Commission has received any other information relating to cartel.[22] Thus it can be said that the US Anti-Trust division plays critical roles in controlling cartels.

EUROPEAN UNION

The European Union's anti-cartel legislation deals both in terms of investigatory powers and the use of penal fines. Articles 81(1) and 82(2) of the EC Treaty[23] deal with enforcement action and

[20] Geogory C. Shaffer and Nathaniel H. Nesbitt, "*Criminalizing Cartels – A Global Trend?*" available at http://ssrn.com/abstract= 1865971 (last visited on 15.08.2014)

[21] Massimo Motta and Michele Polo, "*Leniency Programs and cartel Prosecution*" available at http://ssrn.com/abstract=165688 (last visited on 15.08.2014)

[22] Ibid

[23] Article 81(1) of the EC treaty provides: The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions:
(b) limit or control production, markets, technical development, or investment:
(c) share markets or sources of supply
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage:
(e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

investigation against the cartels in the European Union. Article 81, Regulation 1/2003 provides the Enforcement Mechanism, where the European Enforcement Agencies are granted powers of decision making, investigation and punishment.[24] The European Enforcement Authorities are mainly the European Commission and the National Competition Authorities. The Commission is entrusted with the work of imposing penalties on the participants of cartels and the National Competition Authorities was given the task of increasing the levels of anti-cartel enforcement in the EU. Article 81(1) prohibits three kinds of conduct, namely, agreements between undertakings, concerted practices and decisions of associations of undertakings. The main object of including the concept of "concerted practice" is to ensure that the forms of anti-competitive practices which do not fall under the ambit of 'agreement' do not escape prohibition.[25] In a famous case of *ICI vs. Commission (Dyestuffs)*[26] the ECJ defined "concerted practice" as "a form of co-ordination between undertakings which, without having reached a stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition." Under the EU Law, the fines that are imposed for cartelization has increased to a deterrent level. There is also a *de minimus* principle under the EU Law which provides that if the agreements do not have an appreciable effect on competition, then it shall be outside the purview of Article 81(1). There is also a way for recovering damages by private action, but care should be taken that it does not result to excessive litigation.[27]

Thus, under the US and EU Law, being very tough and strict law, there are also some provisions of leniency to encourage people to come forward with valuable information relating to cartels and ways to minimize/reduce fines. But some conditions need to be fulfilled before such leniency. They are:[28]

- The immunity applicant must submit such information as is useful to the Commission to carry out a targeted inspection in connection with the alleged cartel and also to establish an infringement of Article81 of the EC Treaty.

Article 82(2) of the EC Treaty provides: Any agreement or decisions prohibited pursuant to this article shall be automatically void.

[24] Maher M. Dabbah and Barry E. Hawk (eds), "*Anti-Cartel Enforcement Worldwide"* Vol 1 397 (Cambridge University Press) Cambridge, 2009.

[25] Supra note 22 pg 406

[26] (1972) ECR 619

[27] Christopher Harding, "*Forging the European Cartel Offence : The Supranational Regulation of Business Conspiracy"* available at http:// heinonline.org (last visited on 11.08.2014)

[28] Ibid

- The applicant must co-operate in the investigation on a continued basis and furnish all evidence on relation to the cartel.
- The involvement of the applicant with the alleged cartel was ended immediately.

To conclude it can be said that, there are different legislation for different jurisdictions but the aim of all of them is to minimize cartelization which is harmful at large.

CARTEL ACTIVITIES

There are some cartel activities which the Indian Competition Act, 2002 prohibits in every way. They are bid rigging, price-fixing agreements, limiting production, market sharing and technical development. These will be discussed below:

1. **Bid-Rigging**: Section 3(3) (d) of the Competition Act, 2002 defines bid-rigging. It is an agreement between two persons or enterprises whereby bidders pre-determine the outcome of the bid by pre-determining the lowest bidder. The bidder who wins then shall share the spoils with the losing bidder either in cash or in kind, thereby mutually sharing the profits/benefits from the collusive agreement. In this way the competition of the market is severely distorted. This is considered as *per se* violation in the Anti-Trust Law of the US. There are different types of bid rigging. They are complementary bidding, bid rotation, bid suppression and sub contracting. As the name suggest, bid rotation means a situation where by rotation a bid is won by the competing enterprises. Bid rotation ensures that each competitor gets a chance to win a bid and hence eliminate competition. Bid suppression is an agreement between one or more competing enterprises who involves in an act of suppressing bids and refrains from submitting bids or withdrawn previously submitted bids in order that the competitor designated to win the tender succeeds in doing so.[29] In complementary bidding, the bidders generally submit bids that are not readily accepted by the buyers, but are merely meant for the appearance of genuine competitive bidding.[30] Subcontracting is an arrangement where the competitors to a tender agree not to bid or submit a losing bid in consideration for lucrative subcontracts from the winning bidder.[31]

[29] Vinod Dhall, *Competiton Law Today, Concepts, Issues, and the Law in Practice* (Oxford University Press)
[30] Ibid
[31] Vinod Dhall, *Competition Law Today, Concepts, Issues, and the Law in Practice* (Oxford University Press)

This bid rigging, which is a serious anti-competitive practice, is very difficult to detect, but once found huge penalties are imposed.

2. **Price Fixing:** It is a written, verbal or an implied agreement among competitors to fix and stabilize competitive terms or lower prices. It is always considered as a viable and non-co-operative behaviour yielding zero profit.[32] Price fixing agreements generally has a tendency to break down in the long run as costs are generally incurred in negotiating a fixed price, thereby becoming difficult by the cartel participants to monitor it thoroughly.[33] It is thus regarded by most people as an undesirable trade practice. Price fixing agreements do not have to be formal; they can be a 'wink and nod' made over a drink in a local pub, at an association meeting or at a social occasion.[34] It includes agreements to:[35]

   - Set a minimum price,
   - Eliminate or reduce discounts,
   - Adopt a formula for calculating price,
   - Increase prices, and
   - Maintain prices.

3. **Market Sharing:** In market sharing agreements, firms apportion particular markets between them. This is another way in which competition can be eliminated. These kings of agreements are generally restrictive in nature as it hampers consumer's choices.[36] Goods and services become more expensive, thereby the qualities of services are likely to deteriorate.[37] For example, if two or three firms/entities agree and demarcate their area saying that no other firms will interfere in the markets of another, this practice is prohibited as it restricts competition. This concept is known as market sharing.

4. **Limiting Production and Technical Development:** Some firms/enterprises impose certain conditions on other firms in order to prevent them from providing any new technology in the

[32] Michele Pola and Igier, Milan, "*The Optimal Prudential Deterrence of Price Fixing Agreement.*"
[33] Ibid
[34] T. Ramappa, Competition Law of India
[35] Ibid
[36] Richard Whish, Competition Law (Oxford University Press, 2009)
[37] Ibid

market. One such classic example is the *Cement Manufacturers Case*. In this case the CCI imposed a huge penalty of six thousand crores on the cement manufacturers for violating section 3(3) (a) (b) of the Competition Act, 2002 i.e. for cartelization. The details of this case will be discussed in the next chapter (under Chapter IV).

Thus the above cartel activities are a curse to the competitive markets which primarily aims at acting independently and honestly and for the benefit of the consumer as a whole. Furthermore, the weakening of competition leads to a loss of competitiveness and threatens sustainable employment opportunities.[38]

STUDY OF INDIAN CEMENT CARTEL CASE

The Builder's Association of India vs. Cement Manufacturer's Association and Ors is popularly known as the Indian Cement Cartel Case. This is the most important and recent landmark case where the Competition Commission of India (hereafter will be termed as CCI) has imposed a heavy penalty for being guilty of cartelization.

The informant in this case was the Builder's Association of India which was a registered company under the Societies Registration Act, 1860. The opposite parties were the Cement Manufacturers Association and 11 other cement manufacturing companies. They are:

- Ambuja Cement
- ACC
- J.K Cement
- India Cement
- Madras Cement
- Century Cement
- Binani Cement
- Lafarge Cement
- Ultratech Cements
- Jaiprakesh Associates
- Grasim Industries

[38] T. Ramappa, *Competition Law of India.*

According to the information filed by the informant, the above cement manufacturers indulged in restrictive trade practices by limiting the supply and production of cement, despite having more production capacity. Hence the CCI on September 2010 formed a prima facie opinion that it was in violation of Section 3 and 4 of the Competition Act, 2002, as they were involved in "collusive price fixing". The researcher here will deal only with Section 3 as this is her relevant area. One way in which the cement manufacturers raised their prices was that they limited the production and created a vacuum/scarcity. These above mentioned parties (opposite parties) colluded and raised the prices uniformly, having advance knowledge about the increase in prices. Thus an inquiry was started by the Director General (DG) and a preliminary report was submitted to the CCI. The DG then concluded by saying that the Cement Manufacturers was guilty of cartelization by controlling supply and fixing prices which was in contravention of Section 3 (3) (a) and (b) of the Competition Act, 2002.Then the CCI forwarded the report to the Opposite Parties and they submitted a lot of arguments on their support.

Preliminary Issues:

- The opposite parties denied the allegations and said that cement prices vary very often depending on the market condition.
- They also contended that division of the five zones was there since cement became a controlled commodity and there was no agreement among the Cement Manufacturers in this area.
- The opposite parties also contended that they were denied of the opportunity of cross examining the witnesses relied upon them. The CCI rejected this submission on the ground that if the opposite parties are given a chance to submit their written or oral evidences, the proceedings will be in accordance with the principles of natural justice.
- The opposite parties even went to the extent saying that the findings of the Informant were motivated. The CCI again rejected it on the ground that, according to the scheme of Competition Act, the final outcome was to be determined on the basis of an enquiry.
- Lastly they laid down that they have a right to form an association for their future betterment/prospects, and hence they were not guilty of cartelization. Cartel being a serious offence, there must be enough evidence in support of that, which was lacking in this case.

Findings/Directions of the DG:

- The CCI said that in order to prove an agreement under Section 3(3) of the Competition Act, 2002, showing of direct evidence is not required. Direct/Primary evidence is impossible to find out as these kinds of meeting are generally held in secluded areas. In the cases of Cartels, agreements can also be proved by circumstantial evidence.
- The Commission also held that only after those private meetings, the prices has soared up exorbitantly. Therefore, it can be concluded that the Cement Manufacturers were involved in cartelization, and violated Section 3(3) (a) of the said Act.
- Lastly, the Commission sealed the coffin by a final nail i.e. it said that with reference to controlling and limiting supply, the CCI said that the dispatching figures must be either more or equal to the consumption, but the situation here was other way round. Hence the CCI concluded that this was in contravention with Section 3 (3) (b) of the Act.[39]
- The CCI imposed a penalty on the cement manufacturers in accordance to Section 27 (b) 0f the Act.[40]

The order was given out on 20.06.2012. The CCI imposed a huge penalty of 6 thousand crores on the Cement Manufacturers Association for giving a platform to do cartelization. The penalty has been imposed at the rate of 0.5 times the net profit of such manufacturers for the past two years. In addition to it the Cement Manufacturer's Association has been fined 10% of its total receipts for the past two years for its active role for providing a platform from where cartel activities took place. It further directed the companies to 'cease and desist' from indulging in any agreement, understanding or arrangement on prices, production and supply of cement in the market and also disassociate itself from collecting retail and wholesale cement from the market. The penalty should also have to be paid within 90 days from the receipt of the order. The Cement Manufacturers then moved to the Competition Appellate Tribunal (CAT) and they said that they have to pay 10% of the penalty before the appeal. Even the Supreme did not provide any relief to them.[41]

[39] http://indiacorplaw.blogspot.in/2012/06/summary-of-ccis-order-against-cement.html
[40] Three times of its profit for each year of the continuance of such agreement or 10% of its turnover for each year of the continuance of such agreements, whichever is higher.
[41] http://indiacorplaw.blogspot.in/2012/06/summary-of-ccis-order-against-cement.html

CONCLUSION

This project aims to highlight some of the relevant cartel issues relating to policy and enforcement. Cartel is regarded as a greatest evil of the competition law. As Adam Smith in his famous book *Wealth of Nations* remarked that, *"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices."*[42] The operation of cartel tends to be very complex and varies from country to country, but the aim of all the nations is to minimize cartels. In India, the Competition Commission has taken an active step in preventing cartels by imposing huge penalties to those firms who are practicing cartelization. Other countries like the US and the UK also condemn cartel and consider them as illegal *per se.* In many jurisdictions, it is treated as a criminal offence, subject to prison terms for the individuals involved in the crimes.[43] They are not easy to detect since the colluding parties go to great lengths to cover their tracks. [44]But the thing that is to be noted is that efficient investigating authorities who have adequate knowledge on the subject of cartel are to be involved to track the cartel activities. One ideal policy which is adopted by the Competition Law is its leniency programs designed under various jurisdictions to detect or investigate cartel. This program has proved to be a successful tool in the hands of the authorities, offering huge incentives to the cartel members to abandon the cartel and be the first to reach the door of the competition authority.[45] However, there are few examples of global cartels being penalized; the reason is the limited capacity of domestic competition agencies to investigate and unearth evidence, difficulty in securing co-operation of the corresponding agencies in industrialized countries and limitations in law[46] are responsible for it. There is still a long way to go, but the steps that are taken as of now are praiseworthy. It is slowly moving towards consumer welfare, which is the main essence of the Competition Law.

[42] Adam Smith, *Wealth of Nations*
[43] Vinod dhall, *Competition Law today, Concepts, Issues, and the Practice in Law* (Oxford University Press)
[44] Ibid
[45] Vinod Dhall, *Competition LawToday, Concepts, Issues,and the Practice in Law* (Oxford University Press)
[46] Ibid

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PROPERTY RIGHTS IN OUTER SPACE- RELEVANCE OF NEMITZ CASE IN DEVELOPMENT OF JURISPRUDENCE

Prakhar Maheshwari[*]

INTRODUCTION

Everybody in this world wants to acquire property. This is so because property means money; money implies power; and power denotes the rulers of the world. Therefore, humans want to conquer territories and lands. Humans have used all available resources on earth. The space is also a resource and it was only a matter of time when humans looked up in the sky and made up minds to make economical and the best possible and use of this resource. Exploration of space requires technology, men and investment. However, nations and companies would be interested in such ventures only if it yields profits. From this emerged a willingness among people to acquire property rights in space, akin to those on the Earth.

In this article I would discourse on the property rights that exist in the space in light of the *Nemitz case*. I would be dealing only with real property rights and not intellectual property rights in the Outer Space.

THE SPACE TREATIES

With humans exploring and reaching new heights in outer space, treaties governing their activities were required. The legal sub-committee of United Nations Committee on the Peaceful Uses of the Outer Space (UNCOPUOS) introduced several treaties like the Outer Space Treaty, the Moon Treaty, Rescue Treaty, Liability Treaty and Registration Treaty. The exercise of sovereign control in outer space was the initial focus of the drafters of the outer space treaty.[2] They rejected the concept

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[2]M. Listner, 'The Ownership and Exploitation of Outer Space" [2003].

of *res nullis* which would have treated the outer space as "unclaimed territory" that belongs to no one, but was available for conquest. Such an agreement would allow nations to peremptorily claim ownership of the celestial bodies that they were the first to reach and exclude access to all others. Instead they declared outer space to be *res communis* where all entities, individual or corporate, and nations have common or open access to the resources that are contained within its realm and are precluded from making any claims of ownership. The basic principles governing these treaties are the non-national appropriation of outer space and *res communis*.

The two important treaties in connection with property rights in outer space are the Outer Space Treaty and the Moon Agreement. The Outer Space Treaty provides the basic framework on international space law and includes the principles like the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries and shall be the province of all mankind and that the outer space shall be free for exploration and use by all States. "This principle gives rise to the principle of common heritage of mankind. Common Heritage of Mankind, which although has not been expressly mentioned, is discussed in Articles 1,2 and 4. It is a principle of international law which holds that defined territorial areas and elements of humanity's common heritage (cultural and natural) should be held in trust for future generations and be protected from exploitation by individual nation states or corporations. Common Heritage of Mankind however, has very limited scope in outer space due to the ambiguity of treaties governing it."[3]

Article II of The Outer Space Treaty clearly prohibits any national appropriation, by claim of sovereignty, by use and occupation or by any means. This means that the Governments of the world cannot acquire any land for their own benefit in the outer space. The loophole in the treaty, however, is the silence over private ownership of celestial bodies.[4] The Moon Agreement on the other hand clearly bans any kind of privatization of moon and other celestial bodies by even an individual under Article 11. "This article also provides that 'the moon and its natural resources are the common heritage of mankind' Moon Agreement however fizzled out because important and influential countries like U.S. and U.S.S.R. did not ratify it, with only 13 United Nations countries ratifying it."[5] Hence we will concern with only the Outer Space Treaty in this project.

[3]E. Guntrip, 'The Common Heritage Of Mankind: An Adequate Regime For Managing The Deep Seabed?' [2003].
[4] N1.
[5]M. Listner, 'The Moon Treaty: failed international law or waiting in the shadows?' [2011].

Although outer space cannot be appropriated by nations, the objects launched by nations are considered to be the property of the states. Hence, for example, the satellites launched by India will be considered to be the national property of India.

PROPERTY RIGHTS AND GEOSYNCHRONOUS ORBIT

The outer space treaty completely bans national appropriation of outer space. However, it allows and encourages exploration of outer space for peaceful purposes. Geosynchronous orbit is one such area of outer space which can be nationally appropriated. "Satellites in geostationary orbit must all occupy a single ring above the Equator. The requirement to space these satellites apart to avoid harmful radio-frequency interference during operations means that there are a limited number of orbital "slots" available, thus only a limited number of satellites can be operated in geostationary orbit. This has led to conflict between different countries wishing access to the same orbital slots (countries near the same longitude but differing latitudes) and radio frequencies. These disputes are addressed through the International Telecommunication Union's (ITU) allocation mechanism."[6]

CLAIMS OF PROPERTY RIGHTS IN OUTER SPACE

Anything otherwise expressly prohibited, no activity can be said to be banned.[7] While national appropriation is expressly not allowed, there is no mention about private ownership of celestial bodies. Confusion over private property rights has given rise to many land claims by people. The two most interesting claims are by Dennis Hope and Gregory Nemitz which I will discuss in the next part.

Dennis M. Hope is a citizen of United States who filed a declaration of ownership with the U.S., UN and USSR and claimed property rights over the Moon. On getting no response, he assumed his ownership and even started a company called "Lunar Embassy".[8]

Dennis Hope claims that he has right to own property on moon as The Outer Space Treaty only bars nations from appropriating moon and other celestial bodies in the outer space but doesn't bar

[6]L. D. Roberts, 'A Lost Connection: Geostationary Satellite Networks and the International Telecommunication Union' (law.berkeley.edu 2000) <http://www.law.berkeley.edu/journals/btlj/articles/vol15/roberts/roberts.html> accessed 1 September 14.
[7]M. Listner, 'The Ownership and Exploitation of Outer Space' [2003].
[8]R. Ahmed, 'Car Salesman Owns The Moon, Has Made $11 Million By Selling Plots To Tom Cruise And President Reagan' (hngn.com 2014) <http://www.hngn.com/articles/33529/20140611/car-salesman-owns-moon-made-11-million-selling-plots-tom.htm> accessed 1 September 14.

any individual or company.[9]"He founded his company in 1980 to sell parcels of celestial property to private entities. Lunar Embassy then also informed the UN and USSR of its claim. Any citizen can purchase the property for approximately 20$ only and can earn the property rights." Hope has gone to the extent of selling property rights at 19$ for one acre of land on Mercury, Venus and Mars as well.[10] On paying this minimal amount, one gets three documents – a Deed, a map and the Constitution and Bill of Rights, formulated by Hope himself, of that particular celestial body. A short story "You Own What?" is also provided which includes the declaration of ownership filed with the United States, the USSR and the United Nations.[11]

Although Dennis hope claimed his property rights over the moon, the UN, US and USSR chose to remain silent on the issue and did not reply to him. This means either they recognize his claim or think his claim is too childish and insufficiently ripe to file suit.[12] On asking Dennis Hope about how he considers the signatories' silence as a recognition to his claim, he replied, "People have said just because the UN never responded doesn't mean you own it. Well, I did my due diligence, they should have done theirs."[13]"Hope even said that he wishes to form a "democratic republic sovereign nation," the Galactic Government, in which his property-owning customers will enjoy voting rights. If other nations infringe on the territory he has claimed, he will view their incursions as acts of war."[14]

As many as 6 million people have already purchased land from Lunar Embassy, which includes some celebrities, NASA employees and even American presidents like Jimmy Carter and Ronald Reagan. To not reply to the claims made by Hope, the signatories of the treaty are only creating confusion over the legality of such a claim.

Although the company has attracted a lot of attention, there are several problems with its territorial claims. One of the major drawbacks of Hope's claim is the lack of a permanent settlement on moon. Although Lunar Embassy has customers who would constitute its citizens, they do not live together

[9]E. Svoboda, 'Who owns the moon?' (salon.com 2008) <http://www.salon.com/2008/01/19/moon_real_estate/> accessed 1 September 14.
[10]'Introduction' (lunarembassy.com)<http://lunarembassy.com/#!prettyPhoto> accessed 1 September 14.
[11] ibid.
[12] N1.
[13] N7.
[14]E. SVOBODA, 'Who owns the moon?' (salon.com 2008) <http://www.salon.com/2008/01/19/moon_real_estate/> accessed 1 September 14.

on moon and hence the settlement is not permanent.[15] To claim property rights on earth, one does so either under Civil Law or Common Law. Civil law requires a person to take up an unclaimed land, occupy it, use it and does something productive with it to claim his property rights. Once he does that, the Government recognizes his rights over that particular property. This is the use and occupation method. Under common law, property rights originate from the State. The whole territory of the state is its property and its citizens have to ask for the land. Since outer space doesn't recognize sovereignty, civil law must be applicable in outer space. In the present case however, the only use of the property is reselling it. With technologies at present, no individual can go to moon and start living there and does any occupation. Hence the fact that no customers are living on the claimed territories, the moon cannot be said to be owned by Lunar Embassy.

Secondly, as already discussed above, outer space follows the concept of *res communis* and not res nullis.[16] The outer space is for everyone's enjoyment and exploitation and no one person can claim it as his own.

Thirdly, his claim that he is the first person to raise such a claim is not true. Few people have already tried claiming various outer space areas before Dennis Hopelike Frederick in the 19th century, James Mangan[17] in 1948 and Jenaro Gajardo Vera[18] in 1953.

The best counter the UN might use against Lunar Embassy is that while the company may claim that it has legal title to the moon, its claim is in direct contradiction to international law.

Another extremely surprising and shocking thing about this case happened in 2003 when the National Republican Congressional Committee awarded Lunar Embassy and Denis hope with medals and prestigious prices. The news reads on their website, *"Mr. Hope has been named co-chairman of the Republican Congressional Business Advisory Council. He has also been given the national Republican Leadership Award and most recently he has been issued the highest honor the national Republican Congressional Committee has, the prestigious Republican GOLD Medals."*[19] While such news cannot be confirmed from

[15] N1.
[16] ibid.
[17] Science Illustrated, 'Chicago Man Stakes Claim to Outer Space ' (blog.modernmechanix.com 2008) <http://blog.modernmechanix.com/chicago-man-stakes-claim-to-outer-space/> accessed 1 September 14.
[18] V.G. Pop, Who Owns the Moon?: Extraterrestrial Aspects of Land and Mineral Resources Ownership (1st, Springer Publishing, 2009) 3.
[19] 'Dennis Hope Receives The Prestigious Republican Gold Medal' (lunarembassy.com)<http://lunarembassy.com/us-congress> accessed 1 September 14.

the websites, it cannot be said that US has started to acknowledge it because no formal recognition has been given to Lunar Embassy. Although the signatories of the Treaty do not believe that it is important to answer such an issue, claims like that of Hope cannot be ignored.

Claims like these wide open the discussion on private ownership of outer space. It leaves a big fill in the blank on interpretation of Article II of the Outer Space Treaty.

This brings us to the basic question of interpretation. There can be four ways of interpreting private ownership in outer space. The first one is the lenient method in which national appropriation is considered to be separate from private ownership.[20] This kind of interpretation supports claims by people like Dennis Hope who believe there is a loophole in the Outer Space Treaty in the language of Article II of the Outer Space Treaty. This type of view isn't followed by many authors.

Most of the authors have a different viewpoint that private ownership too is banned under OST and that private owners are just an extension of a nation.[21] Many agree that such a view was taken even while formulating the OST. "The delegate Bal of Belgium said "his delegation has taken note of the interpretation of the term 'non-appropriation' advanced by several delegations as covering both the establishment of sovereignty and the creation of titles to property in private law. The French Delegate also mentioned, one of the three basic principles that have been affirmed is the prohibition of any claim of sovereignty or property rights in space. The reason why a clear mention of ban of private ownership was not mentioned was because such a thing had already been discussed at the negotiating table. Another point working in favor of this view is that there cannot be appropriation by any means, which includes private ownership. Final supporting point of this view can be the fact that private ownership cannot exist without National appropriation. This means that one occupies land on behalf of the state. Hence the state must acknowledge such a claim."[22]

Another viewpoint is that private ownership can occur under individual sovereignty.[23]It can be contended that it is not a requirement for a state to exist to give birth to property rights.[24]Many different authors have pointed out that real estate isn't just a word but is formed by morals and

[20]V.G. Pop, *Who Owns the Moon?: Extraterrestrial Aspects of Land and Mineral Resources Ownership* (1st, Springer Publishing, Romania 2009) 63.
[21] ibid.
[22]V.G. Pop, *Who Owns the Moon?: Extraterrestrial Aspects of Land and Mineral Resources Ownership* (1st, Springer Publishing, Romania 2009) 63.
[23] ibid.
[24] ibid.

ethics like trust, respect, care and duty towards the nature, etc.[25] It is isn't wrong to say that such habits must have existed even before colonies were made or societies were established, giving birth to a state.[26]Hence under this view, one can claim individual sovereignty.

The last viewpoint is that private ownership may occur under international sovereignty. In the Article II of the OST, it has been given that there cannot be national appropriation. Nowhere is it written about international appropriation.

The Board of Directors Of the International Institute of Space Law (IISL), however in a statement, have given a major boost to the viewpoint that Article II of OST includes ban on private appropriation of outer space. The board said that, "*the activities of non-governmental entities are national activities. The prohibition of national appropriation thus includes appropriation by private entities whether individuals or corporations since that would be national activity.*"[27]

We however come down to the basic question. Do we really need property rights in outer space? The answer to this question should be yes. For any development of the understanding of the outer space, there has to be exploration and exploitation of outer space. The private parties would not spend billions of dollars if they do not earn profit over them and have to instead share it with other countries and sovereigns. Random land claims over celestial bodies might be vague as the only use of such properties would be selling deeds. This type of claim may not sustain. To claim property rights over celestial bodies, there must be use and occupation. So if a group of people from different countries are launched and funded by a multinational body to settle on moon, will it give rise to property rights?

An example of such settlement in outer space already in place is the International Space Station. The ISS consists of astronauts, engineers, etc from different countries and sovereigns. Mars-one is an upcoming mission to mars for which this multinational initiative has chosen people from all over the world.[28] There are however certain issues which must be dealt with.

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[25] ibid.
[26] ibid.
[27]'Statement by the Board of Directors * Of the International Institute of Space Law (IISL) On Claims to Property Rights Regarding The Moon and Other Celestial Bodies' (www.iislweb.org 2004) <http://www.iislweb.org/docs/IISL_Outer_Space_Treaty_Statement.pdf> accessed 1 September 14.
[28]'Human Settlement on Mars' (mars-one.com)<http://www.mars-one.com/> accessed 1 September 14.

As a matter of first importance, we should simply envision people can at last build a perpetual living space on the lunar or Martian surface. The real issue that may emerge is the manner by which to figure out which nation is qualified to uphold its purview over that extraterrestrial settlement. Because of the Liability Convention, governments are singularly in charge of their nationals' tries in space.[29] At the end of the day, if a space module, either in circle or on a surface, is manufactured by a given private or open element of a nation, the separate government has unquestionably the ward inside such module and its occupants, much the same as the legitimate circumstance of hailed vessels in high oceans.[30]

"For instance, the International Space Station is comprised of various modules that belong to US, Russian, European, or Japanese registered entities. Should any legal necessity arise, the owner government of the module in which the legal incident occurred would have jurisdiction. Such a legal criterion, though, will not be appropriate for even a relatively small permanent human settlement in space with numerous governments involved. Any legal incident will require studying the national law of the government who owns the module, chamber, or installation where it took place, something that, if not impossible, would be confusing and totally annoying."[31]

One answer for this issue is the presentation of a Specialized Space Code of Conduct to blanket the most well-known legitimate subjects inside multinational space stations or extraterrestrial natural surroundings.[32] So in the event that any infringements of lawful rights happen, all debates naturally are eluded to the particular implicit rules that speak to the agreement of all the included governments.[33] This code could be focused around the most well-known and generally acknowledged standards of major legitimate frameworks in the fields like tort, common, or criminal law that consent to general straightforward lawful needs of those in space territories.[34] Real criminal acts or confused instances of risk that are not secured by Special Space Code of Conduct may be alluded to the concurred global tribunal on Earth.[35]

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[29]B. Shakouri, 'Space settlement and future of space law' (thespacereview.com 2013) <http://www.thespacereview.com/article/2269/1> accessed 1 September 14.
[30]ibid.
[31]B. Shakouri, 'Space settlement and future of space law' (thespacereview.com 2013) <http://www.thespacereview.com/article/2269/1> accessed 1 September 14.
[32] ibid.
[33] ibid.
[34] ibid.
[35] ibid.

Commercialization of space is the second issue that is of significant vitality, essentially as to making motivators for pulling in more players in peaceful space activities.[36] With a specific end goal to induce the investigation and improvement of space by privately owned businesses, it is certain to perceive the right of proprietorship in space.

In the event that there weren't such constraints in regards to the responsibility for bodies, we would likely have seen the first space settlements at this point. In any case, it still is possible to try out ways to establish dummy property rights. This will help in motivating private and public companies to invest in this market.[37]

When human settlements on adjacent heavenly bodies are secured, their business trades with Earth will turn into an issue. Space vagrants who decide to leave Earth and settle in an uncomfortable solid or metal base on the Moon or Mars must have exceptionally solid motivators to step forward for such amazing enterprise. There appears to be no more noteworthy prize than the lucrative monetary open doors found in a settlement on an outsider surface brimming with potential assets.[38]

"The positive economic exchange rate with the Earth may assure the continuation and even expansion of space settlements on celestial bodies. Otherwise, settlers either will depend on equipment and reinforcements from Earth or go bankrupt. This may shed light on the importance of adopting suitable legal regime for human space settlements that, on one hand, fuels the needed investments for establishment of space settlements and, on the other hand, helps the efforts of inhabitants those settlements flourish economically and leads ultimately to their self-sufficiency."[39]

In conclusion I would say that we are slowly but steadily moving towards colonization of outer space and various celestial bodies. With pressure on resources on earth rising everyday, we must modify our treaties, if need be, to allow privatization of outer space. Settlements is a better and fairer method than random claiming of moon and such an adventure must be carried out efficiently and with maximum support and seriousness.

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[36] ibid.
[37] ibid.
[38] B. Shakouri, 'Space settlement and future of space law' (thespacereview.com 2013) <http://www.thespacereview.com/article/2269/1> accessed 1 September 14.
[39] ibid.

THE NEMITZ CASE

The present case involves Gregory W. Nemitz' (Appellant) assertion of private property rights in asteroid 433, "Eros". The object in contention is Eros which is a large asteroid in stable orbit around the sun. On its closest orbit between the Earth and Mars, Eros was 14 million miles away.[40]"The Appellant claims that his ownership of Eros is based on his registration on the Archimedes Institute website and his filing of a California Uniform Commercial Code security interest, in which he named himself as both creditor and debtor."[41] This claim arises out of the February 12, 2001 landing of NASA's NEAR Shoemaker spacecraft on Eros. The appellant claimed that the landing of the NASA spacecraft infringed his private property rights and that he should be compensated for parking and storage fees which total twenty cents per year, or 20$ per century. He estimates Eros' initial value to be 8 billion$. Every day the spacecraft remains on Eros without paying the claimed fees, the Appellant alleges that he is suffering special damages of 5 million $ because he is legally inhibited from accessing the full value of the asteroid and proceeding with his planned developments.[42]

The arguments put up by Nemitz were mainly related to his natural rights as a citizen of US and dealt with the Constitution of US. One argument however was related to Outer Space. He says that the Outer Space Treaty does not apply to him and that any application of the treaty would be unconstitutional.[43] He says that owning property is his natural right and that the Outer Space Treaty would not apply to him because he has neither asked the never granted the United States Government the right to act in this manner nor has he acted in any manner that could strip him of his "sovereign" authority to enter into agreements of this type.[44] According to the Appellant, he should have personally entered into such an agreement but since he hasn't, it would be unconstitutional to consider Outer Space Treaty.

The arguments put forward by the State are that Constitution does not produce rights. Nemitz had himself agreed to the fact that his claim of natural right cannot be found in any statute or common law.[45] The State argues that there is no use or occupation of the property to show that Nemitz had

[40]R. Kelly, 'Nemitz vs. United States, A Case of First Impression: Appropriation, Private Property Rights and Space Law before The Federal Courts of The United States' [2004] 297.
[41] N39.
[42] ibid.
[43] ibid.
[44] ibid.
[45] ibid.

any property interest. The State says that since there is no interest, there arises no right over it. The District Court hence doesn't need to take into account the Outer Space Treaty.

It was held that neither the failure of United States to ratify the Moon Agreement nor the States' ratification of the OST created any rights in Nemitz to appropriate private property rights on asteroids. The conclusion that can be drawn directly from the case is that no person has natural right over any property. Neither the common law nor the civil law considers any natural right over priority.

The case is important in this aspect that first of all, this was the first case that went to the courts. Before this, only claims had been made and court had never been approached. The appellant fails however, because he cannot prove that he has natural property rights over outer space or any part of outer space. He tries to establish this through US constitution but court dismisses it. The one issue that should have been raised but neither parties did so was the interpretation of Outer Space Treaty's Articles 1 and 2. From this case we can conclude that Article 1 and 2 only prescribe enjoyment of outer space by nations and people. Article 2, though bans nations from appropriating the space; is quiet on the issue of private appropriation. This court however, to some extent, tries to establish the fact that even private entities would face tough competition in proving their legality in claiming property rights. By dismissing the case in favor of the respondents, it can be said that the private entities can maximum enjoy the outer space but have a long way to go to establish property rights.

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EFFORTS TAKEN TO MAKE CIVIL PROCEDURE CODE, 1908 MORE EFFECTIVE AND JUSTICE ORIENTED

*Rishimarawat**

INTRODUCTION

A civilized society is governed by two types of laws- substantive and procedural. Though substantive laws that govern the rights and obligations of individuals are more important than procedural laws, their efficacy depends on the substance of procedural laws. Therefore, it is important for the procedural law to be fair and expeditious so that the substantive laws achieve their object. The law governing the procedure of settling civil disputes in India is the Civil Procedure Code, 1908 (*hereinafter* CPC). It was enacted in 1859 by the British. Later, the 1859 code was amended in 1877 and furthermore in 1882. After a lot of deliberation and judicial conflict, a revised Code of Civil Procedure Bill was examined by a Special Committee led by Sir Earle Richards and it received the assent of Governor General of India on 21 March, 1908 giving us the CPC.

The object of CPC is to ensure procedural regularity in civil litigation. It has to adhere to the principles of natural justice and ensure that the parties get a fair and expeditious trial. The latter have been held to be a part of right to life under Article 21 of the Constitution of India. International instruments like the Universal Declaration of Human Rights, 1948[2] and the International Covenant on Civil and Political Rights, 1966[3] (ICCPR), of which India is a part, also recognize fair and speedy trial as essential principles of justice. The provisions in CPC seek to maintain these principles and

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[2] Article 10, United Nations Universal Declaration of Human Rights, UN General Assembly Resolution 217A (III), 10 December 1948.

[2]Article 14, International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI), December 16 1966.

keep the procedure effective and justice oriented. A meticulous examination of the CPC through the passage of time has resulted in many amendments being made to it to increase its efficacy.

This present article seeks to examine the changes made in CPC by three major amendments- 1976, 1999 and 2002 and their impact on procedure. The initial sections discuss the concepts of natural justice, fair and expeditious trail and how the CPC ensures that these are followed. The subsequent sections elucidate provisions relating to *res judicata*, access to justice, settlement of family disputes and special provisions regarding women. A humanist approach adopted by CPChas also been examined. The concluding section critically analyses the changes brought about by the abovementioned amendments.

PRINCIPLES OF NATURAL JUSTICE

The main objective of the CPC is to ensure that the contesting parties get an equal opportunity to argue their case. The expression 'principles of natural justice' is used to highlight the 'criteria of procedural fairness'[4] that should be followed. They ensure that decisions are arrived at after careful scrutiny of the evidence and without any bias after hearing both the parties. The concept of natural justice involves two ideas (a) *Nemojudex in re sua,* which means that the authority before which the dispute is raised should be unbiased (b) *audi alteram partem* meaning the affected person has a right to be heard.[5] These principles have not been laid down exhaustively anywhere. Whether there has been a violation of these principles depends on the facts and circumstances of each case and it for the court to decide.

FAIR TRIAL

The Supreme Court held in *Sangram Singh vs. Election Tribunal, Kotah*[6]that any decision which is likely to affect the life and property of a person should not be taken behind his back without giving him a chance to be heard. For the procedure to be called fair, all the decisions that are taken must be accompanied by reasons. The defendant has to be given a fair hearing. What constitutes 'fair' varies from case to case. The defendant may be only asked to submit a written statement or given a full hearing. Before starting the adjudication process, the defendant must be given a proper notice. A

[4]*Dhakeswari Cotton Mills Ltd v CIT, West Bengal* AIR 1955 SC 65; *M/s Mehta, Parikh & Co. v CIT, Bombay* AIR 1956 SC 554.

[5]MP Jain and SN Jain, *Principles of Administrative Law* (4thedn, Wadhwa and Company, Agra Nagpur 2002) 219.

[6]AIR 1955 SC 425.

proceeding initiated without notifying the defendant will be violative of natural justice.[7] But the underlying idea of a 'fair' procedure is that the defendant must know what action is initiated against him and why. He should have a copy of all the documents that may be used against him. He should be given an opportunity to cross-examine the witnesses.

1. **Issuance of Summons to the Defendant:** In CPC, Rule 1 in Order V is the principal rule that governs the issuance of summons to the defendant after a plaint has been presented before a court. The defendant is given an opportunity to prepare his defense with regard to the claims made in the plaint. Summoning the defendant is a mandatory requirement for proceeding with the trial, except in cases where the defendant is present when the plaint is presented and he accepts the claims of the plaintiff.[8] Rules 2, 6 and 7 of Order V were amended by section 15 of the Civil Procedure Code (Amendment) Act, 1999 (*hereinafter* the 1999 amendment) providing for a copy of the plaint and all the other documents relied on by the plaintiff to be given to the defendant along with the summons. This provision was made to make the defendant aware of all the materials that can be used against him and he can prepare his defense accordingly.

2. **Cross-Examination of Witnesses:** An important aspect of ensuring a fair trial is to allow the defendant to cross-examine witnesses. The purposes of cross-examination are 'to impeach the accuracy, credibility and general value of evidence.'[9] The defendant should know about the evidence presented against him and it should be available for his 'information, comments and criticism.'[10] Thus formal cross-examination is a part of procedural justice. While the court can ask for the personal attendance of any witness provided he is not exempted under any provision of the CPC, provisions have been made to allow either party to cross-examine the witnesses. Sub-rule (1) of Rule 2, Order XIX states that if the court believes that a party bona fide desires the presence of a witness in the court for cross-examination and the witness can be produced before the court, it can call for the witness to be present in court for the purpose of cross-examination by the other party.

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[7] For instance, *East India Commercial Co. v Collector of Customs* AIR 1962 SC 1793; *Municipal Board v State Transport Authority* AIR 1965 SC 459.

[8] MR Mallick*, Ganguly's Civil Court: Practice and Procedure* (13thedn, Eastern Law House 2005) 320.

[9] Justice MR Mallick, *P RamanathanIyer's Cross Examination: Principles and Precedents* (4thedn, Lexis NexisButterworthsWadhwa Nagpur, 2011) 132.

[10] ibid.

3. **Appeals:** Where a substantial question of law is involved, Section 96 of CPC allows for an appeal from an original decree to protect the rights of the judgment-debtor. The 1976 amendment prevented appeal from any suit cognizable by Court of Small Causes, except those involving substantial questions of law, when the amount did not exceed three thousand rupees. The 1999 amendment increased this limit to ten thousand rupees. A major change introduced by this amendment in Section 100A. It prohibited appeal against a decree or order passed by a single judge bench of a high court in any proceedings under article 226 or 227.The section was introduced by 1976 amendment and modified by the amendments in 1999 and 2002.Section 102does not permit appeals in matters where the monetary amount to be recovered does not exceed twenty five thousand rupees. It was amended in 1976 where the amount was increased to three thousand rupees from the original amount of one thousand rupees and further in 1999 where the amount was further increased to twenty five thousand rupees.

4. **Revision:** Another important provision is Section 115. It gives the power to the High Court to call for cases decided by any subordinate court and if the High Court feels that the subordinate court did not have jurisdiction or it exceeded its jurisdiction or it exercised its jurisdiction in an illegal manner or with material irregularity. The Malimath Committee suggested that records of proceedings of the lower courts should be sent to the High Court for revision only if the High Court so desired. Its recommendations were incorporated by the 1999 amendment. It also changed sub-section 3 to add that a revision should not stay the proceedings before the trial court unless expressly stayed by the High Court.

EXPEDITIOUS TRIAL

The right to get a speedy trial has been recognized by the Supreme Court to be a constitutional right under Article 21.[11] Its basis lies in the case of *Hussainara Khatoon v State of Bihar*[12] where Justice Bhagvati held that a procedure that did not ensure a reasonably expeditious trial could not be said to be fair. The efforts have long been aimed at clearing the backlog of cases that still continue to exist. This was identified by the Law Commission of India as long back as 1958.[13] The 54th Law

[11] Press Trust of India, 'Right to Speedy Trial a Constitutional Right:SC' (India Today, New Delhi, 13 July 2008) <http://indiatoday.intoday.in/story/Right+to+speedy+trial+a+constitutional+right:+SC/1/11270.html> accessed 14 Februrary 2014.

[12]AIR 1979 SC 1369.

[13]Law Commission of India, *Reform of Judicial Administration* (14th Report, vol 1, 1958) 129.

Commission Report[14] meticulously examined CPC to streamline the procedure and ensure expeditious trials. The 77th report also suggested changes to reduce the delay and arrears at the trial stage.[15]But recently the Supreme Court had to appoint an amicus curiae in a case to formulate guidelines for speedy trials.[16]Inordinately long trials result in miscarriage of justice and involve a lot of expenses. Thus provisions have been made in CPC to ensure that disputes are settled quickly and no unnecessary delay is caused.

1. **Summons to Defendant**: According to Section 27, CPC, the summons to the defendant must be sent within thirty days of institution of suit. The 1999 amendment fixed the time limit so that there is no delay in hearing the dispute. Order VIII, Rule 1 prescribes the limitation period for the defendant to file a written statement. It was amended by the Civil Procedure Code (Amendment) Act, 1976 (*hereinafter* 1976 amendment) and further in 2002.[17] The 1976 amendment made the provisions of the rule mandatory while the 2002 amendment prescribed a limit of thirty days to file the written statement. The second proviso to sub-rule (1) of rule 1, Order V, which is the same as the proviso to Rule 1 of Order VIII, gives the court the discretion to increase the time limit, after recording the reasons in writing, if the defendant fails to file a statement within thirty days but the date should not exceed 90 days from the date of issuing summons. Section 148 of CPC empowers the court to extend the time for an action if the original fixed period has expired. But a limit of thirty days was added to the extended time was added by the 1999 amendment. The court has been given the discretion to increase the time despite the limit prescribed by CPC. Though it appears self-contradictory, it is the inherent power of the court under section 151 to take certain steps to deliver justice.

2. **Adjournments:** The 1999 amendment also substituted sub-rule (1) of Rule 1 in Order XVII where the number of adjournments that a court can grant have been restricted to three. Sub-rule (2) was also amended allowing the court to award adjournment costs as well as higher costs if it thinks fit. So exemplary costs may be awarded if a party hinders the trial by seeking repeated adjournments. Rule 4 of Order XIV was amended for limiting the court's discretion by fixing the time beyond which it could not grant adjournment for examining the witnesses before issues

[14] Law Commission of India, *On the Role of Civil Procedure* (54th Report, February 1973).
[15] Law Commission of India, *Delay and Arrears in Trial Courts* (77th Report, November 1978).
[16]*Ramrameshwari Devi v Nirmala Devi*(2011) 8 SCC 249.
[17]By the Civil Procedure Code (Amendment) Act 2002.

were framed. The importance of speedy trial can be gauged from the fact that seeking adjournments for postponing the examination of witnesses will amount to misconduct on the advocate's part.[18]Rule 5 was omitted to allow quick framing of issues.[19]

3. **Costs:** Section 35 of CPC provides for awarding costs of litigation. It is the court's discretion to award costs depending on equity, moral and legal merits and other factors like the conduct of the parties during litigation.[20] Extended proceedings lead to the award of heavy costs.[21] Efforts to mislead the court by filing wrong statements attract imposition of exemplary costs.[22] No appeal lies against an order for costs if the court has exercised its discretion sensibly and there is no question of principle involved.[23]To prevent people from filing frivolous claims, Section 35A provides for awarding compensatory costs. The 1976 amendment excluded the application of this section to revisions. It also inserted Section 35B which empowers the court to impose costs on parties responsible for delaying the trial at any stage. Payment of the costs is a condition precedent for further prosecution of the suit.

4. **Summary Trials:** Another provision that aims at providing speedy disposal of cases is summary trials under Order XXXVII. In certain cases, if the court feels that the defendant does not have a genuine claim and is delaying the matter, it can pass an order without letting him defend himself. He can do so only with the court's permission and after filing an affidavit stating that the plaintiff must prove the case against him. Summary trials were introduced for speedy disposal of cases involving the recovery of money where the defendant did not have a strong case.

RES JUDICATA

The rule of *res judicata* is based on two principles: (i) no person should be troubled twice for one and the same cause; (ii) it is in the interest of the State that there should be end of lawsuit.[24] This doctrine aims at preventing the abuse of law by any party. If a party raises different pleas at each

[18]*NG Dastane v Shrikant S Shivde* AIR 2001 SC 2028.
[19]The Civil Procedure Code (Amendment) Act 1999, s 24.
[20]*A Yousuf v Sowramma*AIR 1971 Ker 261.
[21]*RasarajDebnath v Calcutta University* AIR 1998 Gau 112.
[22]*MahendraBaburaoMahadik v Subhash Krishna Kumaar* AIR 2005 SC 1794.
[23]*Hill v Peel* 1870 LR 5 CP 172; *Indian Bank v M/s Mocro Electronics* AIR 2005 AP 328.
[24] Based on the maxims *nemo debit lisvexari pro unaeteadem causa* and *interest reipublicaeut sit finis litium*respectively.

stage of the proceedings, it will result in a multiplicity of suits. To ensure fairness in the procedure, a party should be allowed to raise all the pleas in the proceedings when the action is initiated. For res judicata to operate, the subject matter of the suit should be 'directly and substantially' same in both the suits. The parties to the suit should be the same and the subject matter should have been finally decided in the previous suit by a court that was competent to try the suit.

The rule of res judicata is embodied in Section 11 of CPC. The 1976 amendment added explanations VII and VIII to the section. Before these explanations were added, the provisions of this section did not apply to execution proceedings. But explanation VII provides for the application of not only res judicata but also constructive res judicata to execution proceedings. Prior to the insertion of explanation VIII, a judgment of a competent court did not operate as res judicata in subsequent suits if it had limited jurisdiction. But the 1976 amendment changed this and allows for the judgment of a court of limited jurisdiction, that is competent to hear the suit, to operate as res judicata despite the fact that the court of limited jurisdiction was not competent to hear the subsequent suit or the suit in which such issues were subsequently raised.[25]

The purpose of the amendment was to enlarge the scope of Section 11. Otherwise, there would have been continuous litigation thereby adding to the number of cases in the already burdened judiciary and the object of the doctrine would have been defeated.

ACCESS TO JUSTICE

Litigation entails high costs that are very difficult for the poor to meet. The Constitution of India caste a duty upon the state to ensure that no one is denied access to justice due to their weak economic background. It is the duty of the state to provide free legal aid to people who otherwise cannot afford a lawyer.[26] The court has to inform the accused about his rights and which forum to approach. To give legal aid a nationwide framework, the Legal Services Authorities Act was enacted in 1987.

To ensure that poor people have the means to justice, Order XXXIIIA of CPC deals with 'suits by indigent persons' and Order XXXXIV with 'appeals by indigent persons'. Such persons are

[25]Code of Civil Procedure 1908, s 11, expln VIII.
[26]Constitution of India 1949, art 39A.

exempted from paying the court fee at the first instance. A person cannot be denied access to justice just because he cannot pay the court fee.[27]The concept has been illustrated in *Union Bank of India v Khader International Construction.*[28]These provisions were inserted by the 1976 amendment and are aimed at securing social justice. They cannot be called unfair since they amount to a deferred payment of the court fee. The state will take steps to recover the court fee and this court fee shall be 'a first charge on the subject matter of the suit.'[29]

SPECIAL PROVISIONS REGARDING FAMILY DISPUTES

Order XXXIIA of CPC states the provisions regarding family disputes and calls for a different approach to settle family matters. Since such disputes concern human relationships and are very sensitive, family courts have been established to hear them. Any order or decree passed by a family court, except under Chapter IX of the Criminal Procedure Code, 1973, will have the same effect as if passed by a civil court and shall be executed according to the provisions of CPC.[30] The 1999 amendment inserted Section 89[31] which provides for alternate mechanisms for resolving disputes outside the court. The court can, after framing the issues, refer the dispute for settlement by way of arbitration or mediation, conciliation, judicial settlement or through Lok Adalats. If these methods fail to bring about an amicable settlement between the parties, then that they should approach the Court.

Although the tenets of fair trial require that the proceedings to be open and public, family disputes are an exception and may be held in-camera if the family court and either party so desires.[32] Proviso to Section 153B of CPC was inserted by the 1999 amendment which provides that a judge may order any person or public in general to not be present during the proceedings. The object of these provisions is to ensure that sensitive family matters are not argued in public as it can have an adverse effect on the partied in the society. The importance of in-camera proceedings in such cases has been

[27]*AA HajaMuniuddin v Indian Railways* (1992) 4 SCC 736.
[28](2001) 5 SCC 22.
[29] ibid. Position reiterated in *RV Dev v Chief Secretary, Govt. of Kerela*(2007) 5 SCC 698.
[30]The Family Courts Act 1984, s 18(1).
[31]Civil Procedure Code (Amendment) Act 1999, s 7.
[32]The Family Courts Act 1984, s 11.

discussed in *Janaki Ballav vs. Bennet Coleman and Co. Ltd.*[33] Thus CPC realizes the delicate nature of family issues and deals with them differently.

SPECIAL PROVISIONS REGARDING WOMEN

Certain provisions in CPC were made effective to deal with matters concerning women. Section 56 prohibits the arrest or detention of a woman in civil prison in execution of a money decree.[34] It also applies to arrests made before judgment. That means a woman cannot be arrested or detained in a civil prison under Order XXXVIII, Rule 1 if she is a defendant in a suit for the recovery of money.[35] These special provisions do not violate the right to equality. Article 15 of the Constitution prevents discriminatory treatment but not protective treatment favourable to women.[36]Article 15(3) enables such provisions to be made for women notwithstanding article 15(1).[37] In addition to this, Section 132 exempts those women who are prohibited by customs and manners of the country to appear in public from personal attendance in court.

HUMANIST APPROACH

The CPC is not merely based on the black letter of law and procedure. It takes into account humanist perspective while charting out the procedure. For example, Section 60 that deals with the property that is liable to attachment in the execution of a decree exempts certain kinds of property from attachment. The 1976 amendment made two significant changes to the section. It amended clause (c) of sub-section (1) to include houses and buildings of labourers, agriculturalists and servants to be exempted from attachment. Next, it inserted clauses (ka), (kb) and (kc) thereby exempting deposits under the Public Provident Funds Act, 1968, life insurance policies and those tenancies of residential buildings to which rent controls laws apply respectively from attachment. The distinction between the salaries of government or local or railway employees and private employees has been removed. Cattle and other tools used by an agriculturalist to earn his livelihood cannot be attached. These provisions are based on reasonable and equitable grounds. The

[33] AIR 1989 Ori 225.

[34] See *Jiwandas v Janaki* AIR 1922 Nag 98; *M/s Chelsea Mills v M/s Chorus Girl Inc* AIR 1991 Del 129.

[35]*M/s Chelsea Mills v M/s Chorus Girl Inc* AIR 1991 Del 129.

[36]Universal Periodic Review, available at <http://www.uprinfo.org/IMG/pdf/a_hrc_wg.6_13_ind_1_india_annexii.pdf> last accessed 13 February 2014.

[37]*Preeti Srivastava (Dr) v State of Madhya Pradesh* (1999) 7 SCC 120.

fundamental right to life includes right to livelihood. Therefore, attachment of such property will defeat the purpose of providing social and economic security to the citizens.

If the court feels that the evidence of a witness who is in prison is material to the proceedings, it can call for the attendance of the prisoner under Order XVIA. Rules 1-7 of the order elucidate the provisions using which the court can ask for the attendance of witnesses in prisons. Thus a prisoner is not precluded from the process of justice if he has an important role to play in the proceedings.

CONCLUSION

Ever since the enactment of CPC, a lot of effort and scrutiny have gone into increasing its efficacy. The amendments have always aimed at rationalizing the civil litigation system and make it justice oriented. However, there have been concerns about the amended provisions. It is argued that the amendments have not completely removed the irregularities and have added to the ambiguity.[38] For example, the 1999 amendment to Section 100A raised apprehensions since it disallowed appeal from the decision of a single-judge bench of the High Court in a proceeding under article 226 or 227. It was viewed as a measure barring the aggrieved party to further approach the court for settling the dispute. The later amendment however rectified this and provides the option of appealing to the Division Bench against an order of the single-judge bench. The lawyers challenged the thirty days limit set by the 1999 amendment upon the defendant to file a reply to the summons. The 2002 amendment increased the time to ninety days with reasons to be recorded in writing. Another change that raised doubts among legal luminaries was the 199 amendment to Section 89. It was argued that the section did not clarify that if the parties were to opt for any of the alternate procedures for settlement of disputes, then which among the four- arbitration, mediation, conciliation or Lok Adalat- will be adopted in a certain case and why.[39]

Though there have been apprehensions about the efficacy of the provisions of CPC, it cannot be completely denied that the steps taken have yielded results to some extent. Procedural lethargy has reduced, though not significantly. The provisions have been helpful in providing expeditious relief in certain cases. Special forum for family disputes has reduced the number of cases reaching the ordinary civil courts, thereby reducing the burgeoning backlog of cases to some degree. Free legal

[38] See V Venkatesan, 'Trial and Execution' *Frontline* (Vol 19, Issue 14, July 2002).

[39] PM Bakshi, 'Comments on CPC Amendment (1999 and 2000)' The Indian Council of Arbitration <http://www.icaindia.co.in/icanet/quterli/apr-june2002/ica3.html> accessed 13 February 2014.

aid is being given people who cannot afford the services of a lawyer. While positive measures have been taken, the concerns of the legal scholars and professionals need to be addressed in order to increase the effectiveness of the CPC and make it more justice oriented and simplified.

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NEGLIGENCE AS *MENS REA*

*Vishakha Gupta**

INTRODUCTION

Although with the advancement in technology, the life span of people of the world, in general, has increased, the number of deaths, cases of hurt, and other injury has also suffered adramatically increase over the years. Armed with new gadgets, even slight negligence on the part of an individual may cause excessive damage to others. India, in the past decade has witnessed several landmark cases which deal with criminal negligence, including the recently in news *Dr. Kunal Saha case*[2], in which an amount of 5.6 crores was awarded to the widower. This case and many others raise the question of negligence as a crime, also called criminal negligence. The rationality of criminal negligence has been a subject of debate among the scholars since long, and though the law is much clear now, the debate continues to stand that whether negligence ought to be culpable and whether it is a form of *mens rea.*

This paper attempts to discuss the offence of criminal negligence in the context of Indian criminal system. Starting with the basics of negligence, which is both a civil and criminal wrong, the paper goes on to distinguish between the ordinary and gross negligence, as only gross negligence is punishable under criminal law. A detailed discussion of criminal negligence as is shaped under the Indian Penal Code (IPC) is followed by the difference between recklessness and negligence, as the terms are usually used together, but are not interchangeable. An analysis on why negligence is considered to be a form of *mens rea*, and whether negligence should even be culpable concludes the paper.

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[1] 3rd year, BA/LLB, National University of Juridical Sciences

[2] *Malay Kumar Ganguly v Sukumar Mukherjee &Ors.* [2009] SCC 221

WHAT IS NEGLIGENCE?

"A person acts negligently if he or she departs from the conduct expected of a reasonably prudent person acting under similar circumstances."[3] "The word 'negligence' denotes, and should be used only to denote, such blameworthy inadvertence"[4] so that the person who has caused the injury through negligence/ inadvertence to another is legally obligated to compensate the victim. The use of term "inadvertence by Glanville has been criticized by Russel[5] for being "misleadingly pleonastic"; as he believes that negligence is a subjective state of mind.

Negligence qualifies as both a civil wrong and a crime. The tortious wrong of Negligence occurs when a person breaches a duty of care by either doing something that a reasonable man would not do, or omitting to do something that a reasonable man would do, given the circumstances[6]. The criminal wrong of negligence is an aggravated form of negligence and has been defined by the Indian Courts in a number of cases such as *Empress of India v Idu Beg*[7] and *State v BhalchandraWamanPethe*[8]as "gross and culpable neglect or failure to exercise the reasonable and proper care which it was the imperative duty of the accused to have exercised." "Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in Criminal Law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in Civil Law."[9]Another difference between the civil and criminal negligence is the requirement of proof. Where, in civil torts, "a mere preponderance of probability" suffices; the act has to be proved without reasonable doubt in case of criminal negligence. Also, for criminal negligence, *mens rea* on the part of the defendant must be proved; there is no such requirement for civil negligence. "There can be no civil action for negligence if the negligent act or omission has not been attended by an injury to any person; but bare negligence involving risk of injury is punishable criminally, though nobody is actually hurt by it."[10]

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[3]Andrew Keogh, 'Negligence in crime' <http://www.insitelawmagazine.com/criminalch3.htm> accessed on 12 November 2013
[4]Ratanlal and Dhirajlal, *The Indian Penal Code* (29th edn, Wadhwa and Company Nagpur, 2002) 1038
[5]Russel, *Crime* (11thed, 1908) 48
[6]*Blyth v Birmingham Waterworks Co.* [1856] 11 Ex Ch 781
[7] [1881] 3 ILR 776 (All)
[8] [1966] AIR Bom 122
[9] [2005] 6 SCC 1
[10]Ratanlal and Dhirajlal, *The Indian Penal Code* (29th edn, Wadhwa and Company Nagpur, 2002) 1038

Negligence is never used as an independent term; it is always relative to the circumstances present at the time of the act.[11]The test for negligence is an objective one that is a reasonable man test. If under the circumstances, a reasonable man would have acted differently than what the defendant did, the defendant would be liable for negligence.

ORDINARY AND GROSS NEGLIGENCE

Negligence may be classified into ordinary and gross negligence. Though the distinction is not very clear, it is gross negligence that is punishable as a crime. The difference between negligence and gross negligence is merely a matter of degree of inadvertence committed. "Negligence would be gross if the defendant's conduct not merely fails to meet the standard set by the reasonable man test, but falls short of that standard by a considerable margin- i.e. if the defendant's conduct is not merely unreasonable, but *very* unreasonable."[12]An act of negligence would be considered gross if the act or omission committed was such that any person, even with lesser mental or physical capacities would not have done or omitted to do[13].Thus, where the defendant was driving within the speed limit and tried to swerve to left when he saw the deceased crossing the road, but nevertheless hit the deceased as the latter moved towards the same direction as the defendant; the defendant was held to be liable for only ordinary negligence[14]. On the other hand, where the accused was driving at a high speed, and did not try to swerve on seeing the deceased crossing the road, he was held liable for gross or criminal negligence- rash and negligent driving[15].

NEGLIGENCE UNDER IPC

In the common law system, the only negligence based crime is manslaughter; however, the Penal Code of India has many sections which involve negligence as its standard. These include sections 269, 279, 280, 281, 284-289, 304A, 336-338. Though negligence has not been expressly defined in the IPC, but the idea of the degree of negligence that would make the act criminal can be had through the words of the section 279"[16] of the Code: "whoever drives any vehicle, or rides, on any

[11]*Dr. R.P. Dhanda v BhurelalAndAnr.* [1987] CriLJ 1316 (MP)
[12]*Bateman*[1925] 19 CrApp R 8,11.
[13]HLA Hart, 'Negligence, *Mens rea* and Criminal Responsibility' in H.L.A. Hart and John Gardner, *Punishment and Responsibility* (Oxford Press, 1968) 136, 149.
[14]*Tika Ram v Rex* [1950] AIR 300 (All)
[15]*BaldevjiBhathijiThakore v State Of* Gujarat [1979] AIR 1327 (SC)
[16]Ratanlal and Dhirajlal, *The Indian Penal Code* (29th edn, Wadhwa and Company Nagpur, 2002) 1437.

public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person".

The most important section for criminal negligence under IPC is section 304A. Section 304A punishes a person who causes death of another by doing a rash or negligent act. The section requires a rash or negligent act; death of any person due to the rash or negligent act; and a proper nexus between the act and the consequence.[17]It cannot be assumed that because death is the consequence, the defendant would have driven the vehicle negligently or rashly[18]. The nexus has to be proved by the prosecution. Another requirement of this section, as has been conclusively decided by the Supreme Court, is the presence of *mens rea*[19]. In the very recent case of *Dr. KunalSaha*, the apex court has confirmed this requirement. Most of the cases under 304A are filed against the professional medical practitioners who cause death of their patients. It must be noted that test for negligence in cases of professionals or people with special knowledge is different from the general objective test for negligence. Negligence in cases where people with a special skill set are accused is tested by a subjective test, and not the reasonable man test. It is considered whether a person with a similar set of skills would have acted in the same manner as the defendant did in similar circumstances. For this, opinions of other professionals are noted and the case is decided in accordance with that. The Supreme Court in *Jacob Mathew case*[20]distinguished between the liability for negligence by common man and by professionals. Fixing guidelines for medical negligence cases, the court observed that:

> *"A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed."*

The medical practitioners can be held liable for negligence if they do not possess the requisite skill set to practice or they do not exercise the requisite skill set they possess, reasonably. Certain tests for medical negligence, like Bolam test and Bolitho test have been created. Indian legal system follows Bolam test for medical negligence. Bolam test, as laid down in the English case of *Bolam v Friern*

[17]*Sri Udham Singh v the State of Himachal Pradesh* [1980] Shimla LC 246
[18]*Re Kothandam* [1972] Mad LW (Cr) 52
[19]*Malay Kumar Ganguly v Sukumar Mukherjee &Ors.*. [2009] SCC 221
[20] [2005] 6 SCC 1

Hospital Management Committee[21] states that "if a doctor reaches the standard of a responsible body of medical opinion, he is not negligent".

Section 304A comes into play only when death is caused as a result of a rash and negligent act. In case the victim continues to live but is hurt, grievously or otherwise, a case under section 337 or section 338may be filed, respectively. Section 336 punishes any act done negligently which endangers human life. Sections 304A, 336, 337 and 338 are in the nature of general offences. Section 279 gives a specific instance of negligence, where human life is endangered because of rash driving on a public way. Though sections 279, 337 and 338 overlap, they are of distinct character. "Offence under section 279 IPC is not compoundable, while sections 337 and 338 are compoundable with the permission of the court."[22] Thus, a person can be held liable under both, sections 279 and 337 or 338 simultaneously. However, if the acts which though constitute different offences are a part of same transaction, separate sentences under section 279 and section 337 or 338 are not justified[23]. Section 304A is distinct from section 279 as the former is limited only to cases where the resultant consequence is death.

Another instance is under section 269 of IPC, under which any person who "negligently spreads infection or disease which is dangerous to life" will be held guilty. Thus, a person who knows that he suffers from cholera, if on his own will enters and travels by a railway coach, thereby endangering the health of the persons travelling by the train, would be guilty under section 269[24]. Similarly, if a person who knowingly suffers from AIDS, marries and thereby transmits the disease to his/her spouse, the person would be guilty under section 269 and 270 (maliciously spreading infection or disease) of IPC[25]. Other specific offences for criminal negligence under IPC include negligent conduct while handling poisonous substances[26], fire or combustible matter[27], explosive substances[28], machinery[29], while repairing or pulling down buildings[30], and with respect to animals[31].

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[21] [1957] 1 WLR 582
[22] S K Sarvaria, *Nelson's Indian Penal Code* (Vol. II, LexisNexis Butterworths, 2003) 2398
[23] *Ragho Prasad v Emperor*[1939] AIR Pat 388
[24] *R v Krishnappa* ILR Mad 276
[25] *Mr. X v Hospital Z* [1998] 7 SCC 626
[26] The Indian Penal Code, 1860 s 284
[27] Ibid., s 285
[28] Ibid., s 286
[29] Ibid., s 287
[30] Ibid., s 288
[31] Ibid., 1860 s 289

NEGLIGENCE VIS-A-VIS RECKLESSNESS

Most of the sections in IPC related to criminal negligence, state the expression "rashly or negligently" in the exact or similar fashion. A rash act, distinct from a negligent act, is the one without due deliberation. "In terms of its blameworthiness, negligence is generally thought to fall somewhere between rash (or reckless) conduct and strict liability."[32] Though it has been held that "negligence is a genus, and rashness is a species" and that in certain cases, rashness may result if an act is performed extremely negligently[33]; in *Chintamani Sharma v State*[34], the court has provided a clear distinction between negligence and rashness:

> *"Culpable rashness is acting with the consciousness that dangerous consequences will follow, but with the hope that they will not follow and with the belief that sufficient precautions to prevent the happening of such consequences have been taken. Culpable negligence is acting without the consciousness that dangerous consequences will follow but in the circumstances which show that the actor has not exercised the caution that was incumbent on him."*

Thus, if X is driving on the road, exceeding the speed limit, and sees a pedestrian crossing the road, but does not slow down, believing that the pedestrian would have crossed the road before he reaches; hits and injures the pedestrian, X would be guilty of culpable rashness as he was acting with the consciousness that dangerous consequences will follow. If, however, X is driving above the speed limit on an empty road and does not notice a pedestrian crossing the road; hits and injures the pedestrian, X would be guilty of culpable negligence, as a reasonable man would have been attentive while driving at a high speed.

NEGLIGENCE AS *MENS REA*

"*Mens rea* is the state of mind indicating culpability, which is required by statute as an element of crime."[35] *Actus non facitreum nisi mens sit rea,* meaning that "an act is not culpable until the mind is guilty" is one of the oldestmaxims of the criminal law, and forms the basis of crime. "Criminal negligence is the failure to exercise duty with reasonable and proper care and employing precautions

[32] Victor V. Ramraj, 'Criminal Negligence and the Standard of Care' (1999) Singapore Journal of Legal Studies 678 <http://wiki.nus.edu.sg/download/attachments/89620983/Ramraj%20Criminal%20Negligence.pdf?version=1&modificationDate=1332225937547&api=v2> accessed 13 November 2013

[33] *Tika Ram v Rex* [1950] AIR 300 (All)

[34] [1994] ACJ 357 (Orissa)

[35] *Staples v United States* [1994] 511 US 600

guarding against injury to the public generally or to any individual in particular"[36]. Negligence is a negative act. It is always related to some circumstance, place, time, status of parties etc.

Whether or not negligence should be considered as *mens rea* is debatable. "Strictly speaking, negligence may not be a form of *mens rea*. It is more in the nature of legal fault. However it is made punishable for a utilitarian purpose of hoping to improve people's standard of behavior."[37]Negligence does not require intent, malicious or otherwise. However, the doctrine of *mens rea* is so deeply rooted in the criminal law that the judges refrain from discarding it; thus, the courts have, through a multitude of cases, have asserted that negligence is a form of *mens rea*. When the courts equate negligence with *mens rea*, "they are looking for a substitute of real intent,"[38] or what may be called "intent implied in fact"[39].

Supreme Court of India has observed that for an act to be punishable, it must be accompanied by some mental element, or a "guilty mind."[40]An extensive discussion about criminal negligence under section 304A of IPC was undertaken by the apex court in *Jacob Matthew v State of Punjab and Anr.*[41], in the year 2005. The court laid down guidelines for courts to try cases of criminal negligence. One of them stated that the element of *mens rea* cannot be excluded in a case of criminal negligence. In the case, the complainant's father, who was admitted in a hospital, felt difficulty in breathing at once instance. The doctor was summoned, who arrived around half an hour later. The doctor connected the oxygen cylinder, but the patient continued to suffer and eventually died. It was found later that the oxygen cylinder was empty. The court in this case, acquitted the doctor holding that the required *mens rea* for conviction under 304A was absent, and held the hospital negligent for not providing for requisite equipment. Another case in which state of mind in criminal negligence was sought is the very recent case of Dr. KunalSaha, who on a vacation in India took his wife to certain doctors to cure a skin rash. Due to wrong medications, the condition of his wife deteriorated, and she eventually died. Dr. KunalSaha filed a case against the 26 doctors who had treated her wife in Mumbai and Kolkata. In 2009, the Supreme Court held liable the AMRI Hospital of Kolkata and its doctors for gross negligence. The failure of the doctors to exercise the skills that are reasonably

[36]*Malay Kumar Ganguly v Sukumar Mukherjee &Ors,* [2010] AIR 1162 (SC)
[37]*R v Williams* [1987] 3 All ER 411
[38] RDL, 'Negligence and Criminal Negligence' (Jan, 1926) Michigan Law Review 24(3) 285-287 <http://www.jstor.org/stable/1279529> accessed 8 November 2013
[39] ibid
[40]*Kartar Singh v State of Punjab* [1994] 3 SCC 569.
[41] [2005] 6 SCC 1

expected of them and their profession provide the requisite *mens rea* for gross and culpable negligence. "Negligence means either subjectively a careless state of mind, or objectively careless conduct."[42]

It is contended by various scholars that negligence does not involve a state of mind. They claim that "negligence is to be judged not by an internal, but by an external standard"[43], i.e. the standard is objective and the person's heart and conscience is not looked into while determining whether the person was negligent or not. It is also contended that negligence must be described as "absence of mind" or inadvertence and "*mens rea* is a descriptive and not a normative state"[44], thus negligence is not a state of mind.

SHOULD NEGLIGENCE BE CULPABLE?

It is often contended that negligence is not a positive act, thus, it must not be punishable as a crime. A person would not like to be held liable for his acts done in negligence and without mala fide intention. All the reasons that the scholars who claim that negligence is not a form of *mens rea* give, also stand to argue that negligence should not be punishable. As negligence involves "low or unreasonable standard of conduct, is simply not as culpable as conscious risk taking or recklessness"[45]

However, as Glanville Williams has commented, "the essential question, at any rate for legal purposes, is whether it was reasonable for you to go ahead with your conduct in the circumstances."[46] If the required nexus between the negligent act and the consequence is present[47], the negligent person can be held criminally liable. It is not the ordinary negligence, but gross negligence that amounts to an offence under the criminal law. "There are degrees of negligence and

[42] *Malay Kumar Ganguly v Sukumar Mukherjee &Ors.* [2010] AIR 1162 (SC)
[43] George P. Fletcher, 'The Theory of Criminal Negligence: A Comparative Analysis' (Jan, 1971) University of Pennsylvania Law Review 119(3) 401-438 <http://www.jstor.org/stable/3311308> accessed 11 November 2013
[44] George P. Fletcher, 'Glanville's Inspiration' in Dennis j. Baker and Jeremy Horder (eds), *The Sanctity of Life and the Criminal Law: the legacy of Glanville Williams* (Cambridge University Press, 2013)
[45] Janet Loveless, *Criminal Law: Text, Cases and Materials* (3rdedn, Oxford University Press) 142
[46] Fitzpatrick and Williams, 'Carelessness, Indifference and Recklessness: Two Replies' (1962) 25 MLR 49,57.<http://www.jstor.org/stable/1092634> accessed 13 November 2013
[47] *Sri Udham Singh v the State of Himachal Pradesh* [1980] Shimla LC 246

rashness, and in order to amount to criminal rashness or criminal negligence, one must find that the rashness has been of such degree that injury was most likely to be occasioned thereby."[48]

ANALYSIS

Criminal Negligence in the context of Indian legal system, is not a well -defined topic. The margin between negligence, gross negligence and recklessness is so thin and unclear that ultimately, it depends on the judge trying the case to decide in his discretion whether the act was gross enough to be criminal. The asymmetric judgments in criminal negligence cases support this view. A crude example of this is when a prostitute who was aware that she suffered from syphilis, but misrepresented and encouraged a man to have intercourse with her, but was not held liable for negligence as the court ruled that the man agreeing to the intercourse was an accomplice[49]. In contrast to this, it has been held that a person having AIDS will be liable if he marries another and transmits the disease. Many such cases lay down the ambiguous path of criminal negligence. Another fall back in the theory of criminal negligence is that the law does not allow for emergencies. It may so happen that a person in emergency (say, to rush one's mother to hospital) may behave negligently. The law in this regard is not defined under IPC.

CONCLUSION

The number of criminal negligence cases has increased in the past years. It is being used as an effective tool against the ministers of our country when they fail to take requisite care in the exercise of their duty. For example, recently, the Chief Minister of Uttarakhand, Mr. Vijay Bahuguna was accused of criminal negligence as he did not take adequate measures to safeguard the state against the floods[50]. Negligence as a wrong may incur both tortious and criminal liability. However, the distinction between the civil and criminal liability for negligence is clear. Only gross negligence, i.e. an aggravated form of negligence is punishable as a crime. Unlike the English law, which has only manslaughter as a crime based on negligence, IPC marks fourteen kinds of offences based on criminal or gross negligence. In this context, negligence must be differentiated from recklessness. The most important section under IPC for criminal negligence is section 304A, which covers

[48] *ChamanLal v State* [1970] AIR 1372 (SC): [1970] SCR (3) 913
[49] *Queen v Rakma* [1886] 11 ILR 59 (Bom)
[50] 'Uttarakhand floods: BJP accuses state government of criminal Negligence (August, 2013) <http://ibnlive.in.com/news/uttarakhand-floods-bjp-accuses-state-government-of-criminal-negligence/411076-3-243.html> accessed 20 October 2013

homicide by negligence. Medical negligence emerges out as a crime under the purview of this section, which has become an important issue these days. Medical professionals with inadequate skills or those who exercise improper skills can be tried under this section. Section 304A covers only cases in which death is resulted; cases of endangering of life, hurt and grievous hurt are covered by Sections 336, 337 and 338 respectively. Whether negligence is a form of *mens rea* and whether negligence should be a basis of criminal liability are highly debatable issues. A layman does not want to be held liable for his negligent acts, as he considers them acts done by mistakes or unconsciously, and punishing them for unconscious acts would be fruitless. However, the State still imposes this liability on individuals in the hope that next time, they would be more conscious in those situations and improve their behavior.

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DATA PROTECTION, INFORMATION SECURITY AND PRIVACY CONCERNS IN THE DIGITIZED WORLD

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INTRODUCTION

Data is a valuable asset in this modern age of information technology. Gone are the days when it was easier to protect confidential and sensitive data in the form of hard copies, packed, sealed and marked as "CONFIDENTIAL". Use of digital media, virtual backups, cloud computing, along with users' anonymity and security breach incidents, like hacking have made data security and protection a prime concern for all. The use of data, for instance, by the Call Centres, has fuelled the boom in the Indian I.T. industry. Similarly, many law firms have large volumes of valuable and confidential data of clients in their systems and it is a fact that they do face instances of data theft. Although, most of these cases are not reported, they do raise a serious concern regarding losing sanctity of confidential information and sensitive data.

Most of the concerns regarding data security and protection are directed towards unethical hacking, data theft and use of sensitive personally identifiable information (PII) for commercial purposes without obtaining the consent of the users. In a shocking case, an ex-employee of a Pune based firm shared confidential information and passed them on to a Japanese firm's Indian arm, his new employer. Consequently, the concerned state IT authority ordered the Japanese engineering company's Indian arm to pay the Pune based firm a sum of Rs. 40 lakh for stealing the latter's confidential data, including e-mails, in a bid to snatch its customers. Today, it is not surprising to hear companies paying in billions to buy useful personal 'data' or industry specific 'database'.

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DATA PROTECTION UNDER THE INFORMATION TECHNOLOGY ACT, 2000

As per Section 43 of the Information Technology Act, 2000 (the "**Act**") if any person without taking permission from the owner or any other person who may be incharge of a computer, computer system or computer network (collectively "**Computer**") accesses or secures access to such Computer; downloads, copies or extracts any data or information from such Computer, or helps any person in gaining access to such Computer, such person can be held liable to pay compensation up to Rs. 1 Crore to the person so affected. Furthermore, if any of these acts, as prescribed under Section 43 of the Act, is done with the dishonest or fraudulent intention, such person may have to face imprisonment for a term which may extend to three years or pay fine up to Rs. 5 lakh or both.

Section 43-A of the Act provides even greater penal consequences for negligence in implementing and maintaining reasonable security practices and procedures in relation to sensitive personal data or information by a body corporate. Compensation for the violation of Section 43 A, can even extent to the tune of Rs. 5 Crores.

Similarly, Section 72-A of the Act deals with personal information and provides punishment for disclosure of information in breach of lawful contract or without the information provider's consent. It is to be noted that even data which is outsourced to India gets protection under these section. However, when data is sent outside the territories of India, one cannot seek protection under this Section. India has no jurisdiction in such cases and there is no obligation cast on the countries to which India sends sensitive personal information for processing, to have an equally stringent data protection mechanism. The punishment provided for such disclosure of information in breach of lawful contract is imprisonment up to three years or fine to the tune of maximum Rs. 5 lakhs or both.

As regards an intermediary dealing with such data and information, it can escape liability for any third party information, data, or communication link hosted by it only in the following situations- (a) when its function is limited to merely providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; (b) it does not initiate the transmission, select the receiver of the transmission and select or modify the information contained in the transmission; (c) it observes due diligence while discharging its duties under the

Act. However, the Act does not spare an intermediary if it is proved that the intermediary had conspired, abetted or aided in the commission of any the unlawful act.

EXTRA TERRITORIAL APPLICABILITY OF THE ACT

It is to be noted that as per Section 75 of the Act, the provisions of this Act can apply to an offence or contravention even committed outside India by any person irrespective of their nationality, if the act or conduct constituting the offence or contravention involves Computer located in India. Furthermore, any compensation or penalty provided under this Act will be in addition to any punishment or compensation which may be prescribed under other applicable laws.[2]

DATA THEFT

Although the term "data theft" is not defined in the Act, we can infer the meaning of this term by importing definition of 'data' from the Act and 'theft' from the Indian Penal Code. As per the definition of 'data' provided under the Act, data includes information, knowledge, facts, concepts or instructions in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer. On the other hand, the term 'theft' under Section 378 of IPC has been defined as- *"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft*." In this regard, it is to be noted that the definition of "movable property" as prescribed under Section 22 of I.P.C. only includes *corporeal property*. The provision pertaining to theft in IPC does not cover 'data', owing to its intangibility, However, if 'data' is stored in a medium (CD, Floppy etc.) and such medium is stolen, it would be covered under the definition of 'theft', since the medium is a "movable property". On the other hand, if the data is transmitted electronically, i.e. in intangible form, it would not constitute 'theft' under the Indian Law. Therefore, 'data', in its intangible form, cannot be stolen, under the Indian Criminal Law. However, any person who indulges in such crime, also called a data criminal, can be punished under section 409 of the Indian Penal Code, 1860 for 'criminal breach of trust'. Section 409 states that- "*Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has*

[2] Section 77 of the Information Technology Act, 2000

made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'." Similarly, section 405 of I.P.C. refers to "property" and not "movable property", hence, the word "property" is not restrictive. Therefore, 'data' would be covered within the ambit of "property" in Section 405 of I.P.C. and thus any such act would attract a penalty of imprisonment up to 3 years, or fine, or both, under this section. This section penalizes Data Criminals from amongst the independent contractors (Call Centers etc.) to whom Data may be entrusted in the course of business for carrying out specific tasks /assignments.

DATA PROTECTION UNDER INDIAN COPYRIGHT ACT, 1957

Indian Copyright Act, 1957 provides for database protection under Section 2(o) which defines "Literary Work". Therefore, any data which comes under the scope of Section 2(o) is protected under the Copyright Act. Some of the leading cases related to data protection under copyright laws pertains to holding copyright in 'client list'. Examples are- *Burlington Home Shopping Pvt. Ltd. vs. Rajnish Chibber*[3] *and Diljeet Titus, Advocate vs. Alfred A. Adebare and Ors.*[4] In Burlington case, the issue was whether a database consisting of compilation of mailing address of customers can be subject matter of a copyright so as to hold the defendant liable for infringement of the Plaintiff's Copyright. The Court answered the question in affirmative and held that compilation of addresses developed by anyone by devoting time, money, labour and skill amounts to a literary work wherein the author has a Copyright. Accordingly, the Defendant was restricted from using the list of clients/customers included in the database exclusively owned by the Plaintiff.

CONTRACTUAL PROTECTION OF DATA AND CONFIDENTIAL INFORMATION

Although most of the executive employment agreements necessarily provide for a customary confidentiality clause and non-disclosure clause, the enforceability of the such clauses depends upon the enforceability of the agreement as a whole. A standard confidentiality clause in an agreement creates an obligation on both the parties to maintain confidentiality of the information received in relation to the services. It also imposes an obligation on the receiving party to protect such proprietary and confidential information at least with the standard of care, with which the receiving party would have protected its own proprietary/confidential information. As regards use of such confidential information, a typical confidentiality clause would usually limit it by using the phrase

[3] *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber & Anr.*, 1995 PTC (15) 278
[4] 2006 (32) PTC 609 Del

"need-to-know basis". For an easy reference, a standard confidentiality clause in an agreement may look like this-

> *"The receiving Party agrees and undertakes that, during the Term of this Agreement and for a period of twelve (12) months thereafter, it shall protect the Confidential Information of the disclosing Party, using the standard of care with which it treats its own Confidential Information but in no event less than reasonable standard of care. The receiving Party shall ensure that the Confidential Information of the disclosing Party is stored and handled in such a way as to prevent unauthorized access and disclosure.*
>
> *The receiving Party shall only make use of the disclosing Party's Confidential Information to the extent required to fulfill its obligations under this Agreement and shall only disclose such Confidential Information in furtherance of its obligations and on a strictly need-to-know basis."*

Furthermore, such confidentiality clause may further provide that any confidential information or documents received in relation to the services contemplated under the agreement will be duly returned by the receiving party to the disclosing party or permanently disposed off by the receiving party to the satisfaction of the disclosing party followed by a formal notice of such destruction or disposal. It is to be noted that most of the time the agreement will explicitly exclude certain categories of information from the purview of "confidential information". For instance, information which is already in the public domain or becomes so through no fault of the receiving party, information which may be independently developed by the receiving party or be approved for release by prior written authorization by the disclosing party, or information which may be required to be disclosed under any applicable law or Court's order, etc.

INTERNATIONAL PROTECTION OF HEALTH RELATED DATA

The Health Insurance Portability and Accountability Act, 1996 (HIPAA): The Health Insurance Portability and Accountability Act (HIPAA) is widely acknowledged as the norm for healthcare services and Indian companies are well versed with the Act and other regulatory bodies. The Act covers Health Plans, Health Care Providers and Health Care Clearing houses.

Outsourcing healthcare services to India is extremely popular today. However, there are several concerns being voiced about data security and adhering to standard quality norms, especially regarding Protected Health Information (PHI). As of today, India has no specific privacy laws governing transfer and protection of such data and information.

For organizations that deal with the electronic management of healthcare information it is not only vital to protect the electronic maintenance and transmission of this data, but also protect any paper versions or oral discussions pertaining to this information.

Outsourcing healthcare services like medical billing, medical transcription services and coding to O2I involves the transfer and maintenance of important information. It is an obvious concern for companies outsourcing healthcare work to be ensured that vendors are complying with international standards. For this purpose, most of the body corporates formulates policies and procedures to ensure compliances with Health Insurance Portability and Accounting Act (HIPAA) of 1996 and Physical & Environmental Security Manual. The key element which a body corporate must safeguard is patient's Protected Health Information (PHI) and their medical records (name, DOB, SSN, MRN, voice files, transcribed reports, phone number, email address, address). Some of the safeguards generally implemented in this regard may be-

- Continuous information system review and login monitoring;
- Appointment of a Compliance Officer;
- Protection and safeguard of the facility and equipment from unauthorized physical access, tampering and theft;
- Monitoring the receipt and removal of hardware and electronic media containing protected information into and out of a facility and the movement of these items within the facility;
- Encrypting and decrypting of electronic information while transmission;
- Reporting and investigating security breaches;

Hence HIPAA for India encourages organizations to simultaneously go for enterprise level Privacy and Security up gradation that could meet not only HIPAA but also Data Protection Act and Information Technology Act, 2000.

Safe Harbour Principles: US-EU Safe Harbour is a streamlined process for US companies to comply with the EU Directive 95/46/EC on the protection of personal data. Intended for organizations within the EU or US that store customer data, the Safe Harbour Principles are designed to prevent accidental information disclosure or loss. These principles relate to-

- Notice- Individuals must be informed that their data is being collected and about how it will be used.

- Choice- Individuals must have the ability to opt out of the collection and forward transfer of data to third parties.
- Onward Transfer- Transfers of to third parties may only occur to other organizations that follow adequate data protection principles
- Security- Reasonable efforts must be made to prevent loss of collected information.
- Data Integrity- Data must be relevant and reliable for the purpose it was collected.
- Access- Individuals must be access the information held about them, and correct or delete it if it is inaccurate.
- Enforcement- There must be effective means of enforcing these rules.

There is no exclusive treaty between Europe and India in this regard. However US based BPOs in India have entered into contracts to ensure compliance with the safe Harbour Principles.

TRADING OF PERSONAL INFORMATION & UNSOLICITED COMMERCIAL COMMUNICATIONS

A recent judgment of the Delhi State Consumer Disputes Redressal Commission, which imposed an exemplary fine of Rs. 75 lakh on Airtel, the Cellular Operators Association of India (COAI), ICICI Bank and American Express Bank, on a complaint of consumer harassment by unsolicited telemarketing calls and text messages, is a testimony of what a person may trading-off for his/her privacy and personal information. The Commission's judgment in this case was reportedly based on the fact that mobile service providers traded subscribers' personal information in violation of their contractual obligation to treat it as confidential. Although the Courts have in the past, issued restrictive directions on similar cases of breach of privacy, this was the first time in India that any entity was ever penalized for Unsolicited Commercial Communications (UCC). As of today, the Commission's ruling is under Supreme Court's scanner.

CONSTITUTIONAL PROTECTION AGAINST BREACH OF PRIVACY

In the year 1997, the Supreme Court of India in *People's Union for Civil Liberties (PUCL) v. Union of India*[5] directed the Reserve Bank of India ("RBI") to institute measures to reduce unsolicited calls on the ground that the right to privacy is a fundamental right guaranteed under Articles 19 and 21 of the Constitution of India. However, these guidelines issued by RBI in November 2005 only applied to banks and financial institutions and did not have much impact. As of today, the issues still remain

[5] AIR 1997 1 SCC 301

unresolved and there has been filed a number of PILs which are pending disposal before the Apex Court seeking protection of privacy rights.

NEW PRIVACY BILL: WHAT IS THERE IN STORE?

The new Privacy Bill aims at to establish an effective regime to protect the privacy of an individual and their personal data from Governments, public authorities, private entities and others. It sets out conditions upon which surveillance of persons and interception and monitoring of communications may be conducted. The new Policy also provides for constitution of a Privacy Commission.

Let us have a sneak peek into the Draft bill. Chapter-I deals with definitions where the term sensitive personal data is widely defined and includes many aspects of data protection. The next chapter deals with regulation of personal data followed by a chapter dealing with protection of personal data. The fourth chapter provides for setting up of a Data Protection Authority Regulation by Data Controllers. The fifth and sixth chapters deal with data processors and surveillance and interception of communications. The final chapter prescribes penalties for offences committed under the Act.

However the bill has been criticized on the ground that it seeks to cover both the government and private sector under single legislation. In countries like U.S., there is single privacy legislation controlling the manner in which the Federal Government collects and uses the data of its citizens. Then there are sector wise legislation governing how the private sector and state governments use and share data in the sectors of health, banking, etc. The proposed bill carries the responsibility of curbing violations of right of privacy among citizens as well as regulates the sensitive data use by the government and private bodies. The implementation of the same definitely poses a huge challenge.

INFORMATION TECHNOLOGY (REASONABLE SECURITY PRACTICES AND PROCEDURES AND SENSITIVE PERSONAL DATA OR INFORMATION) RULES

On 13 April 2011, the Ministry of Communications and Information Technology (MCIT), Government of India, notified the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (the **"Rules"**). As per these Rules, Sensitive Personal Data or Information (SPDI) consists of the following:

- Passwords;
- Financial information such as bank account or credit card or debit card or other payment instrument details;
- Physical, physiological and mental health condition;
- Sexual orientation;
- Medical records and history;
- Biometric information.

The Rules mandates a body corporate to provide policy for privacy and disclosure of information, commonly known as "Privacy Policy". Accordingly, a standard Privacy Policy of a website must have the following five components-

1. Clear and easily accessible statements of its practices and policies;
2. type of personal or sensitive personal data or information collected under rule 3 of the Rules;
3. purpose of collection and usage of such information;
4. disclosure of information including sensitive personal data or information as provided in rule 6 of the Rules, and
5. Reasonable security practices and procedures as provided under rule 8.

The Rules also provides for guidelines for collection and usage of such information. The Rules mandated the compliance of Reasonable Security Practices and Procedures by all body corporate.

TRACKING USER INFORMATION AND PREFERENCES

Spyware: Microsoft defines 'Spyware' as software that can perform certain behaviour, usually without first obtaining the consent from the user, for the same. Example of such behaviour may be collecting personal information and preferences of the user, displaying unwanted advertisements while a user surfs internet (by covertly installing adware on their system), etc. Most of these spyware are generally designed in a manner so that it is difficult to be removed. Such spyware even has the ability to make changes to the user's computer and cause their computer to slow down or eventually crash which may again result in loss of valuable data and information. Other than the computers, these spyware may also be installed on a user's cell phone. Once a phone is infected with the spyware, it can enable the tracker to have access the device's text messages, emails, call history, contacts and files from applications such as Facebook and Whatsapp. The spyware can even be used to switch on a phones camera and microphones to record conversations without the knowledge or

consent of its owner. There have also been reports in the past, of government keeping a close eye on social media and arresting people for publishing tweets or Facebook updates that defame the government authorities or the State. For instance, early this year, a Saudi court sentenced one of its citizens to eight years of imprisonment for a number of charges, including mocking the King on social media. Very recently, Aaron's Inc. and its franchise in United States were accused with a proposed class action in Georgia Federal Court by two attorneys alleging it used spyware installed in its rental computers to capture photographs and collect and store privileged and personal information from its customers.

Cookies: In laymen terms, 'Cookies' are small text file or computer ID that are downloaded to the user's browser when they surf the internet. It ensures automatic logins and authentication when a user wants to access a website again, and can store information related to a user's online browsing pattern and preferences. These cookies, when used as a form of spyware, can pose serious internet security threats and compromise a user's online privacy. It can help the advertiser learn about a user's online habits and shopping preferences and then build a consumer profile accordingly. This is called behavioural tracking. Thereafter, it starts showing specific advertisements matching the user's interests. Some of these cookies can also covertly install adware or spyware applications on the hard drive of the user's system or cell phone device. One good example of such cookies is "ATDMT tracking cookie" which can record the websites a user visits and the ads he/she clicks on, in addition to recording personal information like, credit card numbers and passwords to online accounts, etc. There have been several instances of identity theft related to ATDMT tracking cookies so far.

DOES A PERSON HAVE "RIGHT TO BE FORGOTTEN"?

In May 2014, European Court of Justice ("**ECJ**") ruled in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, C-131/12*. In this case, a Spanish national lodged a complaint with Spanish Data Protection Agency that when an internet user enters his name in the search engine of the Google, the list of results displays links to two pages of La Vanguardia's newspaper, which contain an announcement for a real-estate auction being organized following attachment proceedings for the recovery of social security debts owed by the Complainant from 16 years ago. The truth was that the attachment proceedings concerning him had been fully resolved long time back and reference to them was entirely irrelevant at the time of complaint. The Complainant, therefore, requested that La Vanguardia be required either to remove or alter those two pages or to

use appropriate tools so as to protect the data. He also requested that Google Spain or Google Inc. be required to remove or conceal his personal data so that it should no longer appear in the search results or any of the links to La Vanguardia.

As against La Vanguardia, the AEPD rejected the complaint on the ground that the information in was lawfully published by it. However, as against Google Spain and Google Inc., it upheld the complaint. Thereupon, Google Spain and Google Inc. brought two actions before the National High Court of Spain, claiming that the AEPD's decision should be annulled. Thereafter, the Spanish court referred the matter to the European Court of Justice (ECJ).

MAJOR OBSERVATIONS OF ECJ

- By searching automatically, constantly and systematically for information published on the internet, the operator of a search engine 'collects' data within the meaning of the EU Directive. The operator, within the framework of its indexing programmes, then 'retrieves', 'records' and 'organizes' the data in question, which eventually gets 'stored' on its servers and thereafter the same is 'disclosed' or 'made available' to its users in the form of lists of results. ECJ held that these operations must be classified as 'processing', regardless of the fact that the operator of the search engine carries them out without distinction in respect of information other than the personal data.
- The operator of the search engine is the 'controller' in respect of that processing, within the meaning of the Directive; given that it is the operator which determines the purposes and means of the processing.
- In as much as the activity of a search engine is additional to that of publishers of websites and is liable to affect significantly the fundamental rights to privacy and to the protection of personal data, the operator of the search engine must ensure, within the framework of its responsibilities, powers and capabilities, that its activity complies with the directive's requirements.
- Such operators are, in certain circumstances, obliged to remove links to web pages that are published by third parties and contain information relating to a person from the list of results displayed following a search made on the basis of that person's name. Therefore, following a request made by the data subject, if it is found that the inclusion of those links in the list is, at the this point in time, incompatible with the directive, the links and information in the list of

results must be erased. The Court also observed that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where, having regard to all the circumstances of the case, the data appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed. Therefore, the question to be examined is whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results that is displayed following a search made on the basis of his name. If that is the case, the links to web pages containing that information must be removed from that list of results, unless there are particular reasons, such as the role played by the data subject in public life, justifying a preponderant interest of the public in having access to the information when such a search is made. Thus, a fair balance should be sought in particular between that interest and the data subject's fundamental rights, in particular the right to privacy and the right to protection of personal data. However, no interference with such data can be justified merely on the ground of economic interest which the operator of the search engine may have in the data processing.

- Pursuant to this judgment, Google has taken progressive steps towards complying with the European Union's new "Right To Be Forgotten". It has created a new form allowing those in the EU to request take down of URLs they dislike. However, as of today, this feature/form is available only for one of the 28 European Union countries and four non-EU countries, viz. Iceland, Liechtenstein, Norway and Switzerland.

This was a landmark ruling which came as a big surprise and was heavily criticized by free-speech advocates in the U.S., who considered the judgment as pro-censorship ruling, putting search engines in a difficult position as an arbiter of what people have a right to know. In this regard, Lila Tretikov, Executive Director of the Wikimedia Foundation in her blog post commented- The ruling "is undermining the world's ability to freely access accurate and verifiable records about individuals and events." However, the privacy activists later explained that the reaction was overblown as results would only be removed from individual name searches, not from all of Google's search results. (This means, a user can simply change their preferences to use the unfiltered U.S. version where they can still have access to such data).

At present, a new draft Regulation on Data Protection is in the offing by the European Parliament which is keen on introducing a wider and more explicit 'right to be forgotten'. On the other hand, the loudest criticism is coming from Wikipedia which has received notices requesting at least 50 of its links to be deleted from the website.

PHISHING

Oxford English Dictionary added "Phishing" to its latest publication making it a definitive word of English Language. It defines "Phishing" as- "*the fraudulent practice of sending emails purporting to be from reputable companies in order to induce individuals to reveal personal information, such as passwords and credit card numbers, online.*"

According to the Annual Report of Indian Computer Emergency Response Team (CERT-In), Dept. of Information Technology, Ministry of Communications & Information Technology, (Govt. of India) in the year 2009, the CERT-In handled about 374 phishing incidents. There are three major factors that cause an increase in Phishing in India-

1. **Lack of Awareness among Public:** Worldwide, particularly in India, there has been lack of awareness regarding the phishing attacks among the common masses. The users are unaware that their personal information is actively being targeted by criminals and they do not take proper precautions when they conduct online activities.

2. **Lack of Awareness regarding Policies:** The fraudsters often count on victim's unawareness of Bank/financial institution policies and procedures for contacting customers, particularly for issues relating to account maintenance and fraud investigation. Customers unaware of the policies of an online transaction are likely to be more susceptible to the social engineering aspect of a phishing scam, regardless of technical sophistication.

3. **Technical Sophistication:** Fraudsters are now using advanced technology that has been successfully used for activities such as spam, distributed denial of service (DDoS), and electronic surveillance. Even as customers are becoming aware of phishing, criminals are developing techniques to counter this awareness. These techniques include URL obfuscation to make

phishing emails and web sites appear more legitimate, and exploitation of vulnerabilities in web browsers that allow the download and execution of malicious code from a hostile website.

In India, the most common form of phishing is by email pretending to be from a bank, where the sinister asks to confirm your personal information/login detail for some made up reason like bank is going to upgrade its server. A typical phishing email may look like this-

Apart from the general banking phishing scams, some of the recent phishing attacks that took place in India are as follows:

1. **RBI Phishing Scam:** The phishing email disguised as originating from the RBI, promised its recipient prize money of Rs.10 Lakhs within 48 hours, by giving a link which leads the user to a website that resembles the official website of RBI with the similar logo and web address. The user is then asked to reveal his personal information like password, I-pin number and savings account number. However, the RBI posted a warning regarding the fraudulent phishing e-mail on the bank's official website.

2. **Income Tax Department Phishing Scam:** The email purporting to be coming from the Income Tax Department lures the user that he is eligible for the income tax refund based on his last annual calculation, and seeks PAN CARD Number or Credit Card details.

3. **ICC World Cup 2011:** Here, the fraudsters through the similar looking fake website of organizers of the event have tried to lure victims with special offers and packages for the grand finale of the event. The Users were asked for credit card details to book tickets and packages along with their personal information which once submitted would be used to compromise the online banking account of the victim leading to financial losses to the victim.

PHISHING UNDER THE INFORMATION TECHNOLOGY ACT

Phishing is a serious offence under Information technology Act .Section 66C penalizes identity theft. The provision states that-

"Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh."

In addition, Section 66D of this Act deals with sanction for cheating by personation by using computer resource.

Phishing is a major concern in the contemporary e-commerce environment in India as there is no silver bullet to thwart the phishing attack. However, it has been noticed in the most of the phishing scams worldwide particularly in India that the hacker succeeds in phishing attempt due to the uninformed, gullible customers. Therefore, the awareness and customer education is the key here to fight the menace of the "Phishing" apart from mitigating or preventative measures.

CONCLUSION

The meteoric rise of e-commerce, ever-increasing use of internet and mobile applications, and easy access to personal and sensitive data of person and company, have made data security, information protection and privacy one of the prime concerns. Personal and confidential information have now become one of the most sought after intangible assets in the virtual world. The more the value of data and sensitive information, the more vulnerable it is to theft and unauthorized use. The increasing incidents of data theft and copyright claims over confidential information, and demand for more secure protection of medical records and personally identifiable information is a clear indication of the dire need to have a much stronger legal regime for data protection and addressing privacy concerns. The current legal protection regarding data and information security in India need to be expanded to adequately cover protection of medical records and health related information so as to be in compliance with HIPAA and international norms governing medical information. Although, the laws in India do not mandate compliance with the HIPAA and other European Union data protection regime, the need for the same is evident in the light of exponential growth in outsourcing business in the healthcare industry and mushrooming e-commerce in the healthcare sector. Similarly, keeping in the view the colossal cost of storing data and retaining it on a secure server over a long period also indicates that there should be well laid down and specific norms regarding retention of personal and sensitive data over a particular period of time. Furthermore, more stringent legal protection is required regarding unauthorized use of personally identifiable data for commercial purposes and illegal activities like, phishing. Although the Constitution of India guarantees right to privacy, the same may not be adequate to afford protection to use of sensitive personal data by technology giants. It is high time, that India should make its data protection and privacy regime as strong as its counterparts in United States and European countries before the

world starts distrusting India for any potential business involving secure data and confidential information. Furthermore, a stronger privacy protection will ensure that a person in India has a greater bargaining power vis-à-vis the technology giants when it comes to their personally identifiable information.

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