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ABOUT THE JOURNAL

The Karnataka State Law University, Hubballi had initiated with a new Journal on 'Sports and Entertainment Law' (ISSN 2454-4566) in 2015. This is the third volume of 'Sports and Entertainment Law'. The objective of the journal is to create an abundance of resource, blending academic prospective with professional expertise to be published in its Vol. No. III. The Journal has aspired to promote greater interest among the legal professionals and law students to undertake research on issues related to Sports and Entertainment Law. The publication of the journal also aims to analyse the expanded jurisprudential value in the field of Sports and Entertainment Law by giving a platform to the legal professionals and law students.

The Journal on 'Sports and Entertainment Law' Vol. No III is a conglomeration of articles contributed by researchers, practitioners and students. The articles are scrutinised by a panel of student editors of Karnataka State Law University's Law school, under the kind guidance and advice from the members of the Honourary Advisory Board comprising of Prof. (Dr.) C.S Patil, Hon'ble Vice Chancellor (Actg.), Dr. Kalyan C. Kankanala and other members of the board.

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EDITOR'S NOTE

Prabhu N. Savanur*.

It gives me immense pleasure in writing the editorial for this current issue of KSLU JSEL which is the flagship publication as official journal of Karnataka State Law University. This issue is the denouement of the magnanimous efforts of Vice-Chancellor Prof. (Dr.) C. S. Patil which promises to deliver yet another assortment of articles.

There is a need to appraise knowledge on the emerging issues of Sports and Entertainment Law. For this purpose, KSLU started the KSLU's Journal of Sports and Entertainment Law, which endeavours to encourage well researched contributions on the rapidly advancing Sports and Entertainment law disciplines. I sincerely hope that the research articles published in this Journal will not just serve as information to our readers, but also appreciably contribute towards enrichment of Sports and Entertainment jurisprudence.

The articles we received for this edition continue to astonish with their empirical thought-process leading to inquisitive standpoint of bright minds across the nation. This edition comprises numerous articles, short notes by students, academicians, practitioners across the Country. The 11 researched articles covering a wide range of topics which include CBFC's Right of Pre Censorship, Publicity Rights, Sports Betting, Biopics, Entertainment Industry and Antitrust Law, have been short listed from a pool of 27 articles.

I whole heartedly thank all the members of the Honorary Advisory Board, consisting of Legal Luminaries and Academic Giants, the Student Editors without whose cheerful help and practical wisdom this issue would not have been possible. I would also like to thank all those

* Student of 5th year, B.B.A., LL.B., (Hons.), KSLU's Law School, Hubballi and Student Editor, KSLU-JSEL.

who have contributed their articles to this issue and thus endorsing a new initiative and an innovative academic organ and, in doing so, encouraging many more authors.

I sincerely hope this journal achieves its objective of being a value addition to legal scholarship. I also aspire to further widen the forum in our succeeding editions, to accommodate wide range of deliberations and dialogues and also to encompass a wide range of issues.

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ARTICLES

HIDDEN DANGERS OF LEGALISING SPORTS BETTING IN INDIA

*-Dr. Anu Prasannan**

INTRODUCTION

Manu, a bright young disciplined student of a reputed professional college and only son of a middle class family was seen gradually losing his interest in studies which unfortunately remained unnoticed by his friends and even loved ones until it shattered his confidence desperately. He terribly failed in his attempts in spite of his efforts to cope up. On enquiry it was revealed that he was involved in a vicious gang of betting, an easy means to conquer his dreams.....

The imminent question to be resolved here is whether sports betting in India is to be legalized or not. Gaming history of India has been in her culture since time immemorial and with the passage of time has evolved into huge gaming industry.[1] It transcended through generations from illegal and highly un-ethical practice to a regulated legislative framework. With the European invention, cricket betting sweeped Indians and established its firm roots in India. It was not only the betting that grew, gambling increased in spite of some early regulations in the name of *Public Gambling Act,* 1867[2] which exempted any game where mere

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[1] The epics like Ramayana and Mahabharata makes extensive references to gambling. King Sakuni, the embodiment of 'self-hatred' used to roll dice to devastate and dishonour his rivals. See Nithyananda, *Bhagavad Gita demystified,* Vol. 1, (Bangalore, e N Publishers 2011).

[2] The Public Gambling Act, 1867 was enacted 150 years back to punish those who are involved in public gambling and maintaining gaming houses. The Act was meant to stop card games, dice and cock fighting. However, Section 12 of the Act gives exemption to any game of mere skill. The increase of betting racket indicates that the framers of the legislation have terribly failed to anticipate the increase in betting making the piece of legislation obsolete.

skill is involved and could be played anywhere.[3] Although the legalities of gambling have been the subject of extensive debate without any progress in terms of its clarity, there has been no end to its other phase, which is, betting. In the 20th Century when cricket started over swinging football, sports gambling became increasingly popular.[4] Much of its evolution owes to the impact of virtual media and increased internet penetration amongst the younger generations. India is entangled in the internet based on-line gambling like on-line lottery, cricket betting etc. Gaming industry is presently viewed as a major source of income and highly profitable business in the global as well as national level and India is not an exception to it.[5] While operating and regulating gambling and betting is easier in some European countries, in the absence of a comprehensive law in India it is more difficult and one is intrigued to look into the practice in Britain, America and other parts of Europe where they have legalized betting and have maintained a history of regulated betting. It also becomes more relevant in the light of Justice R. M. Lodha Committee Report[6] wherein, the recommendations made by the committee that betting should be legalized involves the enactment of a comprehensive law and calls for a probe into some related questions as to (i) whether such step will not give way to more rise in gambling (ii) will it not directly lead to more match fixing in cricket and other illegal activities and ultimately result in more family breakages and collapse of societal structure itself.

MEANING AND LEGAL IMPLICATIONS OF BETTING AND GAMBLING

Under the Constitution of India 'betting and gambling' has been the subject of the State List and State legislatures have been entrusted with the power to frame specific laws on 'betting and gambling'.[7] While there are no specific laws in India dealing with internet gambling, online

[3] Three exceptions are horse race, Rummy and Lotteries.

[4] Interestingly, hockey had a bigger following in the 50s and 60s. Unfortunately, it lost its way because of poor governance. See Nachappa, Ashwini, The imperative for legislating sports, *The Week*, March 19, 2017.

[5] According to the FICCI-KPMG Indian Media and Entertainment Industry Report 2014, the Indian gaming industry showed growth of 25.5 per cent in 2013, is expected to grow at a CAGR of 16.2 per cent between 2013 and 2018. (Seehttp://www.ficci.com/ spdocument /20372/FICCI-Frames-2014-KPMG-Report-Summary.pdf).

[6] On allegations of corruption, match fixing and betting scandals in cricket, Supreme Court appointed a three panel member led by Justice R.M. Lodha in January, 2015.

[7] Many States have enacted their own gambling legislations regulating physical gambling and sports betting. Some are as follows: The Assam Game and Betting Act, 1970; Bombay Prevention of Gambling Act, 1887; Gujarat Prevention of Gambling Act, 1886; Kerala Gaming Act, 1960; Tamil Nadu Gaming Act, 1930; Karnataka Police Act, 1963; Andhra Pradesh Gaming Act, 1974; Delhi Public Gambling Act, 2005 etc.

lottery and betting, gambling per se is prohibited and hence illegal in one way and at the same time making wagering on games of skill as legal on the other hand under the *Public Gambling* Act, 1867. However, it is to be noted that the *Public Gambling* Act 1867 and other gambling legislations in India are enacted prior to the advent of virtual and on-line gambling and as such have failed to define the term 'gambling'. In 1996 the Supreme Court in *K. R. Lakshmanan v. State of TamilNadu*[8] defined games of mere skill[9] as follows:

> The competitions where success depends on substantial degree of skill are not 'gambling' and despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of 'mere skill'

> According to Entry 34 of List II, under the Seventh Schedule to the Indian Constitution, 'gambling' includes:
> "any activity or undertaking whose determination is controlled or influenced by chance or accident and an activity or undertaking which is entered into or undertaken with consciousness of the risk of winning or losing, e.g., 'prize competitions, a wagering contract, ...Where there is no actual transfer of goods but only to pay or receive the difference according to the market price which varies from the contract price."

Thus although the definition of a gaming contract depends on statutory definitions of gaming, gambling and betting are prima facie wagering contracts[10] and the classic definition of wagering contract is given by Hawkins J.

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[8] AIR 1996 SC 1153.

[9] In an earlier decision *R.M.D. Chamarbaugwala v. Union of India* decided in 1957 SC had held that horse race betting was determined as a skill. Again in 1968, State of Andhra Pradesh *v. K. Satyanarayana,* AIR 1968 SC825; Rummy was also determined to be a skill game. Lottery is legal in many States. It is interesting to note that horse racing is considered legal as one in which skill is employed and this may be one of the reasons why because cricket betting is also being legalized in India. Two States Goa and Sikkim have also passed State level legislation to allow legalized casino gambling.

[10] Wager means a bet. The subject matter of bet may be anything. It is a game of chance, in which the event of either gain or loss is wholly dependent on an uncertain event. Sir William Anson defines it as:

> "a promise to give money or money's worth upon the determination or ascertainment of an uncertain event".

For more details See J. Beatson et al., *Anson's Law of Contract,* 29th edition, (New York: Oxford University Press, 2010).

A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties.[11]

In India Section 30 of the *Indian Contract Act,* 1872 simply says that agreements by way of wager are void. The section does not define 'wager', however, its scope and application was considered by the Supreme Court *in Gherulal Parekh v. Mahadeodas*[12] wherein, Subba Rao J. quoted William Anson and held that this brings out the concept of wager declared void by Section 30 of the *Contract Act.*[13]

In common law bets were enforceable. However, by a complex series of statutes from 1710 to 1892 wagering contracts were rendered void. These statutes were later repealed by sections 334 and 356 of the *Gambling Act* 2005.[14]

In spite of all these implications, in India on line betting and gambling continues so as the cricket betting. As the Public Gaming Act, 1867 makes no reference to online gambling, thinking in the line of *Information Technology Act,* 2000 and having provisions for various offences relating to online activity, there is however, no specific mention of on-line gambling being illegal nor it gives power to the Indian governments the power to block foreign websites opening to more and more hidden dangers... All these calls for an analysis of betting legislation in United Kingdom that has legalized betting.

BETTING LEGISLATIONS IN UNITED KINGDOM AND UNITED STATES OF AMERICA

- **UNITED KINGDOM**

[11] *In Carlill v. Carbolic Smoke Ball Co.* [1892] 2 QB 484 Hawkins J gave the following definition of a wagering contract which later received the unqualified approval of the Court of Appeal in *Ellesmere v. Wallace* [1929]Ch 1 at 24.

[12] AIR 1959 SC 781

[13] Sec. 30 of the Indian Contract Act was analogous to Sec. 18 of the English Gaming Act of 1845. The Act's principal provision was to deem a wager unenforceable as a legal contract. Gaming Act, 1845 is now replaced by the Gambling Act of 2005.

[14] Furmston, Michael, *Cheshire, Fifoot & Furmston's Law of Contract, 15th edn.,* (New York: Oxford University Press, 2007).

United Kingdom has a well-established sports betting culture including on-line betting. As the major portion of the economy of the State is dependent on these gaming, States have always been favorable. *The Gambling Act* of 2005 is the main law governing gambling in the United Kingdom. The Act has three fold objectives:

I. Preventing gambling from becoming a source of crime or disorder, being associated with crime or disorder, or being used to support crime
ii. Ensuring that gambling is conducted in a fair and open way
iii. Protecting children and other vulnerable persons from being harmed or exploited by gambling.

The Act does not differentiate between legal and illegal gambling. Betting on a particular outcome is considered legal, however, match fixing and spots fixing are covered under illegal betting.[15] It also established Gambling Commission as the primary government instrument for enforcing gambling legislation and regulating gambling activities.[16] The Gambling Commission has the power to issue a license to gambling operators and impose fines or revoke licenses if necessary. The Commission shall issue codes of practice about the manner in which facilities for gambling are provided.[17] Thus *the Gambling Act,* 2005 does not criminalize gambling but regulates the betting covering all individuals including cricketers and spectators.

To further address illegal sports betting UK also developed the Sports Betting Intelligence Unit (SBIU) as part of the Commission. SBIU works with sports governing bodies to help keep corruption out of sports betting and encourage the flow of information. This is done by requiring license holders to inform the Commission anytime a bet occurs that the Commission would want to avoid.[18] SBIU collects and develops information about corrupt sports betting. They also co-ordinate with the local police if any criminal activity is suspected.

[15] The penalties include imprisonment up to 2 years and fine.

[16] Sec. 20 deals with the establishment of Gambling Commission under the Gambling Act, 2005.

[17] In particular code describe arrangements that should be made by a person providing facilities for gambling for the purposes of:
(I) ensuring that gambling is conducted in a fair and open way
(ii) protecting children and other vulnerable persons from being harmed or exploited by gambling, and
(iii) making assistance available to persons who are or may be affected by problems related to gambling.

[18] The license holders also have to report any violation of the law of sports governing bodies. Under both the Clinton and Bush administration, the Department of justice has fought its growth . See Megan E. Frese, "Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Free Speech?", 15 *Fordham Intell. Prop.Media &Ent. L.J.*547, 612(2005).

The Gambling Commission has also established a responsible Gambling Strategy Board (RGSB) to deal with the problem of fear that legalizing gambling may promote addiction to gambling. The RGSB also promotes responsible gambling by encouraging licensed operations to provide socially responsible gambling.[19]

In such regulated legal framework and popularity of the sport in the UK, there has been a sharp increase in cricket betting, in conjunction with the increase in the gambling market as a whole in England. The increase in live betting also resulted in abysmal increase in online betting although, on line betting is also regulated by the Gambling Commission on behalf of the government's Department for Culture, Media and Sport (DCMS) under the *Gambling Act* 2005.

- **UNITED STATES OF AMERICA**

Unlike in UK, in America, the attempt of government is in stopping on-line betting.[20] The laws are very stringent that make sports betting illegal in most of the States.[21] *The Wire Act* of 1961 is the first among the couple of laws that make sports betting, online or otherwise, illegal in the United States. Congress passed the *Interstate Wire Act* of 1961, referred to as simply the 'Wire Act', to combat organized crime.[22] The main objective of the Wire Act was to stop sports betting. The Act intended to assist the States, territories and possessions of the United States, as well as the District of Columbia, in enforcing their respective laws on gambling and bookmaking and to suppress organized gambling activities.[23] Subsection (a) of the *Wire Act,* a criminal provision, provides:

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[19] Hanif Qureshi and Arvind Verma, "It is Just not Cricket", in M.R. Haberfeld, Dale Sheehan(ed.), *Match Fixing in International Sports Existing Processes, Law Enforcement, and Prevention Strategies,*(New York: Springer International Publishing Switzerland 2013).

[20] Rod L. Evans and Mark Hance (ed.), *Legalised Gambling For and Against,* (Chicago: Open court publishing Company, 1998).

[21] Historically gambling regulation has primarily been left to the States. Thus gambling laws varied widely from state to state. See Bruce P. Keller, the Game's the Same: Why Gambling in Cyberspace violates Federal Law, 108*Yale L.J.*1576(1999).

[22] The law is attributed to Robert F. Kennedy, the then Attorney General. The enforcement mechanism under this Law was much more powerful compared to the other state laws in awarding longer sentences.

[23] See *United States v. McDonough,* 835 F.2d 1103, 1105 n. 7 (5th Cir. 1988); See also *Martin v.United States,* 389 F.2d 895, 898 n. 6 (5th Cir. 1968), cert. denied, 391 U.S. 919 (1968) (quoting 2 U.S. Code & Cong. News, 87th Cong., 1stSess., 2631, 2633 (letter from Attorney General Robert F. Kennedy to Speaker of the House of Representatives, dated April 6, 1961).

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

With respect to the wordings "any sporting event or contest", there were differing interpretations including as to whether the fifty six year old act will prohibit internet gambling also.[24] Finally, there is also a secondary debate ongoing about as to whether the definition of "wire communication facility" in Section 1081 applies to the Internet[25] as it was enacted long back, even before internet existed. However, US department of justice concluded in 2011 that the *Wire Act* applies only to sports betting and not other forms of interactive gambling. With the Trump administration, the proposed legislation entitled *'Restoration of America's Wire Act'* (RAWA) would see congress extend the 1961 law's scope to prohibit online operations already live in New Jersey, Nevada and other States, while curtailing any other expansion.

In addition to this the other related laws include The Professional and AmateurSportsProtection Act (PASPA),[26] *Unlawful Internet Gambling Enforcement Act* (UIGEA),[27] *Illegal Gambling Business Act* (IGBA).[28]

Thus the analysis of the US scenario shows that US gamblers will continue to gamble in

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[24] Neither Section 1084 nor the definitional section 1081 defines the term "sporting event or contest." Section 1081 defines a "gambling establishment" as:

> any common gaming or gambling establishment operated for the purpose of gaming or gambling, including accepting, recording, or registering bets, or carrying on a policy game or any other lottery, or playing a game of chance, for money or other thing of value.

[25] Cynthia R. Janower, "Gambling on the Internet", *Journal of Computer - Mediated Communication,* Vol. 2, Issue 2: 1996.(See also http://jcmc.huji.ac.il/vol2/ issue2/ janower.html).

[26] PASPA is a federal law passed in 1992 to stop the expansion of sports betting.

[27] UIGEA was enacted in the year 2006.The UIGEAdid not make any new forms of gambling illegal. It simply added additional punishment for payment processors that move money for illegal gambling.

[28] IGBA enacted in 1970 is part of the organized Crime Control Act of 1970. Its objective is to stop illegal gambling syndicates.

the presence of anti-gambling statutes. The laws being more stringent, US has in fact, amplified the risks of consumer abuse, underage gambling, problem gambling and money laundering.[29]

SPORTS LEGALIZING BY LODHA COMMITTEE REPORT

Allegations of sports frauds like match fixing, betting scandals and corruption in the past few years have cast a cloud over the working of the Board of Cricket Control in India (BCCI).[30] Based on these allegations, the Supreme Court of India appointed a three-panel member led by Justice R. M. Lodha in January 2015 to look into the functioning of BCCI and for recommending reforms. The Lodha Committee Report suggested numerous changes for BCCI to implement and also recommended legalizing sports betting in India which has shifted the game play in the hands of money launderers and lobbyists.[31] The Report analysed the black sides of match fixing, a criminal offence punishable under the law and distinguished match fixing with sports betting which is given a completely different outlook that could be dealt with effectively through adequate legal framework and regulations. The Report further suggested legalizing betting in same lines of regulation in United Kingdom with the objective to benefit the game of cricket as such and in a broader way to enhance the Indian economy.[32]

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[29] Gerd Alexander, "The US on Tilt: Why the unlawful internet gambling enforcement Act is a bad debt", *Duke Law & Technology Review,* Vol. 5, 2008.

[30] BCCI is the national governing body for cricket in India. The board was formed in December 4, 1928 as a society registered under the Tamil Nadu Societies Registration Act. It was set up by a group of players at Delhi's Roshnara Club to end the British monopoly in cricket. BCCI had 6 regional bodies as its first members. Today it has 30 full-time members, and is worth Rs 3,308 Crore. (For more details see http://www.bcci.tv).

[31] This recommendation was similar to the report of prior Justice Mudgal Committtee Report which was a headed by former High Court judge Mukul Mudgal and comprising Additional Solicitor General of India L. Nageswara Rao and senior advocate and former cricket umpire Nilay Dutta to conduct an independent inquiry into the allegations of corruption against the former BCCI Chief N. Srinivasan's son-in-law Gurunath Meiyappan and Rajasthan Royals team owner Jaipur IPL Cricket Private Ltd, as well as with the larger mandate of investigating allegations having to do with betting and spot-fixing in 2013 Indian Premier League matches and the involvement of players. The Committee also emphasised that sports betting need to be regulated and legalised by the Government of India. For more details see Justice Mudgal IPL Probe Committee, A Report on the allegations of Betting and Sport/Match Fixing in the Indian Premier League-Season 6 (2014).

[32] The panel felt that the move would help curb corruption in the game and recommended that except for players and officials, people should be allowed to place bet on registered sites.

The Lodha Committee Report also proposed the introduction of several pertinent provisions for sports betting in India, including:

- Sports betting only to be offered by licensed betting houses with framework regulations to be developed.
- Licenses to be cancelled and penal sanctions to be imposed in case of violations
- Establishment of regulator to oversee issue of licenses as well as monitor betting houses and cricket players
- A strict disclosure regime for cricketers regarding their interests with licensed betting houses. With regard to ensuring the latter, betting by persons involved in the conduct of the game of cricket, such as administrators, players, match officials, team officials, owners, etc., would be prohibited in order to minimize instances of conflict of interest.
- Bringing BCCI under of the purview of *RTI Act.*[33]

Thus, Justice Mudgal Committee Report and Lodha Committee Report have directly given a green channel for legalizing sports betting. In addition, there are various other reasons for the Supreme Court to rule that sports betting are not illegal. The main reason being to bring cricket under the umbrella term "game of skill" rather than a "game of chance". If this is permitted to happen, India will not be free from many of the hidden dangers.

CONCLUSION AND SUGGESTIONS

- It is to be taken into note that Lodha Committee report has distinguished 'sports betting' from 'match fixing'. But it is impossible to obliterate the demarcation which itself is evident from the decision of the additional sessions judge of July 2015, who discharged cricketer Sreesanth and other accused in the IPL spot-fixing case, noting that cricket betting is not illegal and no action can be taken for betting on cricket matches.[34] The court failed to consider that it is through betting that one enter into the lobbying of match fixing and if it is legalised there will be more and more cases of match fixing and in fact the birth of even more criminals who can never be booked under any law.
- Presently, the law in India is the *Public Gambling Act,* 1867 which in no way makes

[33] The other recommendations focused mainly on BCCI administrative structures which are as follows:

- IPL and BCCI to have separate governing bodies
- Three authorities, an ombudsman for internal disputes, an ethics officer, an electoral officer are to be appointed to oversee BCCI activities.
- The Lodha committee stated that politicians and government officials may not hold posts in the BCCI.

[34] See *Board of Control for Cricket in India v. Cricket Association of Bihar & Ors.,* Civil Appeal No. 4235 of 2014.

reference to on-line gambling and has become obsolete in the present scenario and need to be repealed. Sports booking and fixing has much inclination towards the virtual world and even if it is accepted that there is rampant betting going on in the IPL, it is disheartening to note that, it is expressly excluded under Section 12 of *Public Gambling Act* and hence not an offence for which any of the accused can be held liable.[35] This calls for the need of a comprehensive law.

- Under the Constitution of India 'betting and gambling' has been the subject of the State List, hence a direction can be sought from the apex court to the State governments to regulate betting under the powers granted to them as per the state list of the constitution.
- As cricket is considered a game of skill, and if sports betting is legalised, it would help ingenious businesses to openly start offering sports betting facilities by claiming cricket betting as a game of skill.
- It will invite the dangers of money laundering,[36] cyber crimes, corruption and would open huge business opportunity for licensed bookers and global on line betting companies to set up operations in India in one hand and huge source of the revenue for the State in the other hand.
- Lodha Committee Report has recommended legalisation of betting with a regulatory body and licensing guidelines to curb match fixing in the line of the *UK Gambling Act of 2005*. In the European context it is a workable solution but in the Indian context analysing the social and cultural perspective, if betting is legalised then there are more chances of booking, gambling, crime, family breakage, more illegal activities as we have no machinery to properly implement them. The regulatory bodies can never be insulated from the interference of politicians and thereby, from corruption resulting in lack of institutional effectiveness.

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[35] Although, Sreesanth and others were discharged, it is still a ray of hope for every law abiding citizen who aspires for a law and order society when the Delhi police chose to file an appeal against the discharge order. The matter is pending before the Delhi high court and is next listed for hearing on August 11, 2017.

[36] In India, the Prevention of Money Laundering Act, 2002(PMLA) is the law which prevents money launderingactivities. The PMLA was amended by the Prevention of Money Laundering (Amendment) Act 2012, whichbrought about significant changes to the complianceprocedures required under the PMLA. Among otherthings, entities carrying out the activities for playing games for cash or kind including casinos ("GamingEntity") are also required to adhere to the provisions of the PMLA and related rules. However, it lacks stringent provisions to prevent match fixing and illegal betting.

- Although, attempts are being made to make BCCI fall in line to the recommendations of the Lodha Committee Report,[37]the contribution of BCCI, though corrupt, is not to beforgotten, as it is BCCI that has made cricket a unifying force of our country. Rather than having two separate governing bodies for BCCI and IPL it would be more adequate to continue with a new uncorrupt governing body and involve more retired cricketers as the office bearers who can guide the future of cricket in proper destiny. The recommendation that politicians and office bearers may not hold the post and appointment of Ombudsman to oversee its functioning can go a long way in curbing corruption within the institution.

Thus the dangers of legalising sports betting will shatter more and more families giving birth to many innocent children like Manu. In a democratic country like India it is always the public interest that must prevail over parochial governmental interests and in spite of this awareness, if the Supreme Court makes a decision on legalising cricket betting it will be nothing but States enriching at the expense of its individuals and retaining sovereign power without accountability.

[37] Supreme Court has appointed former Comptroller and Auditor General (CAG) Vinod Rai as head of four member committee of Administrators to run Board of Control for Cricket in India (BCCI).

SPORTING WITH DISABILITY IN THE REALM OF ACCESSIBLE INDIA – A FUTURISTIC OUTLOOK

*- Mrs. Sheela J.B**

ABSTRACT

"Disability is a matter of perception. If you can do just one thing well, you are needed by someone." — Martina Navratilova

Sport is a philosophy of life as well as a fundamental right of human beings which is essential for the full development of one's integrated personality. While sport has value in everyone's life, it is even more important in the life of person with disability. Additionally, sport and physical activity has been linked to improvements in self-confidence, social awareness and self-esteem and can contribute to empowerment of people with disabilities. In this paper, the international efforts to eliminate discrimination in sports are discussed in brief. An overview of the Indian sports scenario in the realm of accessible India covering constitutional aspects, national sports policies, sports governance, role of agencies such as Sports Authority of India, Ministry of Youth Affairs and Culture, Sports federations etc. is done. Other aspects relating to persons with disabilities, national policy, recent enactment, importance of adaptive sports and general sports culture, objectives of Accessible India Campaign and Vision 2030 plan etc. are also discussed besides relevant suggestions to overcome setbacks in disabled sports. With the launch of Accessible India Campaign and Vision 2030 plan there is positive future to revive the situation to provide facilities and infrastructure accessible to the persons with disability even in sports.

INTRODUCTION

'A sound mind in a sound body', said Swami Vivekananda. It is hard to get optimum result

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of mind without the collaboration of our body. Sport is a philosophy of life as well as a fundamental right of human beings which is essential for the full development of one's integrated personality. Sport has to be integral to education, health, personality development and also for fostering brotherhood and harmony in society.[1] Some of the research also suggest that being involved in sports may raise the employability level of young people by developing specific 'core' and 'soft' skills. Many think that sport is just a casual time-pass activity or a way to be fit, but in reality, sports is a way to live life with full enthusiasm.

While sport has value in everyone's life, it is even more important in the life of a person with a disability. Additionally, sport and physical activity has been linked to improvements in self-confidence, social awareness and self-esteem and can contribute to empowerment of people with disabilities. Adaptive and Accessible Programs allow the disabled the opportunity to participate in the sports and recreation programs of their choice. The types of disabilities include those with visual impairments, amputations, spinal cord injury, multiple sclerosis, head injury, cerebral palsy, other neuromuscular/orthopedic conditions, autism and related intellectual disabilities.

In a nation that is yet to make its basic infrastructure accessible to persons with disability, being a disabled sports person or even wanting to take up sports can be an experience in battling physical and physiological barriers. Indeed, a handful of sports persons with disabilities have produced tales of struggle, and even triumph. But these are scattered instances, indicative of insensitive and backward policies, which fail to make sports accessible to the disabled population of this country. Now in the wake of Accessible India Campaign and Vision 2030 plan there is still hope to revive the situation to provide infrastructure accessible to the persons with disability even in sports.

MEANING AND SIGNIFICANCE OF SPORTS AND PHYSICAL EDUCATION

In general, 'Sport' is a physical activity carried out under an agreed set of rules, with a recreational purpose: for competition or self-enjoyment or a combination of these.[2] According to the *Council of Europe's European Sports Charter, 1993,* 'Sport' means all forms of physical activity which, through usual or organized participation aim at expressing or improving physical fitness and mental well-being forming social relationships or obtaining results in competition at all levels.[3] 'Physical Education' is defined as 'an education by means of physical activities involving big muscle, body limbs and joint of an individual aimed towards the development of body and mind'. Undoubtedly, the physical education and sports have great

[1] Draft Karnataka Sports Policy, 2015.

[2] Anujaya Krishna, Sports Law, (New Delhi: Universal Law Publications, 2014) p. 4.

[3] MukulMudgal, Law & Sports in India, (Gurgaon: LexisNexis Butterworths Wadhwa Nagpur, 2011), p.5.

impact on the physical as well as mental development of children, hence it is adopted in our education system forming part of curriculum but many consider it least importance when compared to other subjects in the curriculum. In spite of being ignored by majority of people in society, sports have noteworthy influence on most of them, directly or indirectly. Today, sports are of great importance and relevance in practical life of younger generation. It is a process to foster an urge to be self-reliant, well disciplined, well behaved and well-adjusted in fast changing or challenging and highly competitive environment. Moreover, research has shown that there is a positive correlation between brain development and exercise.

PERSONS WITH DISABILITY

A disabled person shall mean a person who is physically challenged, incapacitated, impaired, handicapped person. According to the *Declaration on the Rights of Disabled Person, 1975,* a disabled person is unable to ensure by him or herself, wholly or partly, the necessities of a normal individual and social life. According to the *Census of India,* 2011[4] disabled persons accounted for 2.21% of India's population. Of these, 20.3% have a movement-related disability, 18.9% are those with hearing disabilities and 18.8% with vision-related disabilities. Recently, the *Right of Persons with Disability Act,*2016[RPWD Act, 2016] has been enacted basically to overcome various setbacks of the *Persons with Disabilities (Equal-Opportunities, Protection of Full Participation) Act,* 1995 and to give effect to the United Nations Convention on the Rights of Persons with Disabilities, 2006 and related matters.

The *RPWD Act,* 2016 Act provides definitions for various terms, provides expanded definition of 'Disability' (from 7 types to 19 types such as autism spectrum disorder, low vision, blindness, cerebral palsy, deafness, hemophilia, hearing impairment, leprosy cured person, intellectual disability, mental illness, locomotor disability, muscular dystrophy, multiple sclerosis, specific learning disabilities, speech and language disability, sickle cell disease, thalassemia, chronic neurological conditions and multiple disability– also confers power on the central government to notify and other condition as disability), reiterates the rights of persons with disability such as right to equality, personal liberty and to live in community to them, provides for benchmark disability of at least 40% to be eligible for entitlements and include reservation in education and employment and so on.

INTERNATIONAL EFFORTS TO ELIMINATE DISCRIMINATION IN SPORTS

Sports law or *lexsportiva* is the one of the law that is developing and is likely to come into its own with the increasing significance of the sports industry as well as rising number of cases related to the field. Some of the global efforts to eliminate discrimination in sports are given hereunder. *United Nations* has framed conventions related to physical education, sports, countering doping and discrimination in sports. Several international treaties address the issue

[4] Census of India 2011, Ministry of Home Affairs, Government of India.

of discrimination in sports. The fundamental principles of Olympics in the *Olympic Charter,* state that 'sport is a human right' and it prohibits discrimination of any kind. The *International Covenant on Economic, Social and Cultural Rights (ICESCR)* confirms the right of everyoneto receive an education and the right of everyone to take part in cultural life.[5] Sports are specifically mentioned in two provisions of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).*

The UNESCO *International Charter of Physical Education and Sport* states a general prohibition against discrimination by recalling the *Universal Declaration of Human Rights* in its preface. Article 1 of the Charter specifically mentions every human being's fundamental right of access to physical education and sport. *European Sport for All Charter* prohibits discrimination in access to sports facilities or sports activities on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, and birth or *other status.* In United Kingdom (UK), *Sport England* is focused on helping people and communities across the country create a sporting habit for life. South Africa has its own *National Sport and Recreation Act,* 1998. Australia has a number of Acts in place regarding sports.

INDIAN SPORTS SCENARIO IN THE REALM OF ACCESSIBLE INDIA CAMPAIGN & VISION 2030

India has a long way to go as it does not have a comprehensive law to deal with sports issues. To begin with the Constitution of India ensures equality, freedom, justice and dignity of all individuals and implicitly mandates under various provisions such as Articles 14, 15, 21, 41, 51A an inclusive society for all including persons with disabilities. Although there is no distinction between disabled and physical person but in fact, in India disabled persons are never treated at par with the physically fit person. Such constitutional guarantee is still a dream. At present sports is dealt with Schedule VII Entry 33 of List II (State List) of the Constitution of India. In 1988, 61st Constitution Amendment Bill proposed to transfer 'sports' from state list of concurrent list in which the central government could also share equal responsibility but it was withdrawn for want of support from state governments.

Sports Policies in India: The efforts to improve sports in India can be related to the changes introduced in the policy domain which includes: National Sport Policy, 1984, *National Sports Policy,* 2001, a comprehensive National Policy 2007 and a *Draft National Sports Development Bill* 2011 and a *Sports Development Code,* 2011. The 2011 Bill sought to introduce

[5] Anujaya Krishna, Sports Law – The International Scenario and the Indian Perspective, (New Delhi: Universal Law Publishing, 2014) p. 10-11.

[6] Article 13 and 15 of International Covenant on Economic, Social and Cultural Rights (ICESCR).

transparency in sports administration in India and to make it open to public scrutiny. The 2011 Bill aims at transforming India into a leading edge sporting nation, within next decade, by combining sports development with other development as a whole. It also looks at some of the key lessons to be learnt from other performing sporting nation such as Australia, China, Cuba, Germany and USA.[7] The existing sports policy also proposes major constitutional and institutional reforms to achieve the national objective.

Sports Governance in India: The existing model of governance of sports in India has two wings. One in which government bodies are controlled by the Ministry of Youth Affairs and Sports (MYSA).[8] This wing has institutions like the Sports Authority of India (SAI), and other institutions working towards promoting sports training under SAI. The other wing has the Indian Olympics Association (IOA). Under IOA comes the State Olympic Associations (SOAs) and the National and State Sports Federations (NSFs and SSFs). However, the MYSA provides financial and infrastructural support to the National and State Sports Federations and indirectly control these federations through political representations. In addition, there are sports councils and development authorities both central (e.g All India Council of Sports) and state levels. In addition, there are regulations that govern different sports like All India Tennis Association (AITA) Rules, the constitution of the Indian Olympic Association (IOA) etc.

Ministry of Youth Affairs and Sports: The Ministry of Youth Affairs and Sports was set up in 1982 as the Department of Sports and became an independent Ministry in 2000. The Ministry aims at maintain and improving India's position in the world ranking of sporting events, supporting federation policies to increase participation in competitive sports, creating the infrastructure and promoting capacity building for achieving excellence in various competitive events at the national and international levels.

National Sports Federation: The National Sports Federations are responsible for organizing, developing, and coordinating high-level sports; identify players to represent India also supervises and coaches them; they are entrusted with the responsibility of resource allocation etc. Apart from their general responsibilities these federations are required to play an important role in the quantitative improvement of sports activities, particularly for people with disabilities, school children, women etc, as well as in the development and fitness of every individual.

Indian Olympic Association (IOA): IOA both national and state levels are dedicated in

[7] Gurdeep Singh, "India's Quest for Olympic Gold", University News, 54(3) August 08-14, 2016.

[8] D. Dhanuraj and Rahul V. Kumar, "For a Free and Fair Sporting Sector in India", Centre for Public Policy Research, January 27, 2015.

playing a responsible role by preparing the athletes and their participants in the Olympic Games, Paralympic Games as well as in events like Commonwealth and Asian Games.

Scheme of Sports and Games for the Disabled[9]**:** The 'Scheme of Sports and Games for the Disabled' is a Central Sector Scheme being introduced by the Ministry of Youth Affairs and Sports in 2009-10 during the XI Plan Period. The objective of the Scheme is broad-basing participative sports among the disabled. Competitive sport among the high performing disabled sports persons, their participation in national and international competitions, training and equipment and other support including training the trainers, is funded separately, by assisting the Paralympic Committee of India (PCI), Special Olympics Bharat (SOB) and the All India Sports Council for the Deaf (AISCD), under the Scheme of Assistance to National Sports Federations. Special Olympics Bharat, designated as the Nodal Agency for conduct of training of community coaches and sports competitions at district, state and national level, is being given grants for conduct of training programmes for training of community coaches and conduct of sports competitions for differently-abled children at district, state and national levels. Budgetary allocation of Rs. 4 crore has been made for the Scheme of Sports and games for Persons with Disabilities during 2016-17.

Category: Para-Sports				
S. No.	*Name of the Event*	*Amount of Award Money (In Rupees)*		
		Gold Medal	*Silver Medal*	*Bronze Medal*
1	Paralympic Games (Summer & Winter)	57 lakh	50 lakh	30 lakh
2	Para Asian Games	30 lakh	20 lakh	10 lakh
3	Common Wealth Games (Para Athletes)	30 lakh	20 lakh	10 lakh
4	IPC World Cup/Championship (Held Bi-annually)	20 lakh	14 lakh	8 lakh
5	IPC World Cup / Championship (Held Annually)	10 lakh	7 lakh	4 lakh
Category: Blind Sports				
1	IBSA World Championship	10 lakh	7 lakh	4 lakh
Category: Deaf-Sports				
1	Special Olympics (Summer & Winter)	5 lakh	3 lakh	1 lakh

[9] http://csridentity.com/governmentschemes/sports.asp.

Scheme of Special Awards to Winners in International sports events and their coaches[10]: This was introduced in the year 1986 to encourage and motivate outstanding sports persons for higher achievements and to attract the younger generation to take up sports as a career. The Ministry has revised the Scheme in September 2015, in which amount of cash award to medal winning sports persons has been substantially enhanced and the discriminatory clause of the scheme under which medal winners in closed events like Para-Olympics, Special Olympics Championships for handicapped, deaf, dumb, blind etc was done away with and these events were included in the revised scheme and it is given hereunder:

National Policy for Persons with Disabilities 2006: It is noteworthy that the *National Policy for Persons with Disabilities 2006* recognizes that Persons with Disabilities are valuable human resource for the country and seeks to create an environment that provide them equal opportunities, protection of their rights and full participation in society. The National policy focuses on *Sports, Recreation and Cultural Life along with other aspects like barrier free environment, children with disability etc.*

Accessible India Campaign and Vision 2030: After Digital India, Clean India and Skill India, the government has launched the Accessible India Campaign which will focus on making India a disabled-friendly country.[11] It is the vision of the Government to have an inclusive society in which equal opportunities and access is provided for the growth and development of Persons with Disability (PWDs) to lead a productive, safe and dignified lives thereby giving meaningful impetus to the obligations bestowed under the *United Nations Convention on the Rights of Pesons with Disabilities* (UNCRPD), to which India is a signatory. Through joint venture the Department of Empowerment of Persons with Disabilities and Ministry of Social Justice and Empowerment conceptualized the 'Accessible India Campaign (Sugamya Bharat Abhiyan)' is a nation-wide flagship campaign for achieving universal accessibility that will enable persons with disabilities to gain access for equal opportunity and live independently and participate fully in all aspects of life in an inclusive society. At the first instance, Accessible India Campaign programmes are launched in seven cities including Delhi, Tamil Nadu, Gujarat, Assam, Rajasthan, Maharashtra and Haryana. In addition to this, Vision 2030 is a plan document prepared by National Institution for Transforming India (NITI) Aayog, keeping in view of social and economic needs of the country and SDG (Sustainable Development Goals).[12] The vision document lays down road map of programme and the path country needs to follow from fiscal 2017-18 till 2030. The overreaching principle of vision 2030 is long term development blueprints of the country with motto of 'leave no one behind'. Disability seeks a special focus in 2030 as it is not just a subject for the Ministry of Social Justice and Empowerment but an issue that cuts across several Ministries, say nearly 26 Ministries. A

[10] http://www.yas.gov.in/sites/default/files/achievements-sports2016.PDF.

[11] http://www.thebetterindia.com/31834/government-initiatives-for-the-accessible-india-campaign.

[12] Deccan Chronicle, May 2017.

multi-pronged strategy will be adopted for the campaign with key components as leadership endorsement of the campaign, mass awareness, capacity building through workshops, interventions (legal framework, technology solutions, resource generation etc.), and leverage corporate sector efforts in a Public-Private Partnership. Thus the above initiatives by the Government of India aims at making the country more inclusive by way of achieving universal accessibility for all citizens including Persons with Disabilities and enable them to gain access to live independently. Further, the above mission programmes for persons with disability should also consider sports within their purview of inclusive society and their well-being.

SPORTING WITH DISABILITY AND ADAPTIVE SPORTS

A disabled person not only suffers from the agony of being physically or mental or sensorial handicapped, but also suffers from the agony of being socially handicapped. Such persons also face adjustment problems of different nature. While sport has value in everyone's life, it is even more important in the life of a person with a disability. This is because of the rehabilitative influence sport can have not only on the physical body but also on rehabilitating people with a disability into society. Furthermore, sport teaches independence. Nowadays, people with a disability participate in high performance as well as in competitive and recreational sport. Over the past three decades, numerous studies have revealed that physical activity and sport participation result in improved functional status and quality of life among people with selected disabilities. From the late 1980s, organizations began to include athletes with disabilities in sporting events such as the Special Olympics and Disability Commonwealth Games (Para-Sports, Athletics, Lawn Bowls, Swimming, Table Tennis and Weightlifting were introduced for the first time in 2002 in an inclusive Sports Program in Manchester).

Rio 2016 – Paralympics experience: The Paralympic Games[13] is a multi-sport event for athletes with physical, mental and sensorial disabilities. This includes mobility disabilities, amputees, visual disabilities and those with cerebral palsy. The Paralympic Games are held every four years, following the Olympic Games, and are governed by the International Paralympic Committee. The largest ever contingent in the country's Paralympics history, the disabled champions have brought heartthrob in the Indian masses with their success stories in the Paralympics 2016 held at Rio. Mariappan Thangavelu, created history by winning a gold medal in the men's high jump T-42 event, with a leap of 1.89 metres. Varun Singh Bhati, clinched bronze in the men's high jump T-42 event, with a leap of 1.86 metres. Deepa Malik won second place in the women's shotput F53 event with a personal best throw of 4.61m. With this herculean effort, she became India's first woman and the oldest athlete ever to win a medal at the Paralympics. Then DevendraJhajhariya, India's sole gold medalist at the Paralympics prior to 2016 won the javelin gold medal by breaking his own Paralympics record after 12years. *"If you have the willpower then nothing is impossible in this world. I won my first*

[13] https://www.disabled-world.com/sports/.

paralympics medal in 2004, and now, after 12 years, it is just the dedication and hard work which paid off," says Devendra Jhajhariya.

Adaptive Sports: Adaptive sports or disability sports or parasports are competitive or recreational sports for people with disabilities i.e., activity or sport which anyone can do or play, regardless of their level of disability, including physical and intellectual disabilities. Adaptive sports often run parallel to typical sport activities. However, they allow modifications necessary for people with disabilities to participate and many sports use a classification system that puts athletes with physical challenges on an even playing field with each other. The number of people with disabilities involved in sport and physical recreation is steadily increasing around the world with organized sports for athletes with disabilities divided into three main disability groups, sports for the deaf, sports for persons with physical disabilities, and sports for persons with intellectual disabilities. As many disabled sports are based on existing able bodied sports, modified to meet the needs of persons with a disability, they are sometimes referred to as adapted sports. In general, there are two types of adaptive sports: a) Sports adapted to meet the needs of people with disabilities. For example: Wheelchair basketball, Wheelchair tennis, Wheelchair volleyball, Wheelchair cricket etc using similar rules, with a few differences and b) Sports created especially to be played by people with disabilities such as cycling, shooting, swimming, judo, table tennis, power lifting, archery etc. Studies show that adaptive sports provide numerous benefits[14] including: less stress, more independence, higher achievement in education and employment, reduced dependency on pain and depression medication, fewer secondary medical conditions (i.e., diabetes, hypertension).

DISABILITY SPORTS PATHWAY IN INDIA (NURTURING SPORTS CULTURE AMONG CHILDREN AND CHILDREN WITH DISABILITY IN PARTICULAR)

Sport can play a key role in the lives and communities of people with disabilities, the same as it can for people without a disability. There is a wealth of evidence to support participation in sport and physical activity for people with a disability concerning trends, barriers and benefits of participatio.[15] Over the past three decades, numerous studies have revealed that physical activity and sport participation result in improved functional status and quality of life among people with selected disabilities. As discussed above sport and physical activity has been linked to improvements in self-confidence, social awareness, self-esteem, promoting leadership, teaching teamwork and encouraging inclusion and companionship thatcan contribute to empowerment of people with disabilities. These values are hard to learn through textbooks, but can be taught practically and enjoyably through sports.

[14] www.va.gov/adaptivesports.

[15] http://www.sportanddev.org/en/learn-more/disability/sport-and-adapted-physical-activity-apa/role-sport-and-apa/role-sport-and-apa-people-disabilities.

Various countries in the world too are emphasizing on selected games in their physical education curriculum. Brazil offers martial arts classes, wrestling in the United States and so on. The physical education curriculum is planned to allow students to expertise in at least a minimum categories of activities: aquatics, conditioning activities, gymnastics, individual/dual sports, team sports, rhythms, and dance.[16] So keeping in mind the whole scenario of the world we have to say that lot of changes is needed in our education system. It should be constructed in such a way that to meet the latest demand of children in general and children with disability in particular. Parents, teacher, society and government should start a campaign to make sports a habit of every child only then it will be possible for us to put majority of youth in right direction to be a good citizen of our nation. The governments' Accessible India Campaign and Vision 2030 plan document have great expectation in bringing revolution among disabled persons for their overall development and growth in which sports too takes a special mention.

SUGGESTIONS AND CONCLUSION

At present, the sports system in India needs a revitalization to realize the objective of becoming a developed sporting nation. With the introduction of the Draft *National Sports Development Bill,* 2011 sports law in India, although a distant dream is set to become a reality. Now in the wake of Accessible India Campaign and Vision 2030 plan there is positive hope to revive the situation to provide facilities and infrastructure accessible to the persons with disability even in sports. In India, the sports in general, there exists: the lack of sports culture in the country, the non-integration of sports with the formal education system, the lack of co-ordination between all stakeholders, the inadequacy of sports infrastructure, the inadequate participation of women, transsexuals, disabled and other deprived classes in sports, and the lack of effective sports system for talent identification, training and fair selection of team and so on. Following are some of the suggestions concerning inclusive sports in India:

- *Human Resource and Sports Culture:* First and foremost, the sports in general and sports for persons with disability in particular, India has to inculcate sportsculture among general masses keeping in mind the overall benefits of sports and its contribution for enhancing the value of human resource (self reliance, self-esteem, spirit of brotherhood, improving education and employability, stress management, independence and so on).
- *Adaptive Sports:* All across the country, people with disabilities are now able to participate in a variety of sports like their able-bodied counterparts throughadaptive sports. Their abilities are accommodated through specialized equipment that is adapted to their specific disability. In this regard, great impetus to be provided to persons with disability to actively participates and benefit from adaptive means in sports and recreation.

[16] Kuldeep Singh, "Role of physical education and sports in Indian prospective: an overview", International Journal of Physical Education and Sports and Health, (2016), p. 281.

- *Increasing the scope and role of Sports Authority of India, Ministry of Youth Affairs and Sports, Sports Federations, Clubs, Associations and other agencies* in promoting, funding, regulating, implementing schemes or programmes for achieving excellence, providing sufficient scope for the participation of persons with disabilities and make provision for availability of adequate technological developments in upgrading cost effective infrastructural facilities.
- *Co-ordination and co-operation among general stakeholders:* General stakeholders such as parents, teachers, society, media and government should render co-ordination and co -operation to make sports a habit of every child thereby put majority of youth in right direction to be a good citizen of our nation as well as contribute for their personality development.
- *Stakeholders of school:* It is important that the various stakeholders of schools, including management, teachers, parents, students and the education ministry recognize the role that sport and physical education can play in the development of children, and prepare a road map to introduce structured programmes in schools across India.
- *Also reputed business houses and public-private partnership* deserve to be given incentives to invest the process of promoting sports, especially at *grass root level* – schools, colleges and universities along with strict monitoring and regulatory system.
- *Integration of sports with formal education:* Although inclusive sports policies have been adopted in the Indian education system, such policies can become more meaningful if sport is effectively integrated with formal education.
- The *international and national efforts* to eliminate discrimination in sports as far as practicable should be adopted in case of persons with disability also.
- *Customized sports:* Disabled sport and recreational activities, includes indoor and outdoor recreation, weather specific sports, team and individual activities, activities for children, adults and families, activities that fit in with the needs of people with physical, intellectual and/or emotional disabilities and those for competitive and leisure use. Hence, the ambit of such sports be widened and customized according to the various needs and make sports whatever manner, be available to all.
- *Sensitizing public with Accessible India campaign and Vision 2030:* Recent welcome initiatives such National Sports Development Bill, 2011, Accessible India Campaign and Vision 2030 – 'leave no one behind' focuses on making India a disabled-friendly country brings hope among the disabled persons thereby promoting their self-confidence, self-esteem et al.
- *National Policy and Comprehensive Sports Law:* Besides, the objective of sports for all and excellence in sports and to constitute sports authorities at the national, state, district and local bodies level for obtaining participation of the citizen in sports i.e. a fresh perspective, an independent authority, effective national policy and a comprehensive law with smooth interface between various agencies of sports is the need of the hour.

Disability is just a matter of perception, but in a country like India, such persons are stigmatized by the family as well as society resulting in failure to discover their possible abilities in them. For various ailments and treatment, activities in the name of physiotherapy, occupational therapy, sensorial integration, lifestyle modification etc are recommended globally. In this regard, the most suitable method shall be sports especially, customized sports and recreational activities. With the launch of 'Accessible India Campaign' and 'Vision 2030', along with the success stories of Rio Paralympic 2016 there seems to be an optimistic future to the overall well being of persons with disability. While sport has value in everyone's life, it is even more important in the life of a person with a disability hence, to conclude sports should be the way of everyone's life.

LODHA RECOMMENDATIONS: CAN IT FORMULATE INDIAN CRICKET?

*- Mr. Manas Daga and Ms. Anisha Agarwal**

INTRODUCTION

The Indian economy is one of the fastest growing economies in the world attributing to the young demographics of the country. India is considered to be one of the most preferred nations to host global sporting events like Commonwealth, Asian Games and World cups of Hockey and Cricket. Even though the national sport of the country is hockey, our nation's heart revolves around cricket. Cricket is not considered to be just a sport but a religion. High profile cricket matches like the IPL or T20 invite not only a lot attention at a global level but also contributes immensely to the economy and pride of the host nation. It is an unquestionable fact that our cricketers have been performing luminously in both home country and in foreign countries too. One of the reasons of the same is massive amount of private and public investments which flows in the associations regulating the sport. Recently, there have been debates raging in favor and against the functioning of the Board of Control for Cricket in India (hereinafter referred as 'BCCI') due to the Indian Premiere League (hereinafter referred as IPL) scam which dented the national pride relating to sporting performance severely.

BACKGROUND

In an unprecedented move from the Supreme Court, the SC intervened into the functioning of the BCCI. The inception of this move can be traced to the dire need of sports law in our country which time and again has been highlighted in various cases.[1] It would be pertinent to

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[1] KrishanLal Gera v. State of Haryana and Ors., (2011) 10 SCC 529, Union of India v. Abhimanyu Tiwari, (2016) SCC Online SC 395, Balram Sharma v. Union of India (2010) 15 SCC 393.

mention the recent example of the IPL betting scam which shook the foundation of belief in the sanctity of the sport. In the above mentioned case,[2] three cricketers, Sreesanth, Ajit Chandila and Ankeet Chavan, who represented Rajasthan Royal in 2013 Indian Premier League, were arrested by the Delhi Police on the charges of spot-fixing.

From further investigation it was discovered that Vindu Dara Singh, BCCI President N. Sreenivasan's son in law Gurunath Meiyappanwere involved and arrested by the Mumbai Crime Branch.[3] To ensure fairness during investigation, Supreme Court suggested N. Srinivasan to step down from his position on his own as BCCI president else it would pass verdict asking him to step down.[4]

To investigate the allegations of betting and spot fixing in the Indian Premier League (IPL), Supreme Court appointed a three member Committee, which was headed by Justice MukulMudgal.[5] The other two members were Additional Solicitor General of India L. Nageshwara Rao and former cricket umpire Nilay Dutta.

RECOMMENDATIONS OF MUDGAL COMMITTEE

The Mudgal Committee recommended certain noteworthy changes, chief among them was to legalize sports betting in order to reduce the element of black money. They also recommendedthat the players should be instructed in the local language about the ills of spot fixing and the esteemed players such as Sachin Tendulkar and Anil Kumble should guide the younger players regarding the same.[6]

The Committee threw some light on lacunas in the working of existing investigating agencies. The Committee was of the opinion that current agencies lack in intelligence tools to detect a sporting fraud. BCCI's investing wing must be properly defined in order to prevent those holding any position in BCCI to curtail or restrict any investigation of the wing. A proper system should be developed by the BCCI for registering player agents who are well aware of the rules and regulation of the Board. The criteria for qualifying to be an agent would be an examination which would test their knowledge and understanding of the rules and regulations.

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[2] *BCCI v. Cricket Association of Bihar &Anr.*, (2015) 3 SCC 251.

[3] *GurunathMeiyappan arrested in Mumbai,* available athttp://www.espncricinfo.com/indian premier-league 2013/content/story/637612.html, last seen on 20/12/2016.

[4] *IPL Sport-fixing, Srinivasan should step down:* SC, available athttp://lex warrier.in/2014/11/ipl-sport-fixing-srinivasan-step-sc/, last seen28/11/2014.

[5] ChanderShekharLuthra, *Bihar cricket association to oppose Nilay Dutta's name,* DNA India, http://www.dnaindia.com/sport/report-bihar-cricket-association-to-oppose-nilay dutta-s-name-1900288, last seen8/10/2016.

[6] Justice Mudgal IPL Probe Committee, Supreme Court, A Report on allegationsof Betting and Spot/Match Fixing inthe IndianPremier League (2014).

There would also be a background check regarding possible links of the agents with the underworld and bookies to preserve the sanctity of this game. Also, these agents should not be allowed to travel and stay with the players.[7]

IPL has succeeded in its attempt to bring forward new emerging talents from small towns and by providing them a platform to compete with foreign players. Thus, it would be for the best interest of the league to keep an absolutely separate commercial entity with its own representatives from the Board. The players who are either in playing eleven or in extras would not be allowed to own or have an interest in any stake in player agencies or companies involved with the game unless such interests are in nature of sponsorship. Such interest must be declared within 15 days prior of accruing on such interest.[8]

TRANSFORMATION FROM MUDGAL COMMITTEE TO LODHA COMMITTEE

The Mudgal Committee came to the conclusion that IPL Chief Operating Owner (COO) Sundar Raman, Chennai Super Kings' owner Meiyappan and Rajasthan Royals' owner Raj Kundra are guilty of betting and that BCCI Chief Srinivasan did not act upon the accused despite knowing their violations. The Supreme Court had agreed with the Mudgal Committee report, however, it did not accept all the recommendations. The Court felt the need for more stringent regulations to be introduced and that paved the path for another Committee under the supervision of CJI, Justice R.M. Lodha.

The new formed Committee decided to focus on three major tasks[9] which were providing for punishment for those who have been found guilty by the MudgalCommittee, scrutinizing the role of COO Sundar Raman in the IPL spot fixing scam in addition to making the functioning of BCCI more transparent to avoid further stings. The Committee imposes a life ban on Meiyappan and Kundra and suspended the IPL franchises, Chennai Super Kings and Rajasthan Royals fortwo years.[10] However, the players of the teams were given the liberty to be auctioned for other franchises.

The Lodha Committee had further decided that it had to understand the functioning of the BCCI in order to make it a transparent body. To achieve this task, the Committee framedvarious question naireson the exhaustive set of to picssuch as role of BCCI's stakeholders to the Board's election processes, the basis and formation of its various

[7] *Ibid.*

[8] *Ibid.*

[9] BCCI *v. Lodha Committee: A Timeline of Events, Cricket Country,* available at http://www.cricketcountry.com/news/bcci-vs-lodha-Committee-a-timeline-of-events 532110last seen 06/12/2016.

[10] SumitChakraborty, *"BCCI v Lodha Panel:* All you need to know about the case",*Financial Express*, available at http://www.financialexpress.com/sports/bcci-vs-lodha-panel-all-you need-to-know-about-the-case-supreme-court-cricket/408002/, last seen 06/12/2016.

Committee, player welfare, conflict of interest and transparency in the IPL's functioning.[11] As a follow up to the sent questionnaires, on 4th January 2015, Lodha Committee shook the foundation of BCCI by its revolutionary reforms to change the power structure and functioning of BCCI. Throughout the working of Lodha Committee, it had tremendous support from the Supreme Court. The court had given the BCCI an ultimatum to adhere to the Lodha panel's recommendations for the overhaul of Indian cricket.[12]

LODHA COMMITTEE RECOMMENDATIONS

The report given by the Lodha Committee was divided into two major parts. The first part of the report states its objective which has already been mentioned. The second part of the report which titled as "Getting off the mark", critically analyses the gaps in the functioning of BCCI and statevolumes about corruption, lack of transparency, conflict of interest and such other difficulties.

The Lodha Committee came up with following recommendations:[13]

a) BCCI office bearer can work for not more than two continuous terms: This recommendation is accompanied by fixing the retirement age at 70, in order to avoid the management of the sport by elderly who could barely speak, which indeed is the current trend. Also those administrators who are declared as insolvent, or of unsound mind or charged with criminal charges, or who hold any office or post in a sports or athletic association or federation apart from cricket are to be eliminated.
b) President of the BCCI cannot hold his post for more than two years.
c) Proposition of one vote per state and no proxy voting: This recommendation would take away the monopoly of the suppressing states like Maharashtra, which currently exercises multiple votes owing to multiple associations.
d) Separate governing body for IPL with certain level of sovereignty to be made available to IPL as a governing body. The Committee has also suggested to form a players association and has called for a "steering Committee". The intention behind the same is to enforce grass root level change in the structure of BCCI.
e) Legalizations of betting: The panel has proposed to legalize betting. It has also recommended that BCCI Officials shall disclose their assets to the Boards, so that they could be certain about the non-involvement of BCCI officials in betting.

[11] A Timeline of the BCCI and Lodha Committee reforms case,available at http://www.espncricinfo.com/ india/content/story/1030889.html, last seen on 15/12/2016.

[12] *BCCI v Lodha Committee,* First Post (02/01/2017), available at http://www.firstpost.com/sports/bcci-vs-lodha-Committee-all-you-need-to-know-before-the-supreme-court hearing-today-3036764.html, last seen 16/12/2016.

[13] Supreme Court, Report of Supreme Court Committee on Reforms in Cricket [Volume 1], available athttp://www.sportstarlive.com/multimedia/archive/02682/lodha_ full_268295 4a.pdf,last seen on 12/01/2017.

CRITICAL ANALYSIS OF THE RECOMMENDATIONS

The Board was never excited with the implementation of these reforms as it would affect the working of the Board to a great extent. Though the Board had accepted and promised to take up the reforms, they failed miserably in keeping their promise and implementing the reforms.[14] The Hon'ble Supreme Court is forcing the Board to implement these recommendations. In a complete resistance to what Supreme Court has stated, BCCI has rejected several recommendation of the panel, as in the opinion of the Board such recommendations doesn't deem fit and they are subject to criticism.

The Committee had recommended a one state-one votesystem which cannot be properly implemented in India. The reason can be because of instances where some politically stronger states would dominate over the weaker states which would also encourage corruption. Reliance can be placed on one country-one vote system which was adopted by FIFA that led to 2015 FIFA corruption scam. This was the scam in which countries having very little or no football activities were accused of taking bribe from FIFA officials and countries which has more football activity, to vote in a specified pattern.[15] In this way, votes of politically weak states can be tampered by stronger states which will result into an undesirable situation.[16] In context of India, the votes for political weak states such as north eastern states can be tampered by Gujarat, Maharashtra, etc. which are politically strong. Therefore, one state-one vote cannot be implemented in a country like India.

The most important recommendation proposed by the Committee was to legalize betting in India. Legalizing betting might fetch a lot of revenues to the government and will pull up the GDP of our nation but it will also significantly increase match fixing in the game of cricket. Even if the government has not legalized betting, it is still prevalent in the nation. As per the recent survey,[17] betting money involved in IPL-7 and IPL-8 were around 7,000 crores and 12,000 crores respectively. Illegalization of betting has led to flow of black money in the economy.

Furthermore, it was also suggested by the Committee that Comptroller and Auditor General (CAG) should be included as a nominee in the managing Committee of the society.

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[14] *Ibid.*

[15] Vijay Lokapalli, "Lodha report addresses key areas that need reform",*The Hindu,* available at http://www.thehindu.com/sport/cricket/lodha-report-addresses-key-areas-that-need reform/article8065450.ece., last seen on 18/12/2016.

[16] *BCCI to file review petition against verdict of Supreme Court,* available at http://www.espncricinfo.com/india/content/story/1044013.html, last seen on 20/12/2016.

[17] *IPL Betting Dossier with One India: Bookies put in Rs. 7000 crores last year,* One India (23/01/2015), available at http://www.oneindia.com/feature/oneindia-exclusive-ipl betting-dossier-bookies-put-in-rs-7000-crore-in-2014 1630631.html, last seen on 20/11/2016.

This is contrary to the constitution of BCCI as it does not permit a non-member to be involved in the managing Committee meeting of the society.[18] Also, according to rules framed by the ICC that if the governmental representatives are included as full time member of the Board, then ICC holds the power of derecognizing such domestic cricket Board of a country and at a global level, ICC will treat CAG representation as a governmental interference.

The Committee also strongly recommendedrestricting the number of advertisement shown on a television during a cricket match live telecast, as it is of the opinion that BCCI is unnecessarily showing large number of advertisement and should curb down its frequency. It was clearly stated that advertisement should be telecasted to the extent of drinks and break session and unnecessary advertisement after every over and fall of wicket should be avoided. However, if the frequency is reduced then it would affect the income of Board which would lead to heavy losses. The BCCI being a self-funded organization does not depend on government for any source of revenue and such an act would hamper its earnings. The Board needs to run training programs and search for talented players in small towns and villages which requires huge amount of funds and advertisements are its major chunk of revenue.[19] Therefore, this recommendation of the Committee will restrict the funding of the Board and it would be difficult for the Board to perform its function.

The Board did not welcome the proposals of the Committee regarding the capping of the age limit to 70 years for the officers of Board. As per the Board, an office bearer is elected through a democratic format and therefore proposal is subjected to the criticism.[20] If a member has attained the age of 70 years that doesn't mean he has become inefficient to perform the given task. If this recommendation is implemented then a very few people who have a good experience will be left in the Board which will further hamper the working of the Board.

Many news agency, NGOs and social groups have demanded to include BCCI under the purview of RTI but the Board always had the ways to deal with it. The same was also recommended by the Lodha Committee in order to make BCCI publicly accountable and also to build public trust in the working of Board. However, the BCCI was of opinion that mere

[18] Express Web Desk, BCCI *v. Lodha Committe: Everything you need to know,* Indian Express (21/10/2016), available at http://indianexpress.com/article/sports/cricket/lodha-committe panel-everything-you-need-to-know-3094827/, last seen on 21/12/2016.

[19] BCCI *refuses to Implement Lodha Committee recommendation,* News world India (06/10/2016), available at http://newsworldindia.in/sports/cricket/bcci-files-reply-in-sc-on lodha-committee-recommendations/230693/,Last seen on 14/12/2016.

[20] "Supreme Court to BCCI: Set Lodha panel's reform rolling or court will do so tomorrow", *India Today* (06/10/2016), available at http://indiatoday.intoday.in/story/lodha-vs-bcci suprme-court-hearing-status-report-anurag-thakur/1/781357.html, last seen on 20/11/2016.

performing public function would not be a sufficient cause to make RTI applicable on it.[21] The Board stated that it is a society registered in Tamil Naduand did not receive any funding from the government.

CONCLUSION

Cricket is no longer a gentleman's game which it used to be. Even though the IPL might have given fame, success and money to many upcoming players but it has also opened a window for gambling, spot fixing and underworld activities in the country. To overcome such problems, Indian judiciary has made several attempts to develop sports law in the nation and one of such attempts was the appointment of Lodha Committee.

Lodha Committee has come up with tremendous recommendations which will not only put checks and balances on the working of Board but will also change its performance. Still, the legality of some recommendations can be challenged and their reconsideration is required to introduce better laws in the nation.

The Board needs to stop opposing to the recommendations and should adopt them with some necessary modifications for the betterment of cricket in India. The disputes between Lodha Committee and BCCI must be addressed by the Hon'ble Supreme Court with broad minded approach. The Supreme Court shall finally decide the fate of BCCI keeping in mind the consequences on the Board and the game itself.

SUGGESTIONS

As in the recent past; the malpractices and misconducts of BCCI has come up to the surface. Judiciary, took the initiative to curb down the monopolistic approach of the Board, which has been discussed in detail in the aforementioned part. Apart from the recommendations proposed by the Lodha Committee, the following suggestions which are in line with Lodha Committee's recommendation could help in improvising BCCI's working:

- Betting should be legalized but a threshold limit for a person must be set in order to limit the amount of betting.[22] It can be done by registered individuals through their authorized online accounts for which proper rules should be drafted. Betting shall be legalizedexcept

[21] N R Mohanty, "After year of resistance, will Lodha Panel report finally force BCCI to come under RTI Act", *First Post,* available at http://www.firstpost.com/sports/after-years-of resistance-will-lodha-panel-report-finally-force-bcci-to-come- under-rti-act 2575444. html, last seen on 20/11/2016.

[22] *Lodha Committee: Recommendation and Analysis,* available at http://iasscore.in/special details-30.html, last seen on 20/11/2016.

for players, BCCI officials or administrators covered under BCCI and IPL regulations.[23]

- The nomination of CAG as managing Committee member of the society can be made without affecting any international obligations, if no voting rights are assigned to CAG. By this way, CAG can become a member of the Board to ensure that proper books of accounts are being maintained and also India will not violate any international agreement.
- The advertisements during a live telecast of cricket match shall be allowed after every five overs, fall of wicket, drinks or lunch, instead of ad breaks given after an over is finished.
- Apart from it, all the sports bodies which enjoy the right to use 'India' as the team's name should come under the purview of RTI.[24] It is performing a public function of selecting the national and international team to represent the nation at a global front. It regulates cricket in India of all forms at all levels. The decision of *Zee Telefilms v.Union of India*[25] requires some reconsideration on the ground that it performs the public function involving millions of funds and arbitrarily using its power in recent past. Therefore, it should be considered as 'State' under Article 12 of the Indian Constitution.[26]
- A separate body needs to be constituted to manage the affairs of IPL which will have a completely different set of rules. The new Committee for IPL should have the members from CAG which will keep the check and balances on the financial transactions.
- There is no representation for women in BCCI. In order to promote women empowerment and participation in BCCI, few seats should be reserved for women.
- The Board should increase its funding for promoting women cricket team and provide proper infrastructure, equipment and experienced coaches for their training. The women team has always been ignored as it failed to draw the attention of mass media. The training programs and talent hunts in smaller towns for women cricket team should be encouraged.

Many members hold the post in BCCI for multiple terms and various occasions without any ceiling limit. Tenure should be fixed for the members so as to give chance to the other members. The Board should also set qualification and disqualification for a person to be a member and its removal.

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[23] Pramit Bhattacharya, "Should betting in sports be legalized in India",*Indian Express,* available at http://indianexpress.com/article/sports/cricket/lodha-committe-panel everything-you-need-to-know-3094827/, last seen on 20/11/2016.

[24] *Here's why BCCI should come under Right to Information,* Mid-Day, available at http://www. mid-day.com/articles/heres-why-bcci-should-come-under-right-to information/16832165, last seen on 20/11/2016.

[25] *Zee Telefilms v. Union of India,* (2005) 4 SCC 649.

[26] M. Suresh Benjamin &Sanu Rani Paul, "Legal Status of BCCI as Instrumentality of State under Article 12 of Indian Constitution", *NALSAR Law Review*(2013).

EMERGING TRENDS IN PUBLICITY RIGHTS IN INDIA: AN ANALYSIS UNDER THE INTELLECTUAL PROPERTY LAWS IN INDIA AND OTHER COUNTRIES

*- Ms. Akanksha Jumde**

ABSTRACT

Emerging as an interesting legal trend in India, Publicity or Personality rights of celebrities are contributing to the development of Indian Entertainment law, thereby establishing the need for legal scholars and academics to study the implications of these unique rights.

Publicity Rights have their origins in other common law jurisdictions and arose in response to the presence and influence of the cinema industry. Primarily derived from the right of privacy, publicity rights in India have arisen as a *sui generis* regime due to the increasing rate of unauthorized usage of the various aspects of the celebrity persona, whose appearance or likeness have been unduly exploited for commercial gain by advertisers and brands alike. Unfortunately, the current Indian intellectual property regime seems insufficiently equipped to deal with this issue and its consequences. Judicial decisions in this area have been sporadic, leading towards the need to develop more lucid statutory language for enforcing this right and possibly, a distinct regime of publicity rights.

The question that arises is whether a separate species of rights are required to protect these interests or whether the existing legal infrastructure already provides a framework that simply requires more implementation.

With the ever increasing recognition afforded to publicity rights in courts across jurisdictions, the author aims to focus on answering some of the above mentioned questions with the hope that they will culminate in a response to address the question of whether we need a separate rights regime for publicity rights or whether the existing legal infrastructure proves

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sufficient. The author concludes that Indian approach to publicity rights is constitutional rather than commercial, and, similar to more developed jurisdictions such as USA, a dual approach needs to be adopted for better enforcement of publicity rights. There is therefore, an urgent need to recognize persona as a commercial rather than right of human dignity.

PART I

1. INTRODUCTION

With the growth of digital media, the study of publicity rights assumes an increasing role of importance and finds itself at the centre of several contracts and negotiations in the entertainment industry.[1]

Publicity rights very simply, are those which protect the interests of celebrities in their images and identities.[2] Also referred to as privacy rights in some jurisdictions, the development of the jurisprudence of publicity rights has been surrounded by a great deal of skepticism, often giving rise to debates of whether such a right is truly representative of the need to protect a person's privacy rights or merely an exaggeration of an otherwise frivolous interest. Some scholars advocate that the treatment of the human likeness as a source of monetary gain is an unnecessary and excessive commercialization of the human body and thus, resulting in speculation as to whether such a right must exist and be encouraged.[3] Others consider publicity rights to be an offshoot of intellectual property rights like copyright and trademark, finding no significant difference between the commercial exploitation of a person's idea and a person's likeness, so long as there is consent on her behalf.

2. DEFINING A PUBLICITY RIGHT

A publicity right refers to the right, which protects an individual's interest in an image, a voice or likeness.[4] This right enables a celebrity to object to the commercial, or use of his or her image or likeness uses without his consent, such that the user may derive commercial benefit or profit by using a celebrity's image. Conversely, it allows a celebrity to gain profits for the consensual use of his or her likeness. Right of publicity may be distinguished from a right of privacy because if man has a right in the publicity value of his photograph, then he has a right to grant exclusive privilege of publishing his picture.[5]

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[1] Barnett S., "The Right to One's Own Image, Publicity and Privacy Rights in the United States and Spain", *American Journal of Comparative Law,* 47 (1999) 556-79.

[2] Fischer III, W.W., "A History of the Ownership of Ideas in the United States", *Intellectual Property Rights: Critical Concepts in Law.*

[3] Dogan and Lemley, "What Right of Publicity Can Learn from Trademark Law", *Stanford Law Review* 58 (2006) 1162-64.

[4] McKenna M., "The Right of Publicity and Autonomous Self-Definition", *University of Pittsburg Law Review* 67 (2006) 346-350.

[5] *Halean Laboratories, Incv. Topps Chewing Gum, Inc.,* 202 F.2d 866 (2d Cir. 1953) at p.868.

Brook LJ, in a 2005 decision defined the right to publicity as "An exclusive right of a celebrity to the profits to be made through the exploitation of his fame and popularity for commercial purpose".[6] This definition helps to distinguish the notion of the publicity right from related moral and privacy rights, as it emphasizes on the commercial value of any celebrity's image. In the same case, it was observed by Sedley LJ. that the damage to the reputation of an individual does not amount to financial or economic loss, and thus the publicity right is one which concerns intangible harm. This hints at the recognition of an intellectual property right that aims to secure financial benefits rather than merely provide protection to the celebrity.

The most cited definition of a publicity right can be found in S.46 of the 'Restatement (Third) of Unfair Competition Act (2005), Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity' which essentially states "One who appropriates the commercial value of a person's identity by using without consent, the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate."

In sum, publicity rights or personality rights, is the right of an individual to control the commercial use of his or her own name, image, likeness, or other equivocal aspects of one's identity.[7] Impliedly, it gives an individual the exclusive right to license the use of their identity for commercial promotion.

2.1. THE ORIGINS AND HISTORY OF THE RIGHT

The origin of the publicity right lies in the understanding of the right to privacy.[8] The notion that a celebrity was entitled to financial benefit on the use of his or her image was only a consequence of acknowledging the fact that the celebrity had a right to be left alone. In other words, it was only after the Courts[9] made it clear that being a celebrity and public figure did not justify the full disclosure of everything that occurred in their personal lives, that it was also understood that if a celebrity were to make some part of his or her life public, then he or she would be entitled to monetary compensation for the same. This necessarily led to a controversial two-fold justification for the introduction of publicity rights, namely an economic and a moral justification. The economic justification for the right serves to afford protection because a celebrity is able to derive commercial benefit out of use of his or herimage. The moral rights justification adopts the view that since the celebrity is the one who

[6] *Duglas and Zeta Zones v. Hello Ltd.*, [2005] EWCA Civ 595.

[7] Right of Publicity: An Overview, Cornell University Law School, https://www.law.cornell.edu/wex/publicity (5 August, 2015).

[8] Frackman, R.J, and Bloomfield, T.C., "The Right of Publicity: Going to the Dogs?",The University of California at Los Angeles Online Institute for Cyberspace Law and Policy, September, 1996, http://www.gseis.ucla.edu/iclp/rftb.html. (1 October, 2014).

[9] *Vanna White v. Samsung Electronics America, et al.*, 971 F.2d 1395 (9th Cir. 1992); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F. 2d 831 (6th Cir. 1983).

contributes towards the creation of the identity; he or she alone stands to gain from the benefits accruing to the identity. The justifications have a firm basis in the prevention of unjust enrichment.

One of the most common forms of the exploitation of popularity is celebrity advertising, which is often the only way in which one can distinguish between several similarly priced products of the same quality.[10] In addition to an attractive packaging and a respected trademark, the position in the limelight of a celebrity adds substantial market value to the product, thereby placing a price tag on market popularity as well.[11] It is the effort to curb 'free-riding' and appropriation of another's popularity, which lends purpose to the creation or rather recognition of the publicity right.

The first case to explicitly recognize the right to publicity was *Halean Laboratories, Inc v. Topps Chewing Gum, Inc.*.[12] This case is known to have devised the traditional right of the publicity doctrine, while recognizing the value of and property right in a baseball player's photograph used on trading cards. The Court held that in addition to and independent of that right of privacy, a man would also have a right in the publicity value of his photograph.

Subsequent commentaries however modified our understanding of the publicity right so as to allow it to be independent of the right to privacy. For instance, Professor Melville B. Nummer[13] argued that, although publicity and privacy claims sometimes overlapped, privacy plaintiffs were concerned with unwanted intrusion into their personal lives, while publicity plaintiffs properly complained of the uncompensated exploitation of their identities. In 1977the United States Supreme Court recognized a common law right of publicity.[14] The action was said to lie if the claimant could demonstrate the fact that he

- Owns a publicity right concerning his own or licensed personality features
- That the defendant without permission used these features in a way that the celebrity is identifiable and
- That this use is likely to cause damages to the commercial value of the personality features

The right of publicity originated as a prohibition against misappropriating a person's name or likeness, thus creating the idea of a protected persona. .

[10] Hogue A.D., "Image Consulting", *Intellectual Property Supplement to National Law Journal,* (1998) 67-70.

[11] Klink J.,et al, "50 Years of Publicity Rights in the United States and the never-ending Hassle with Intellectual Property and Personality Rights in Europe", 2003, http://www.ab-patent.com/downloads/publicity_rights.pdf. (1 October, 2014).

[12] *Halean Laboratories, Incv. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

[13] Nimmer M.B., "The Right of Publicity", *Journal of Law and Contemporary Problems* 19 (1954).

[14] *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 564 (1977).

In one celebrated case, Woody Allen was granted his request for an injunction to prevent the use of a look-alike in a commercial, thereby protecting his likeness.[15] In another case, the repetitive use of the slogan, "Here's Johnny" which was used to introduce a TV show was held to be indicative of a famous person, and therefore, could not be adopted for the sale of portable toilets.[16] An actor could prevent a restaurant from adopting the name of the performed film character Spanky McFarland, and prevent the use of the pictures of other actors.[17] The problem regarding the use of sound-alike voices was addressed in several cases. *In Waits v. Frito-Lay,*[18] the Court awarded compensation of $375,000 plus $2 million in punitive damages to Tom Waits whose voice was adopted by a voice alike for commercials. *In Motschenbacher v. R.J. Reynolds Tobacco Co.,*[19] the defendant tobacco company used a slightly modified footage of a famous race car driver's car in a television commercial without permission and consequently the driver's right of publicity was held to have been infringed. Statutory incorporation of the right has also taken place in different jurisdictions. The publicity right is growing however, in order to combat the ever increasing ways in which one may benefit from another's fame.

STUDY OF PUBLICITY RIGHTS FROM OTHER JURISDICTIONS

2.1 THE RIGHT OF PUBLICITY IN THE UNITED STATES

The development of the right to publicity is closely related to the right to privacy in American jurisprudence. The New York legislature created a statutory right[20] to privacy in 1903 following a case[21] where the plaintiff claimed that her likeness had been used to create an image on flour bags. The Court rejected her claim; however this gave rise to the need for a right to privacy, violations of which would entail both civil and criminal liability. The Common law principle of privacy however, was soon phased out as it was held to be inadequate in dealing

[15] *Allen v. National Video, Inc.*, 610 F. Supp. 612, 630 (S.D.N.Y. 1985).

[16] *Carsonv.Here's Johnny Portable Toilets, Inc.*, 698 F. 2d 831.

[17] *McFarlandv. Miller,* 14 F.3d 912.

[18] *Waitsv. Frito-Lay,* 978 F.2d 1093. An earlier case dealing with the same kind of problem was *Midler v. Ford Motor Co.*, 849 F.2d 460.

[19] *Motschenbacherv. R.J. Reynolds Tobacco Co.*, 498 F.2d 821.

[20] Sections 50, 51, N.Y. Civil Rights Law. Both the sections provide for primary statutory provisions for right of publicity actions. Section 50 makes for right of publicity violation a misdemeanour, while Section 51 provides a private cause of action. Section 51 provides for protection for a person's:

1. Name
2. Portrait
3. Picture,
4. Voice.

[21] *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

with the commercial interests of celebrities.[22] The need was felt to recognize a right which was meant to protect the pecuniary interest of the celebrity, and possibly the intellectual property produced by them.

The strongest publicity rights in the US exist in California,[23] the home of a powerful celebrity market. The statutory protection afforded is almost custom made to suit the needs of professionals and celebrities in California.[24]

On federal level, the Lanham (Trademark) Act, 1976[25] which affords protection in cases involving passing off, one of the most sought after routes to ensure celebrity protection.

2.2 LATEST DEVELOPMENTS IN PUBLICITY RIGHTS IN USA

In a recent lawsuit filed before the California Superior Court, right of publicity has been taken beyond college athletes and Hollywood celebrities.[26] In this lawsuit, former Central American despot Manuel Noriega has sued Blizzard/Activision over their portrayal of Noriega in its highly successful game "Call of Duty: Black Ops II". One of the characters in the game bore Noriega's likeness, and in view of the above, he had sued Activision under California's right of publicity statute for "portraying him as an antagonist and creating a false impression by using his name and likeness". The case is *subjudice*.

The latest trends in publicity rights judgments includes right of personality for college

[22] T., David, "Beyond the Trademark Law: What the Right of Publicity Can Learn From Cultural Studies", *Cardozo Arts and Entertainment Law Journal,* 25(3) (2008) 913-14.

[23] Cal. Civ. Code § 3344, protects a person's:
- Name
- Voice
- Signature,
- Photograph
- Likeness.

[24] Cal. Civ. Code § 3344 (a): prohibits the "knowing" use of a person's name/likeness, etc. on products, merchandise, or goods, or for purpose of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent. Cal. Civ. § 3344 (e): It shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with paid advertisement as to constitute a use for which consent is required.

[25] Section 1125, The Lanham Act.

[26] Sholder S., "Video Game Cases May Break New Right-of-Publicity Ground", http:// www.law360.com/articles/562163/video-game-cases-may-break-new-right-of publicity-ground (5 August, 2015).

athletes.[27] The Court of Appeals applied the transformative use test[28] to determine Hart's right of publicity. The court considered two parameters: appearance of the celebrity's avatar in the video game and the context of the use of the avatar, and whether the user of the game has the ability to alter the avatar's appearance. Holding that the NCAA Football had sufficiently transformed Hart's identity, the Court accepted his claim for right of publicity.

In a case dealing with post-mortem celebrity rights of Albert Einstein,[29] the Court found Albert Einstein's post mortem rights to have expired under New Jersey common law. The Court also became the first to recognize a limit on the common law post-mortem right of publicity and concluded that it could no longer be more than 50 years.

In a 2014 judgment,[30] the Seventh Circuit ruled in favor of basketball legend Michael Jordon against supermarket chain Jewel Food Stores, Inc., by making a distinction between commercial and non-commercial speech, the Court held that the advertisement featuring Michael Jordon in a special edition of Sports Illustrated was non-commercial speech, therefore protected by First Amendment, guaranteeing freedom of speech and expression.

2.3 DEFENSES AND DURATION:

The right of publicity, which permits a person to prohibit others from using her name or likeness on goods or products, without the person's prior consent, is subject to certain limitations. Although there has been some disagreement as to what limitations can be imposed on the protection accorded to the citizen under the right of publicity, there have been some accepted defenses to the right. Firstly, consent, preferably written, is a valid defense, although there have been instances such as Washington's statutory law acceptance of "oral" or "implied" consent as adequate.[31] Material published with the consent of the celebrity, cannot be said to infringe the celebrity's right of publicity. Another popular defense cited is that of news-worthiness. If the material published is not merely gossip or speculation, and is factual in

[27] *Ryan Hart v. Electronic Arts,* No. 11-3750 (3d Cir. May 21, 2013).

[28] *Comedy III Prods., Inc. v. Gary Saderup, Inc.* 21 P. 3d 797, 804-08 (Cal.2001). The Court considered the artist's reproduction and sale of t-shirts and prints which had a charcoal drawing of three stooges. Held: the Right of publicity is invoked in commercial speech. This doctrine asks whether or not the new work is "transformative" enough to evade infringing on one's right of publicity.

[29] *The Hebrew University of Jerusalem v. General Motors., 202 WL* 4868003 (C.D. Cal. Oct. 15, 2012).

[30] *Michael Jordon v. Jewel Food Stores, Inc. and Super Value Inc.,*

[31] Lewis O.Y., "Publicity Rights" (2008). http://www.hllaw.com/images/78222PublicityRights.pdf. (1 October, 2014).

nature and worthy of being reported as news, it is possible to claim that there has been no infringement on the individual's right of publicity.[32]

A very important defense concerns the protection offered under the ambit of the freedom accorded to speech and expression. This has already been dealt with in detail previously in connection with the famed Tiger Woods' case. In the U.S especially, a great deal of literature has been generated on the discussion of First amendment defenses which primarily focus on speech and expression. The role of the Courts when determining the applicability of such a defense essentially involves conducting a fact-specific balancing test which aims to compare competing interests of the person's right of publicity with the public's right to be informed. As already mentioned, the transformative elements test is of crucial importance here, as is determining the primary message of the work in question. For instance, if the purpose of the reference is to advertise or sell an unrelated product, chances are that it will be treated as a commercial endeavour and thereby will be entitled to little or no First amendment protection.[33] Similarly, if the primary purpose of the reference is art, parody or political speech, then the Courts are more likely to support First amendment protection as was witnessed in *ETW Corp v. Jireh Publishing, Inc.*[34]

Death is not necessarily a practical defense to adopt, as in most jurisdictions, the right of publicity is descendible and transferable. This effectively allows the right of publicity to persist for a period ranging from 10 to 100 years after the death of the individual. In the US, Tennessee, Indiana and Oklahoma are states which recognize the longest potential post-mortem publicity rights[35] with Indiana and Oklahoma recognizing a right persisting for 100 years. The Tennessee statute provides protection to the right holder for as long as he or she continually exploits the commercial value of the identity. This necessarily means that the duration of the right is practically unending in some jurisdictions. Washington law provides a 10 year post mortem right for individuals and 75 years for those whose persona rights continue to have commercial value.

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[32] *In Walter v. NBCTelevison Network, Inc, et al.*,27 A.D. 3d 1069 (2006), the newsworthiness exception was to be construed broadly in a comedy routine-the headlines segment of 'The Tonight Show' may fall within the ambit of this exception.

[33] *InParks v.LaFace* Records, 329 F.3d 437 (6th Cir.2003), it was concluded that a rapper's song bearing as its title the name of civil rights icon Rosa Parks was a "disguised commercial advertisement".

[34] *ETW Corp.v.Jireh Publishing, Inc.*, 332 F.3d915 (6th Cir. 2003).

[35] Briston H., "The Right of Privacy and the Right of Publicity: It's not just about tabloids and fame" in *Choices and Challenges: Hot Topics Facing Curators and Archivists,* Oct 9th, 2004. University of Oregon publication. https://scholarsbank.uoregon.edu/dspace/bitstream/1794/2444/2/HFM_paper_v2.pdf. (last visited Oct 1st, 2014).

Marilyn Monroe is synonymous with the words "blonde" and "bombshell". Easily one of the most successful actresses of her time, she was known to have redefined American cinema through her performances and controversies. Her fame earned her a great deal of money, something which has not really changed since her death in 1962. The use of Monroe's name, voice and likeness in the course of selling a vast range of products, has been a huge source of income for her estate. Combining efforts with leading talent agency CMG Worldwide Inc, the Monroe estate has been able to rake in nearly $30 million after licensing the actresses' name and image.[36] This enormous income flow however, faced an insurmountable blockade created by two decisions in May 2007,[37] which held that Monroe's publicity rights died with her. As a result, the Monroe estate was no longer to be held the rightful owner of Marilyn's voice, likeness or image, thereby preventing them from licensing through CMG or any other agency.

2.4 PUBLICITY RIGHTS IN THE UK:

English law has always resisted the creation of a publicity right, and has instead emphasized freedom of speech and expression.[38] The gradual development of the right of publicity is partly due to the country's commitment to international treaties such as the European Convention on Human Rights. In a series of cases, Courts have held that taking pictures of individuals without their consent is violative of Article 8 of the ECHR,[39] regardless of the purpose for which the photographs are meant. There have also been several famous decisions such as the one involving pictures of the Douglas-Jones wedding, and the recent decision concerning a compensation made to Naomi Campbell under the Data Protection Act, for an unauthorized publication of her photo in a story about her drug therapy.

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[36] Edelman S.L., Death Pays: The Fight Over Marilyn Monroe's Publicity Rights, The Metropolitan Corporate Counsel (2007). http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=August&artYear=2008&EntryNo=6903. (1 October, 2014).

[37] *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, No. 05 Civ. 3939 (CM), 2007 U.S. Dist. LEXIS 35674 (S.D.N.Y. May 2, 2007) and *The Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc*, 05-CV-2200 (MMM).

[38] Celebrity Rights, http://www.legalserviceindia.com/article/1139-Celebrity-Rights.html. (1 October, 2014).

[39] Article 8 reads as :

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right exceptsuch as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others.

2.5 PUBLICITY RIGHTS IN GERMANY:

In Germany, the situation under trademark, copyright and unfair competition laws differs only slightly from the position in the UK.[40] It is here that it is necessary to highlight the fact that both UK and Germany have developed torts that grant protection in specific situations, such as the tort of passing off. The tort of passing off establishes that nobody has any right to represent his goods as the goods of someone else.[41] Every passing off action has at its core, ingredients of goodwill, misrepresentation and damages. In the "Jif Lemon"[42] case the House of Lords stated that:

- Goodwill or reputation must be attached to the products or services of the plaintiff
- The misrepresentation must lead to confusion as to the source of the goods or services and
- This confusion must cause damage to the claimant.

The difference between the UK and Germany, in the treatment of this right and the tort of passing off, is the presence of additional tools in German law. Statutory protection afforded by the German Civil Code, the Copyright in Works of Art and Photography Act, 1907 and the German Constitution attempts to provide a stronger legal support to celebrities' interests in terms of protecting the rights to one's name, picture and personality.

PART II

II. DEVELOPMENT OF PUBLICITY RIGHTS IN INDIA

The jurisprudence of publicity or personality rights is at nascent stages in India. While no legislation recognizing *per se* the right of publicity in India exists, the courts, particularly the Delhi High Court and Bombay High Court have been reasonably active in recognizing and enforcing this right.

The right to publicity stems from right of privacy, as evidenced from *R. Rajagopal v. State of Tamil Nadu.*[43] The Court held that one of the inherent aspects of the right of privacy as enshrined under Article 21 of the Constitution is the right to prevent others from using the person's name or likeness from being used without his consent for advertising or non-advertising purposes. This also includes the right to prevent others from publishing the life story of a person, whether written in laudatory manner or critical commentary.

However, if a matter dealing with an individual, his family, or education becomes a matter of public record, the right to privacy no longer subsists and becomes a legitimate subject for comment by press and media.

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[40] Publicity Rights, http://www.ab-patent.com/downloads/publicity_rights.pdf. (1 October, 2014).

[41] *Reddaway v. Banham* (1896) 13 R.P.C 218 at p.224.

[42] *Reckitt & Colman v. Borden* [1990] R.P.C 340, H.L at p.499.

[43] *R. Rajagopal v. State of Tamilnadu,* AIR 1995 SC 264, (1994) SCC (6) 632.

In a number of instances, the Courts have interpreted the right of publicity of famous persons in the same light as protection afforded to well-known trademarks. For instance, in *DM Entertainment v.Jhaveri,*[44] *Daler Mehndi,* a famous Indian singer, composer and performer, brought an action against a party that had registered the domain name 'dalermehndi. net'. The Delhi High Court prohibited the defendant from using the mark and domain name, thus recognizing the fact that an entertainer's name may have trademark significance. Similarly, in the case of *Arun Jaitleyv. Network Solutions Pvt. Ltd.*[45] the plaintiff, *Mr. Arun Jaitley,* a prominent political leader of the Bharatiya Janata Party, had filed for a permanent injunction to restrain the defendants from misusing and the immediate transfer of the domain name "www.arunjaitley.com". The plaintiff wished to register the domain, www.arunjaitley.com, through the website of the defendants.

The Delhi High Court upheld the rights of politician *Arun Jaitley* in the domain name 'arunjaitely.com'. According to the Court, any person may be restrained to use popular or well-known personal names, when, firstly it is satisfied that the particular personal name is a well-known trademark as envisaged under the basic principles of trademark law, and secondly, the person is entitled to use his personal name for commercial purposes.

The scope and applicability of the right of publicity was defined in *ICC Development v. Arvee Enterprises and Anr.,*[46] wherein the Delhi High Court laid down that right of publicity does not apply to non-living entities or objects such as an event, or a sport which made the individual famous, nor the corporation that has brought about the organization of the event, as non-living entities are protected under the copyright, trademark law, dilution and unfair competition law, therefore, non-living entities need not be brought under the scope and ambit of rights of publicity. Furthermore, extension of the right of publicity to non-living entities goes against the basic tenets of the concept of "persona". Additionally, since the right of publicity has evolved from the right of privacy, it can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, or voice. An individual may acquire right of publicity as a result of his or her association with any event, sport, or a movie, however, this right cannot be enjoyed by the event, or the sport which made the individual famous, nor the corporation that has brought about the organization of the event.

Another interesting case brought before the Delhi High Court was, *Titan Industries v. Ramkumar Jewellers.,*[47] This case involved superstars, Amitabh Bachchan and Jaya Bachchan, who had been hired by Titan Industries for promoting Titan's Diwali season jewelry collection,

[44] *DM Entertainmentv. Jhaveri,* (1147/2001).

[45] Arunjaitley v. Network Solutions pvt Ltd., 181 (2011) DLT 716.

[46] *ICC Development v. Arvee Enterprises and Anr.,* 2003 VIIAD Delhi 405, 2003 (26) PTC 245 Del, 2004 (1) RAJ 10.

[47] *Titan Industriesv. Ramkumar Jewellers.,* CS(OS) No.2662/2011.

under Titan's brand name of TANISHQ. The defendants, Ramkumar Jewellers, allegedly copied the images of the two superstars for their own hoardings, which were put up all over Muzzarfarpur in U.P, to the extent that it became ostensible to the members of the public that Amitabh and Jaya Bachan were endorsing Ramakumar Jeweller' products. The Court held that the right to control the use of identity of the famous personality should vest with the celebrity himself. Therefore, this right to control the commercial use of the identity of any human being, not only a celebrity or a "famous person" is known as "right to publicity".

Furthermore, the Court has laid down the following guidelines for establishing the burden of proof by the plaintiff in cases of infringement of the right of publicity:

i) Validity: The plaintiff owns an enforceable right in the identity or persona of a huma being.
ii) Identifiability: The Celebrity must be identifiable from defendant's unauthorized use. If the plaintiff is very well known and widely recognized celebrity a simple comparison of the defendant's use and the plaintiff's identifying features may itself be sufficient to create a strong inference of identifiability. This is termed as unaided identification.
iii) Direct or circumstantial evidence of the defendant's intent to trade upon the identity of the plaintiff, from which identifiability can be presumed.

In *Sonu Nigam v. Mika Singh,*[48] Sonu Nigam, the well-known Bollywood singer, filed a suit against, interalia, Mika Singh and Bright Outdoor Media, before the Bombay High Court because unauthorized hoardings and billboards, featuring the image of Sonu Nigam were put up by the defendants. The hoardings contained advertisements, which featured large picture of Mika Singh, as against smaller images of Mr. Nigam.

The Bombay High Court granted an order to restrain Mika Singh and OCP Music from directly or indirectly publishing the advertisement as it violated Sonu Nigam's personality, publicity and image rights and use of the plaintiff's image in any manner whatsoever.

In another case before the Calcutta High Court *(Sourav Ganguly v. Tata Tea Ltd),* Sourav Ganguly, a popular cricketer and former captain of the national team, discovered that a well-known brand of tea was cashing in on his success by offering consumers a chance to meet and congratulate the cricketer. The offer implied that the cricketer was associated with the promotion, which was not the case. Ganguly successfully challenged the case in court before settling the dispute amicably.

In sum, the courts in India have recognized the right of publicity, or personality rights as stemming from the right of privacy. Similar to the approach adopted by the American courts, Indian courts, as seen from the above mentioned cases, recognize the right of person to control the use of his name, likeness, for selling, promotion or any commercial use for a profitable purpose, without a person's consent.

[48] *Sonu Nigam v. Mika Singh,* CS 372/2013.

Some unanswered questions:

A perusal of these cases also reveals that courts also look at the reputation of the person in a claim for right of personality. For instance, both *Amitabh Bachchan and Jaya Bachchan* in the *Titan* case are well-known celebrities, with brand value that stretches across the globe. So, it may be concluded that the courts may look at the worldwide reputation of a celebrity. Impliedly, the question left unanswered is will the court accord the same protection to a lesser-known, i.e. less-widely known celebrity, who may not enjoy the same world-wide fame, like that of say, Mr. *Bachchan?* Is nationwide or localized fame sufficient for a successful claim of right of publicity, or the bench mark is only worldwide fame? In other words, how "famous" or "well-known" does a celebrity or any person, for that matter, need to be so as have "right of publicity"?

RELATIONSHIP BETWEEN PUBLICITY RIGHTS AND OTHER IP RIGHTS:

2.6 TRADEMARKS, PASSING OFF, AND PUBLICITY

The right to publicity and the law of trademarks has a great deal in common, beginning with their common goal of ensuring that the owners of the right continue to control the use and meaning of their identities.[49] Trademark legislations attempt to curb such use of trademarks which might result in confusion or ambiguity as regards the affiliation or source of the goods. The right to publicity provides a similar protection in that it tries to prevent cases where a celebrity may be falsely or mistakenly associated with a product that they are not necessarily using, much less endorsing. These rights are significant as they serve a dual purpose of protection; they not only ensure the protection of celebrity interests, but also contribute to creating awareness among the general public. In other words, both rights are responsible for eliminating the possibility of misinformed audiences, or consumers. This is where passing off and dilution finds meaning. The basic premise underlying passing off, is that misinforming or misleading the public is to be treated as unacceptable. The notion of understanding publicity rights in the context of trademark law has several advantages.[50]

Much like publicity rights, trademark rights are rights appurtenant, rather than self-supporting intellectual property rights.[51] For a trademark claim to succeed there must be demonstration of the likelihood of consumer confusion, whereas publicity claim requires a demonstration of appropriation of the economic, associative value. For example, a clear,unequivocal disclaimer of affiliation of any kind can be used as a defense to an

[49] Thomas G., "Celebrity-focused Culture Highlights Need for Statutory Right to Publicity", http://www.worldtrademarkreview.com/issues/article.ashx?g=1596958f-55a7 4b2b-a93c -66f887027801 (8 January, 2015).

[50] Brown R.S., Jr., "Advertising and the Public Interest: Legal Protection of Trade Symbols", *Yale Law Journal* 57 (1948) 1165-85.

[51] *Hanover Star Milling Co. v. Metcalf,* 240 US 403, 413-14 (1916).

infringement claim, whereas such a disclaimer in the publicity claim, which is not dependent upon endorsement, could well serve to exacerbate the appropriation.

In Bite-Rite Enterprises, Inc. v. Button Master,[52] the Court held that trademark right cannot be the vehicle for enforcing claims arising out of the merchandising of the mark itself, absent clear evidence of real (rather than spurious), consumer protection as to the source, origin, or sponsorship of the goods or services. In the same vein, the right of publicity, if properly understood and bounded, similarly is an appurtenant right, rather than absolute exclusionary property right, in the name or image, that recognition accordingly precludes a publicity claim based solely on the exploitation of the image itself without association with the user of the image.

Thus, there are noteworthy similarities between the right of publicity and trademark law. Theoretically, the right of publicity is of the same genus as unfair competition, and more precisely, the doctrine of misappropriation, as reflected in the Lanham Act. Like a trademark, the right of publicity can function as a quality assurance to consumer, especially if a celebrity, or his estate, maintains self-imposed quality standards and exercises discretion in the licensing publicity rights.[53] Also, the proprietors of both trademark and publicity rights seek to prevent others from reaping unjust rewards by appropriation of the mark or celebrity's fame.

Given the occasional parallels, overlap is inevitable. In *Motown Record Corp. v. Hormel & Co.,*[54] trademark laws were used to protect the 'persona' of the legendary music group.

2.7 LATEST CASES ON RIGHT OF PUBLICITY AND TRADEMARK RIGHTS

In the case of *Brown v. Elec. Arts, Inc.,*[55] it was held by the Court that famed football player Jim Brown cannot make a false endorsement claim for using his likeness in Madden NFL football video games. The Court further held that Electronic Arts' use of NFL great Jim Brown's likeness in Madden NFL franchise was not explicitly misleading about Brown's endorsement or affiliation with the game, and thus, Brown's Lanham Act could not surmount the First Amendment's protections of freedom of expression.

2.8 COPYRIGHT LAW AND PUBLICITY RIGHTS

There have been some instances where the application of the law of copyright has created problems in the assertion of publicity rights. In the U.S this has culminated in the possible

[52] Bite-Rite Enterprises, Inc. v. Button Master, 555 F. Supp. 1188, 1194 (SDNY 1983).
[53] Right of Publicity: Brief History, http://rightofpublicity.com/brief-history-of-rop (5 August, 2015).
[54] *Motown Record Corp v. Hormel & Co., F. Supp.* 1236 C.D. Gal. 1987.
[55] *Brown v. Elec. Arts, Inc.,* 9th Cir. No. 09-56675, 7/31/13.

pre-emption by copyright law, although there have been cases where the publicity right claims arising under state law have stood up to the challenge. When the U.S Congress amended the Copyright Act in 1976, it provided for the explicit pre-emption of certain types of state law claims related to copyright in the enactment of S. 301(a) and (b).S. 301(a) provides for a two-pronged test wherein pre-emption is to be allowed if

- The state right is "equivalent" to the exclusive rights of a federal copyright and
- The state right is "within the subject matter of copyright" as defined by th Copyright Act, 976.

A claim for violation of a right of publicity in connection with use of an individual's name or claims arising from the use of a photograph, a likeness, or any other still image cannot be subject to pre-emption. *In Stanford v. Caesars Entertainment, Inc.,*[56] the Court held that Crisper Stanford's right of publicity claims were pre-empted because it was not the plaintiff's image, voice, likeness and persona that were at issue, but rather his role as the fictional character "Loose Slot Louie." Since the plaintiff's performance was a dramatic work which could be fixed in a tangible medium of expression, it fell within the ambit of copyright law. It thus, satisfied the subject matter and equivalency requirements necessary for pre-emption.

Nevertheless, the right of publicity has little to do with copyright law. Copyright law applies to original works of authorship fixed in a tangible medium of expression.[57] The exclusive rights are held in the copyright owner and apply to the work itself. This can complicate things because right of publicity and copyright considerations can be implicated in a single usage. An advertisement featuring a celebrity's picture may require authorization from the photographer for the copyright use, and from the celebrity for the Right of Publicity use.

In Sim v. Heinz & Co. Ltd,.[58] the court said that copyright is neither granted to voice, likeness or other identifiers of persona. To pursue an action for copyright infringement, an individual must be able to show ownership of a copyright in the image and copying of the image. In the context of celebrity photographs, lack of ownership is one of the biggest issues which a celebrity encounters, if a photograph gets exploited.[59] Copyright gives exclusive, but limited rights of protection and allows celebrities to authorize reproduction, creation of a derivative image, sale or sale of commissioned photograph.[60]

2.9 PUBLICITY RIGHTS VERSUS FUNDAMENTAL RIGHTS

[56] *Stanford v. Caesars Entertainment Inc.*, 430 F. Supp. 2d 749 (W.D. Tenn. 2006).
[57] 7 U.S.C. Section 102 (a); Copyright Act, 1957.
[58] *Sim v. Heinz & Co. Ltd.*, [1959] 1 WLR 313 1959.
[59] Ahmed T. and Swain S.R., "Celebrity Rights Protection Under IP Laws", *Journal of Intellectual Property Rights,* 16 (2010) 10-12.
[60] Prather M., "Celebrity Copyright Law", available at: http://www.ehow.com/about_6461739_celebrity-copyright-law.html (5 August, 2015).

Publicity rights run a tight rope between protection of individual interests of the celebrities and public interest. For instance, in the U.S. this translates into cases concerning First amendment protection of freedom of speech and expression as was disputed in *C.B.C Distrib. and Mktg., Incv. Major League Baseball Advanced Media L.P.,*[61] where the Federal Circuit Court of Appeals rejected publicity rights claims of major league baseball players, stating that their interests were subordinate to the First amendment free speech protection.

The right of publicity is often found to be at conflict with the right to freedom of speech and expression. In U.S law, this tense situation is expressed in the form of a continuing debate between the right of publicity and the First Amendment Right of freedom and expression.[62] For years, U.S. Courts have been attempting to strike a balance between the celebrity's publicity right and the first amendment rights of speech and expression. In the case of *Hoffman v. Capital Cities/ABC Inc.,*[63] the Court held that commercial aspects were "inextricably entwined" with expressive elements, due to which protection could be opted under the First amendment. *In Comedy III Productions, Inc. v. Gary Saderup, Inc.,*[64] the Court also laid down the transformative elements test to determine whether an artist's work could be protected under the first amendment. Under this test, if a work contained significant transformative and also less likely to interfere with the economic interests protected by the right of publicity, then the first amendment protection would automatically outweigh the state's interest in enforcing the right of publicity. The transformative elements test attempted to resolve the conflict between first amendment protection and publicity rights by laying down the standard which would balance both rights. The debate between first amendment protection and publicity rights reached a critical point in 2003, in the case of *ETW Corp v. Jireh Publishing, Inc.,*[65] better known as the Tiger Woods case. Essentially the case was instrumental in the analysis of several precedents, ultimately upholding the validity of The Court determined that Rush's work, a painting titled, "The Masters of Augusta", featuring Tiger Woods in three poses, was entitled to first amendment protection as it was more than a mere literal likeness, and involved artistic elements. Using the he balancing test adopted in *Cardtoons L.C. v. Major League Baseball Players Association*[66] was also used to conclude that the degree of restriction placed on speechin this case, was greater than Wood's intellectual property right. Therefore, the

[61] C.B.C *Distrib. and Mktg., Incv. Major League Baseball Advanced Media L.P,* 505 F.3d 818 (8th Cir.2007).

[62] The amendment reads as: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[63] *Hoffman v. Capital Cities/ABC Inc.,*255 F.3d 1180 (9th Cir.2001).

[64] *Comedy III Productions, Inc. v. Gary Saderup, Inc.,*21 P.3d 797 (Cal. 2001).

[65] *ETW Corp. v. Jireh Publishing, Inc.,* 332 F.3d 915 (6th Cir. 2003).

[66] *Cardtoons L.C. v. Major League Baseball Players Association,* 95 F.3d 959 (10th Cir.1996).

appearance of Woods' image in an artwork is not detrimental to the commercial value of his image and likeness.

2.10 LATEST CASES OF BALANCE BETWEEN RIGHT OF PUBLICITY AND FREEDOM OF EXPRESSION

In the case of *Ryan Hart v. Electronic Arts,*[67] Ryan Hart filed a lawsuit against Electronic Arts (E.A.) for violation of his right of publicity. He alleged that E.A. misappropriated his likeness in an NCAA Football video game in order to enhance the commercial value of the game. The district court granted summary judgment in favor of E.A. the U.S. Court of Appeals for the Third Circuit mentioned that this case would be determined based upon balance of interest test between right to freedom of speech and expression against the interests in protecting the right of publicity.[68] The Court ruled in favour of E.A. and held that freedom of speech and expression under First Amendment of the Constitution weighed in favour of E.A.

In the case of *Edgar Winter v. DC Comics,*[69] the Supreme Court ruled that comic book characters Johnny and Edgar Autumn, modeled on real-life brothers Johnny and Edgar Winter are protected by the First Amendment.

PART III

STATUTORY PROTECTION FOR IMAGE RIGHTS OF THE CELEBRITIES IN INDIA

A) COPYRIGHT ACT, 1957

Copyright Act protects the interests of famous persons by extending moral rights. The important cases dealing with this issue are: *Smt. Manu Bhandari v. Kala Vikas Pictures Pvt. Ltd. and another*[70] *and Amar Nath Sehgal v. Union of India and others.*[71]

Sometimes, the lives of famous celebrities have also formed the scripts of many films. In the case of *Phoolan Devi,*[72] former lady dacoit Phoolan Devi had protested against her portrayal in the film Bandit Queen. The court held that a celebrity could protect his/her life and image as a

[67] *Ryan Hart v. Electronic Arts,* No. 11-3750 (3d Cir. May 21, 2013).

[68] Balancing of interests test was laid down in the case of *Zacchiniv. Scripps-Howard Broad. Co.,* 433 U.S. 562, 574-75 (1977).

[69] *Edgar Winter et. alv. DC Comics.,* 69 P.3d 473, 479 (Cal. 2003).

[70] *Smt. Manu Bhandari v. Kala Vikas Pictures Pvt. Ltd. and another,* 1968 (2) Arb.L.R. 151 (Delhi).

[71] *Amar Nath Sehgal v. Union of India and others,* 2002 (2) Raj. (Delhi) 248.

[72] *Phoolan Devi v.Shekhar Kapoor and others,* (1999) PTC 46.

constitutional right. Similarly, in the case of *Bala Krishnan,*[73] the dispute was over the life history of Mr. Kamaraj, a national leader. Historical facts are not actionable per se, and thus, the producers claimed that no one could hold copyright over the life history of a national leader and the information was already available in public. The court did not restrain the release of the film as it held that the reputation of the national leader was not at stake.

Thus, in India, publicity rights arise from privacy rights and flows from human dignity as enshrined under Article 19 and 21 of the Constitution, as contrasted with treatment of publicity rights as commercial property.

B) PERFORMERS' RIGHTS

There is a separate category of performers' rights which grants economic rights to performers. Sections 38 and 39 provides that where any performer appears to engage in any performance, he shall have the special right to be known as the "performer's rights" in relation to such a performance.

Section 38(3) provides that during the continuance of a performer's right in relation to his performance, any person who without the consent of the performer, does any of the aforementioned acts in respect of the performance, or any substantial part thereof, shall be deemed to have infringed the performer's right.

However, these rights are subject to exceptions as provided under Section 39 of the Copyright Act. Section 39 of the Copyright Act provides that no performer's right shall be deemed to be infringed by:

1. The making of any sound recording or visual recording for the private use of the person making such a recording, or solely for the purposes of bonafide teaching or research,
2. The use consistent with the dealing of excerpts of a performance or of a broadcast in the reporting of current events or for bonafide review, teaching or research, Such other acts, with any necessary adaptions and modifications, which do not constitute infringement of copyright under Section 52.

C) TRADEMARK RIGHTS

Section 14, Trademark Act, 1999 prohibits the use of personal names where an application is made for the registration of a trademark, which falsely suggests connection with a living person, or a person whose death took place within 20 years prior to the date of application.

Besides, certain names like Sri Sai Baba, Lord Buddha, Sri Ramakrishna, Sri Sharada

[73] *Bala Krishnan v. R. Kamaraj and others,* (2000)(3)Ar. L.R. 622.

Devi, The Sikh Gurus, and Lord Venkateshwara cannot be registered under Section 159(2) of the Trademarks Act, 1999.

Thus, the Act provides for a basic framework for celebrities to protect their name and Image in India and this right can be claimed by their legal heirs, when the reputation and image of the deceased is at stake.[74]

CONCLUSION

In sum, the ability control commercialization and providing revenue streams for the rightful recipient is the policy objective of the Right of Publicity. The right does not simply ensure that a celebrity or celebrity estate gets paid, but the right to control how celebrity is commercialized, or if she or he will be used at all.[75]

As may be seen from the discussion above, jurisprudence of publicity rights is more developed in USA than India. However, even USA till date lacks a federal Right of Publicity Statute, and most statutes dealing with this right are state-based.

The current regulatory and legislative framework under the current intellectual property laws in India is insufficient to deal to curbing blatant use of various aspects of commercial persona, image or likeness of a famous individual.

After the Delhi High Court recognized the publicity rights as an individual right, it is now up to the legislature to the commercial and ownership aspects of the publicity rights.

On the one hand, there is a need to either broaden the existing intellectual property legal regime, or an exclusive statutory framework may be adopted to recognize and enforce publicity rights of celebrities.

However, since celebrities are public figures, and their activities evoke everyone's interest, conferring on them special rights may have the effect of putting them on a higher pedestal, and this may, in turn, be a dangerous proposition.

These concerns surely need to be addressed before any statutory framework is enabled to protect their rights.

The legislature should adequately balance the public interest and the individual interest of the celebrity. This may be done by creating an exception for freedom of speech and expression and other bona fide uses, similar to USA.

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[74] Kumari T.V., "Celebrity Rights as a form of merchandise-Protection under the Intellectual Property Regime", *Journal of Intellectual Property Rights* 9 (2) (2004) 134.

[75] Johnathan Faber, "Indiana: A Celebrity Friendly Jurisdiction", *Res Gestae* 43 (2000).

INTERPLAY OF ENTERTAINMENT INDUSTRY AND ANTITRUST LAW

- Ms. Shefali Agarwal and Mr. Chahat Abrol***

ABSTRACT

The Competition Act, 2002 prohibits vertical and horizontal agreements that have an appreciable effect on the competition. With the globalization, liberalization and privatization of the economy, there has been burgeoning effect of the entertainment industry on the competition in India. In the wake of the commercialization of the Indian film industry, there is a dire need for a new approach that balances the growth of the entertainment sector, without hampering the competition law.

In the present paper, the Authors have discussed the impact of the entertainment sector on the antitrust laws in India, by delineating the horizontal and vertical agreements and abuse of dominance in the Indian film industry. Also, a critical analysis of the relevant case laws has been undertaken so as to comprehensively understand and scrutinize the contemporary requirements for a reform in the current scenario.

INTRODUCTION

In the year 2002, one of the most important legislation was enacted, *which was The Competition Act,* 2002 which replaced the *Monopolies and Restrictive Trade Practices Act* 1969. One of the major reasons for replacing this Act was that the prior act was no more sufficient to deal with the present changing situations as the economy was opening up and this required the need for regulatory intervention. When talking in respect to the entertainment

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industry, with the era of liberalization, globalization and privatization, we saw more fierce competition in this industry and eventually the entertainment industry was been brought under the regulation of the *Competition Act.* There is a burgeoning demand for the regulation by the competition authorities. Indian film industry has entered a new phase of growth, integration, right sizing of all functions across the value chains and is heading towards further consolidation.[1]

Although there are limited numbers of production houses that have the experience of managing all elements of value chains, integration of studio, production and distribution isnow a growing trend.[2] In recent years, the Indian film industry has witnessed marked improvements on all fronts, viz., technology, themes, exhibitions, finances, marketing and business environment. Indian film industry is also getting corporatized.[3]

The purpose of this article is to examine the relevance of Competition Law to the entertainment industry. Many cases focusing on aspects such as anti-competitive agreements, abuse of dominance and combinations have been discussed. It is seen that the Competition Law has an important role to play in the entertainment industry since entertainment industry seems to violate competition law. In part II, the authors have discussed the relevance of competition law in regards to anti-competitive agreement. Part III includes the relevance of competition law in regards to abuse of dominant position. In part IV, the authors have discussed the relevance of competition law in regards to laws relating to combinations.

RELATIONSHIP BETWEEN ANTI-COMPETITIVE AGREEMENTS AND ENTERTAINMENT INDUSTRY

HORIZONTAL AGREEMENTS

S.3 *of the Competition Act* is a substantive provision dealing with anti-competitive agreements or arrangements. S.3(1) prohibits and declares in respect of production, supply, distribution, storage, acquisition, or control of goods or provision of services, which causes, or is likely to cause "appreciable adverse effects" on competition in India.[4] S.3(2) declares void, any agreement between enterprises in contravention of S.3(1).

S.3(3) states that the horizontal agreements shall be presumed to have an appreciable

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[1] *FICCI-Multiplex Association of India v. United Producers/ Distributors Forum,* (2011) Comp LR 0079 (CCI).

[2] *Ibid.*

[3] *Ibid.*

[4] T. Ramappa, *Competition Law in India: Policy, Issues, and Developments,* 3rd ed., (Oxford: OxfordUniversity Press, 2013), p. 5.

adverse effect on competition.[5] According to Merriam-Webster's Dictionary of Law, Horizontal restraint is a restraint of trade involving an agreement among competitors at thesame distribution level for the purpose of minimizing the competition. Horizontal agreements are agreements that are entered into between two or more firms operating at the same level of production or distribution in the market.[6]

Although not expressly mentioned, S.3(3) is governed by the *per se* rule, which means finding an illegality on the face of an arrangement or practice. The US Supreme Court noted that there are certain agreements which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborated inquiry as to the precise harm they have caused or the business excuse for their use.[7] But the *per se* rule is applied differently in India, as it is a rule of procedure to adduce evidence and not a rule of illegality.[8] Once the existence of the horizontal agreements is proved, the burden of proof shifts to the defendant who can take the defense of no agreement, no adverse appreciable effects or of pro-competitive effects.

CARTELS

Horizontal agreements under S.3 (3) also include cartels. In India, cartel is defined under S.2 (c)[9] of the Act. Cartels are considered to be the "the supreme evil of antitrust."[10] There are

[5] Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

[6] Maher M. Dabbah, *EC and UK Competition Law: Commentary, Cases and Materials,* (United Kingdom: Cambridge University Press, 2004), p. 233.

[7] *Northern Pacific Railway Co. v. United States,* 356 US 1 (1958).

[8] VershaVahini, *"Indian Competition Law"*, 1st ed., (Gurgaon: Lexis Nexis,2016), p. 62.

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

[10] *Verizon Communications Inc. v. Law Offices of Curtis,* 540 US 398 (2004).

several factors that contribute favorably to the formation of cartels, which have been recognized by the CCI in *FICCI-Multiplex Association of India*[11] case. These factors include an oligopolistic form of market, geographically concentrated market, homogenous product, inelastic demand and inefficient governmental control.

In *FICCI-Multiplex Association of India*[12] case, a collective decision was taken by United Producers and Distributors Forum (UPDF) not to release Hindi films in multiplexes in order to pressurize them into accepting new terms of revenue sharing ratio. UDPF issued notices instructing all producers and distributors including those were not the members of UPDF not to release any new Hindi film for the purpose of exhibition at the multiplexes. A complaint was registered with the CCI. It was alleged that the UPDF is behaving like a cartel, as the members of the UPDF are competitors and are clearly "acting in concert" to fix prices in contravention of S.3 (3)(a) of the Act and also limiting and controlling the supply by refusing to release Hindi films for exhibition in multiplexes and hence violating S.3 (3)(b) of the Act.

According to the DG, the concerted action is evident from the instructions issued to its members to comply with the letters restraining them from releasing the films or face boycott and also from the meetings and conferences. Also, the report of the DG stated that the UPDF was controlling almost 100% of the market for production and distribution of Hindi Motion Pictures which exhibited in multiplexes in India. The CCI agreed with the findings of the DG and held the actions of the UPDF in violation of S.3 (3)(a) and 3(3)(b) and a penalty of Rs 1 lakh was imposed on each of the 27 opposite parties.

Further, in *Reliance Big Entertainment Ltd.*[13] case, the informants were the producers and distributors of the films, and the opposite parties were the associations or bodies associated with the business of film distribution and exhibition in the territories under their control in India. It was alleged that the rules and regulations of these organizations were restrictive in nature and violative of S. 3 and 4 of the Act. The rules and regulations included compulsory registration of the films with these bodies for exhibition, directing members not to deal with the non-members, restricting the number of cinemas in which films could be exhibited, discriminating non-regional films against regional films, undue long holdback period of satellite, DTH and other rights and imposing ban against those who violated these rules.

The CCI held that this is a case wherein the members of the body have entered into a horizontal agreement, which is acted upon through the associations in the form of decisions

[11] *FICCI-Multiplex Association of India v. United Producers/ Distributors Forum,* (2011) Comp LR 0079 (CCI).

[12] *Ibid.*

[13] Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce and Ors., (2012) Comp LR 269 (CCI).

and practices carried on by the associations, not to deal with the non-members. This results in limiting the supplies and distribution of the films and hence violative of S.3 (3)(b) of the Act. Also, the compulsory registration and the undue long holdback period result in restriction on supplies of films on media other than theatres, limits the market of distribution and exploitation of the films. And also, it was held that there is foreclosure of competition in the areas under the control of KFCC because non-Kannada films cannot be released in all cinemas thereby depriving the consumers the choice of watching the movies of their choice. It was further held that these rules and regulations did not have any pro-competitive effects as they neither brought any improvement in the production or supply of films in any manner nor any technological improvement. Heavy penalties were imposed on the opposite parties.

Subsequently, similar rules and regulations were held to be violative of S.3 of the Act in similar cases in *Eros International Media Ltd.,*[14] *UTV Software Communications*[15] and *ManjuTharadv. EIMPA.*[16]

Further, in *SajjanKhaitan*[17] case, the informant had the rights to telecast the Bengali dubbed version of a TV serial. However the opposite party EIMPA issued a letter to the informants and the TV channels to stop the telecast of the serial. The opposite parties took the defence of protecting the language and culture and loss of employment opportunities for regional artists. The CCI observed that the conduct of the opposite parties by prohibiting the exhibition of the dubbed serial has prevented the competing parties in pursuing their commercial activities. It has also deprived the consumers of exercising their choice. Therefore, the CCI found the conduct to be violative of S.3 (3)(b) of the Act.

But the competition authorities should be careful in observing the limits in the applicability of antitrust laws to the entertainment industry especially when they affect the issues of language and culture. There are a number of reasons for this such as, cultural and linguistic diversity is an end in itself and cannot be traded with any other objective, the loss of culture and language could be irreversible and its consequences more widely distributed the Commission does not have the know-how to assess the non-market consequences of market competition and the market argument focuses on short-term individual consumer welfare and efficiency, whereas the cultural argument focuses on long-term community welfare effects, which may not be immediately apparent.[18]

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[14] *Eros International Media Ltd. v. Central Circuit Cine Association, Film Distributors Association, Kerala etc.,* (2012) Comp LR 20 (CCI).

[15] *UTV Software Communications v. Motion Pictures Association, Delhi,* MANU /CO / 0053/ 2012.

[16] *ManjuTharad v. EIMPA,* Case No. 17 of 2011, (CCI, 24/4/2012).

[17] *Mr. Sanjay Khaitan v. Eastern India Motion Picture Association,* [2012] 115 SCL 383 (CCI).

[18] Vikas Kumar and Poonam Singh, "Competition law and the entertainment industry in India: a case of overreach", available at www.eastasiaforum.org/2013/03/01/competition-law and-the-entertainment-industry-in-india-a-case-of-overreach/ (as viewed on 3/3/2017).

Subsequently the CCI has in a plethora of cases held the rules and regulations of the film organizations to be restrictive in nature and passes 'cease and desist' orders against the opposite parties. In *Shri Ashtavinayak Cine Vision Ltd.*[19] case, compulsory registration of the film with the trade organization was held to be anti-competitive. Further, *in Cinergy Independent Film Services Pvt. Ltd.,*[20] the opposite parties were ordered to cease and desist from practices of pressuring the distributors to settle monetary disputes with its members. In *Shri P.V. Basheer Ahamed,*[21] The Opposite Party tried to control the film distribution business in the State of Kerala and also issued directions vide circular dated 01/12/2011 to all its members restricting the distribution of films produced and directed by Malayalam filmmakers Shri Kamal and Shri Jayaraj. The CCI held that the Opposite Party has imposed restrictions to limit the market of film distribution/exhibition business in the State of Kerala and hence violated S.3(3)(b) of the Act.

VERTICALAGREEMENTS

Vertical agreements are agreements or concerted practices entered into between two or more companies each of which operates at a different level of production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.[22] Vertical agreements are defined under S.3(4)[23] of the Act. These agreements are not treated as anti-competitive *per se* as in the case of horizontal agreements. The vertical agreements have to be judged under the 'rule of reason' test.

The 'rule of reason' is a legal approach where an attempt is made to evaluate the pro-competitive features of the restrictive business practice against its anti-competitive effect in order to decide whether or not the practice should be prohibited.[24] This approach was classically formulated in 1918 in *Chicago Board of Trade,*[25] which was defined in an open-

[19] *Shri Ashtavinayak Cine Vision Ltd. v. PVR Picture Limited,* New Delhi and Northern India Motion Pictures Association(NIMPA), Jalandhar City, (2013) Comp LR 368 (CCI).

[20] *Cinergy Independent Film Services Pvt. Ltd. v. Telangana Telugu Film Distributors Associations and* Ors.,(2013) Comp LR 284 (CCI).

[21] *Shri P.V. BasheerAhamedv. Film Distributors Association, Kerala,* (FDAK),(2015) Comp LR 179 (CCI).

[22] *European Commission's Guidelines on Vertical Restraints* (2000/OJC 291/01).

[23] Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—(a) tie-in arrangement;(b) exclusive supply agreement;© exclusive distribution agreement;(d) refusal to deal;(e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

[24] World Bank: Glossary of Industrial Organisation, Economics and Competition Law.

[25] *Board of Trade of City of Chicago v. United States,* 246 US 231 (1918).

ended manner, which requires inquiry into the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable, history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained and so on.

In *Ajay Devgn Films case,*[26] the opposite parties were the distributors and producers of the movies *EkTha Tiger and Jab Tak Hai Jaan.* They put a condition on the single-screen theatres either to exhibit either both the movies or none. A majority of single-screen theatres agreed to exhibit both the films because of their big names. This conduct, according to the informant, amounted to contravention of S.3 (4).

The CCI noted that the agreement between the opposite parties and the single-screen theatres amounted to a vertical agreement as it is a "tie-in arrangement". But it noted further that tie-in agreements are not per se violative of S.3 (4)(a) of the Act. Whether such an agreement is prohibited under the Act depends upon its actual of likely "appreciable adverse effects" on the competition. The CCI held that the single-screen theatres do not hold a significant position in the exhibition market as there are other categories of theatres also. Further the single-screen exhibitors have the liberty either to agree or reject the restraint caused by the opposite parties. Also, the CCI held that it has neither created entry barriers for new entrants nor drove existing competitors out of the market nor has caused any appreciable adverse effect on the ultimate consumers. Therefore, it was held that the conduct of the opposite parties is not violative of S.3 (4) of the Act. The Competition Appellate Tribunal, in an order of 8/11/12, also refused to pass any interim order against *Yash Raj* Film on the ground that the complainant had not put forward sufficient facts to establish that YRF had violated the *Competition Act.*

RELATIONSHIP BETWEEN ABUSE OF DOMINANT POSITION AND ENTERTAINMENT INDUSTRY

There are several matters handicapping the entertainment sector in relation to abuse of dominant position such as the manipulation of TV ratings, booking of single screens for movies, etc. Abuse is stated to occur when an enterprise or enterprises forming a group use their dominant position in the relevant market in an exclusionary land in an exploitative manner. Under S.4 of the Act, while determining the abuse of dominant positions there are several things that need to be addressed. These are as to whether the accused falls within the definition of enterprise, delineation of the relevant market, the dominance in the said market and finally whether any abuse of dominance is taking place. The four steps are:

ENTERPRISE

'Enterprise' has been defined under S.2 (h) of the Act and brings within its ambit any firm

[26] *Ajay Devgn Films v. Yash Raj Films Pvt. Ltd.,* (2012) 116 SCL 593 (CCI).

or person who is engaged in any of the activities which relate to production, storage, supply, distribution, and acquisition etc. of goods. But this definition does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

RELEVANT MARKET

Definition of the relevant market as enshrined in S. 2 of the Act reads as: *"relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.* The purpose served by delineating a relevant market is to define the scope within which the position of an enterprise is to be tested for dominance and abuse thereof. Under S. 19(5) of the Act, the 'relevant market' is defined in terms of 'product' and 'geographical area'. In the case of In re: *M/s HT Media Limited v. Super Cassettes Industries Limited,*[27] the radio stations were dependent upon the licensing party since the opposite party owned majority of the music labels. The issue raised in this case was regarding the issue of excessive pricing as license fees for grant of rights for the broadcast of music content, imposing minimum commitment charges ('MCC') to be paid to the opposite party per month irrespective of actual needle hour of broadcast of the opposite party's music content by the informant and making conclusion of licensing arrangements with the opposite party subject to the acceptance of license fees and MCC imposed by them and the commission found them in contravention of S. 4(2)(a)(i) of the Act .The informant also alleged that such imposition of exorbitant license fees limited and restricted the right of the informant to broadcast its music content of other music companies thereby limiting the choice of music for the end consumers which results in denial of market access for other music companies. In this case, the court held that the radio as a medium is distinct from other media of broadcasting. The main distinguishing factor between radio and other forms of media is that radio is free-to-air while TV broadcasting is subscription-based services. Radio broadcasting is more localized whereas TV broadcasting and mobile VAS is available nationally; and costs associated with radio as a source of entertainment is much lower than others. They held that the AIR (AM as well as FM) is distinct from private FM stations. The relevant market was delineated to be *"market for licensing of Bollywood music to private FM radio stations for broadcast in India"*. The CCI also held that music content cannot be interchangeable with non-music content. The CCI in this case noticed that pricing abuses might come under the purview of competition law as abuse of dominance.

PRODUCT MARKET

The term 'relevant product market' is defined under S.2(t) of the Act as a market

[27] Case No. 40 of 2011, (CCI, 1/10/2014).

comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of products or services, their prices and intended use. Some of the factors taken by commission into consideration are encompassed under S.19(7) such as:

- Physical characteristics or end use of goods;
- Price of goods of service;
- Consumer preferences;
- Exclusion of in-house production;
- Existence of specialized producers;
- Classification of industrial products.

One of the crucial competition issues handicapping the entertainment sector is about the abuse of dominance in the Television Viewership Ratings. In the case of *Prasar Bharti (Broadcasting Corporation of India) v. TAM Media Research Pvt. Ltd.,*[28] TAM was accused of not carrying out the viewership ratings measurement in a fair and transparent manner. They alleged that there were broadcasters who paid money to the TAM agency in order to manipulate the ratings in their favor. TAM measured viewership in the form of TRP/TVR (television rating points/television viewership ratings for which it was using the electronic gadget 'people meter' connected to TV sets in selected sample households. The CCI held in this case held that relevant market in the present case may be considered as "audience measurement for channels and programmes on television in India." The CCI noticed that TAM had limited its survey only to larger cities and had not taken into consideration the rural cities and that there was difference in the taste of viewership of the rural people and the urban people and held that broadcasters and advertising agencies/ advertisers operate in distinct markets and have distinct functions, and, therefore, cannot be viewed as similarly situated enterprises or entities and if same rates are offered to differently placed consumers, i.e., the broadcasters and advertisers/ advertising agencies; it would lose its subscribers and it would no longer remain profitable to conduct its business. The Commission noted that TAM had clearly disclosed to its stakeholders and had also stated on its website as well in every subscription contract that its data is largely representative of viewing preferences of the urban and semi-urban population and therefore no unfair condition was imposed. The CCI in this case also debated as to whether there exists substitutability between different media platforms including TV, Internet, print media and radio. The court observed that in India, Internetpenetration is limited leading to significantly lower coverage by this platform in comparison to television, which has a pan India presence. Online websites like YouTube give an option to skip the advertisement to play the main video unlike on TV where the viewer would need to skip the channel to avoid the advertisement. With regard to Radio, the Commission notes that it has no visual component unlike TV, which has both visual and audio components to reach the audience. In regard to print media, it was

[28] Case No. 70 of 2012, (CCI, 25/2/2016).

observed that it is an important media platform but its impact and reach is restricted on account of low level of literacy in the country.

GEOGRAPHICAL MARKET

The term 'relevant geographic market' is defined under S.2(s) of the Act as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from conditions prevailing in neighboring areas. Under S. 19(6), several factors are listed which have to be taken into consideration such as:

- Physical characteristics or end use of goods;
- Price of goods of service;
- Consumer preferences;
- Exclusion of in-house production;
- Existence of specialized producers;
- Classification of industrial products.

The intention of the consumer may also be used in defining the relevant geographical boundary. In a case of purchase and allocation of apartments, the Commission upheld *"geographic region of Gurgaon* to be the relevant market because it observed that it was the intention of the buyer to buy an apartment in Gurgaon because it had developed a unique brand image over the years, a characteristic which other regions did not share.[29]

In the case of *Big CBS Networks &Anr v. Tata Sky Ltd,*[30] the complainant alleged abuse of dominant position in contravention of S. 4 of the Act by the opposite party. The informant stated that the DTH player was charging an exorbitant amount as carriage fee from the informant to broadcast its channels. The relevant market was taken as Pan India when the informant was unable to supply the court with any evidence as to why English channels would not have been watched in certain areas, where the assumption could not simply be made that people residing in rural areas do not watch English channels. In this case, the CCI held that *prima facie* no case was made out against the opposite party since the accused was not dominant in the said market and therefore no question arose of abuse of dominance.

DETERMINATION OF DOMINANT POSITION

Under the provisions of the Act, dominance refers to the ability of an enterprise to operate independently of market forces, and its position of strength, which enables it to affect competitors or consumers or the relevant market in its favour.[31] There are several factors under

[29] *DLF Limited v.* CCI, Appeal No.20 OF 2011, (CAT, 19/5/2014).

[30] Case No. 36/2012, (CCI, 5/9/2012).

[31] In the explanation to S. 4 of the Act, it is mentioned that (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(I) Operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

S. 19(4) which are considered by the commission to determine as to whether an enterprise enjoys a dominant position or not such as market share, size and resources of the enterprise, economic power of the enterprise, dependence of consumers on the enterprise etc.

ABUSE OF DOMINANCE

The mere fact of dominance is inconsequential in so far as attracting the Act is concerned. What has to be shown is that there has to be an abuse of the said dominance. An enterprise or a group is said to be abusing its dominant position if its activities, are found to be fit any of the activities listed under. Such activities may be divided into two categories- Exclusionary activities and exploitative activities.

Exclusionary activities are those in which the dominant entity uses its dominance to restrict entry of competition into the relevant market. Exploitative activities, meanwhile, are those where the dominant entity exploits its dominance by imposing discriminatory and/or unjust conditions on other firms or consumers.

Another issue, which frequently emerges in the entertainment sector when the question of abuse of dominant position ensues, is regarding the interoperability of the DTH set up boxes. We all are aware of the different mediums, which are providing the set up boxes. There is Airtel, Videocon, Tata sky etc.

Inter-operability is the ability of a system or a product to work with other systems or products without special effort on the part of the customer. This was challenged on the ground of abuse of dominant position as these set up boxes use different technologies, and therefore it when consumers they change their connection even need to buy a new set up box. It becomes difficult for them to change from one network to another, as it requires changing of set up boxes, which leads to less market competition and higher prices. If technology paves for the way of changing from one set up box to another then it shall lead to more competition and economical pricing of set up boxes. This case was contended in the front of CCI where the question of abusing of S.3 and S.4 of the competition act arose.[32] The CCI held that the interoperability of the set up boxes does not lead in any way to abuse or violate the principles of S.3 and S.4 of the Act. The court noticed that the competition was highly fair in the market of the set up boxes and the whole question was regarding technological advancement and not regarding the abuse of dominant position.

Further, in the case of *Dish TV v.Prasar Bharti,*[33] the informant approached the CCI with the complaint that the opposite party refused to broadcast ads of the informant's DTH services

[32] *Consumer Online Foundation v. Tata Sky Limited &Ors.,* Case No. 2 of 2009, (CCI, 24/3/2011).

[33] Case No. 44 of 2010, (CCI, 30/11/2011).

on DD National, on a commercial basis. The court held that there was no infringement of the act because the policy decision of Prasar Bharti in not allowing the advertisement of informant or other competitors by itself cannot be termed as anti-competitive.

In another such case, *Jak Communications v. Sun Direct*[34] the opposite party was accused of having an anti-competitive agreement by way of promising (and implementing) a subscription of a channel by name 'Tamil Freedom Package' for a sum of Rs 440 for four months and consequently charging its subscribers Rs 99/channel. This was challenged on the ground of abuse of dominant position as it attempted to eliminate all other players in its area of operation by indulging in predatory pricing, charging fees per channel as lesser than what was permitted by the TRAI circular for subscription rates of channels. It was also accused, in doing so, of having an anti-competitive agreement with the consumers that caused foreclosure of competition thus falling under an abrogation of s. 3 (4) and 4 (2) (ii) respectively. Finally, it was also accused of using its dominant position in one market (i.e. broadcasting) to make itself dominant in the DTH sector [S. 4 (2) (e)]. The court decided that there was no contravention since consumers have the freedom to select the DTH operators providing services and selection of SUN DTH by the consumers in no way hampers the competition process as this is a selection by consumer based on his criteria of preferences.

RELATIONSHIP BETWEEN COMBINATIONS AND ENTERTAINMENT INDUSTRY

The term 'combination' includes any acquisition of shares, voting rights, control or assets or merger or amalgamation of enterprises, where the parties to the acquisition, merger or amalgamation satisfy the prescribed monetary thresholds in relation to the size of the acquired enterprise and the combined size of the acquiring and acquired. Entering into a combination, which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination would be void. The relevant provisions of regulation of combinations are given under S.5, 6, 20, 29, 30 and 31 of the Act.

In *M/s Kansan News Private Limited v. M/s. Fastway Transmission Private Limited and Others,*[35] the CCI considered abuse of dominance by a group of enterprises. The CCI noted that all the opposite parties were related enterprises and formed part of the same 'group' in terms of S.5 of the Act. The CCI found that the conditions of competition of Cable TV in different States differ on account of difference in consumer preferences and choices. Keeping in view the consumer preferences, the relevant geographic market in the present case was delineated to be *Punjab and UT of Chandigarh.* The Commission found the alleged party of abusing its dominant position. This matter went in appeal to the CAT. The CAT however overturned the

[34] Case No. 8/2009, (CCI, 30/8/2011).
[35] Case No. 36/2011, (CCI, 3/07/2012).

decision of the CCI. They held that the MSOs and the broadcasters are not competition with each other as they are both at different levels of the supply chain.

The CCI approved the acquisition of 27.5 per cent equity shares of Living Media India Limited (LMI) which is a private company and is the holding company of India Today Group, which is involved in broadcasting through TV and radio, print media, publication and distribution of music etc. by IGH Holdings Private Limited (IGH) which is an investment company in Aditya Birla Group (ABG). ABG has diversified business interests in various sectors including telecommunications, IT, IT enabled services etc. ABG places advertisements in various media, which are owned and operated by ITG but the advertising revenue generated by ITG form ABG is negligible in total market of advertising. Further, ABG through Idea Cellular in engaged in telecommunications and Internet services and ITG provides content for mobile value added services to be used by telecom companies. However, revenue generated by ITG through provision of such content is also a very small percentage of the total revenue generated by ITG. Hence, the proposed combination is not likely to have any appreciable adverse effects on competition in India.[36]

A notice was filed by Independent Media Trust relating to a series of inter-connected and inter- dependent acquisitions intended to acquire control over Network18 Group companies by Reliance Industries Limited. The Commission assessed the effect of the combination on the businesses for supply of televisions channels, event management services and broadband Internet services using 4G technologies and content accessible through such services. It was concluded that the combination was not likely to give rise to any appreciable adverse effect on competition and was cleared.[37]

CONCLUSION

To conclude, the article has demonstrated the present condition by which the competition law is been applied to the entertainment industry. What we can ascertain is that in regards to abuse of dominant position in the entertainment sector, many a time's individuals who have a dominant position in the market may try to use that position in their own advantage by charging excessive prices, putting in unfair conditions or exclusionary contracts. Thus, there the need arises of the competition authorities as entertainment industry does contribute a sufficient amount of revenue in the economy. There are a lot of competitors competing for the same contract due to the growing acceptance of the entertainment from the public. This may at times lead to abusing of dominant position. What we need is more comprehensive legislation in regards to competition law as entertainment industry many a times faces linguistic and multi-regional disputes. There are many a times jurisdictional issues and also difference of opinion of public. Also, laws relating to competition law need to be applied strongly and strong punishment such as heavy compensation should be awarded.

[36] Combination Registration No: C-2012/03/47(CCI).
[37] Combination Registration No: C-2012/06/62, (CCI).

BIOPICS AND THE LAW: CONUNDRUMS OF OPYRIGHTABILITY

*- Ms. Anwesha Dutta**

ABSTRACT

Often, the making of films, and biopics in particular, have been fraught with legal issues arising from publicity rights or defamation. This paper seeks to examine the intersection of copyright law with the same and how these issues are dealt with under the current framework and judicial understanding of the same. To begin with, the jurisprudential basis for such rights, in particular reference to Hegelian Theory, is looked at, drawing a parallel between the two. The concept of moral rights is then briefly examined in this context. This is followed by the interpretation of personality and publicity rights in the Indian framework; and how chief ideas in such interpretation may apply to the making and legal aspects of biopics.

Film, being a collaborative effort, an amalgamation of different spheres of art, thus springs several issues when it comes to the copyrightability in these spheres. Traditionally, the law mandates a series of rights to the 'Producers'; other contributions to the work being treated as 'work for hire'[1] - entailing compensation by means of an employment contract but not continual royalty from the profits the producer reaps. The biographical film, being an account of personalities, entails another set of issues. To begin with, "historical facts" being a component of the public domain, cannot be copyrighted.[2] It was also elaborated upon in *R. Rajagopal v. State of Tamil Nadu;*[3] that once the matter becomes a matter of public record, the right to privacy no longer subsists and it is open to, *inter alia,* comment by the press and media.

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1 Deborah Tussey, *Employees as Authors: Copyrights in Works Made for Hire, Intellectual Property and Information Wealth - Issues and Practices in the Digital Age,* Vol. I, (New Delhi: Pentagon Press), p. 71.

2 Feist Publications, Inc., v. Rural Telephone Service Co,. 499 U.S. 340.

3 *R. Rajagopal v. State of Tamil Nadu* 1994 6 SCC 632.

However, a good biopic often delves into the life of its subject, unraveling several layers of information and hence making the work susceptible to legal action, whether in terms of invasion of privacy, defamation or an infringement of personality rights. What then are the legal concerns arising out of such work?

Life rights of celebrities or public figures, the subjects of such cinematograph films, are often licensed in order to avoid such issues. In what may seem to be a rather metaphysical question, one may question the idea of inherent rights in one's life, the incidents it is composed of, relationships and events. This may in turn be linked to the Hegelian idea, that one's property is an extension of one's personality. This argument in fact ensures a property right when there a 'personality link' to an activity or event that is when such activity becomes a manifestation of one's self. By this logic therefore, an inherent right to property lies in one's life. In a way, these rights are abandoned only in case of alienation of such rights that is, say, licensing of life rights. This is discussed in detail in the course of this paper.

Notably, the interpretation of a public figure and facts in public domain and where the right to privacy may creep in - has often been brought to light.

The depiction of persons in biopics and the arising legalities have often been battled on the ground of right to privacy. However, to examine the emerging philosophy on copyright law with regard to these, we must take into consideration, "personality rights" or the more elusive "moral rights".

The issue of copyright claims in biopics may be approached in two ways:

I. Moral Rights: When the source for such biopics are available in a "tangible form", for instance any written document by the subject or another, any distortion of the same may result in violation of the aspect of Integrity as per moral rights or Droit Moral. *The Indian Copyright Act* outlines moral rights by way of 'Author's special rights' under Section 57. Thus an author is entitled to rights of attribution (or paternity rights) and to the integrity of the work.

ii. Personality Rights: The second approach is that of personality rights. These are rights inherently associated with one's person and how an appropriation of the same is perceived under the law. This may be in the nature of publicity rights, that is one's inherent right to control the commercial usage of his or her identity.[4] Also, it is closely associated with the right to privacy.

Apart from copyright or personality rights action, the issue is usually approached as a breach of privacy and a violation of one's fundamental rights.

[4] Keller Bruce P, Condemned to Repeat the Past: The Reemergence of Misappropriation and other Common Law Theories of Protection for Intellectual Property, Harvard Journal of Law and Technology, 11(2) (1998) 401.

the exhibition, release and exploitation of the film Vana Udham which portrayed the life of the Late Veerapan and his family. It was enunciated that each individual has the right to privacy as a fundamental right under the Constitution of India. Also, during his lifetime, Veerapan had not sought to stop publications based upon the criminal cases filed against him. The Court held that certain scenes in the movie were to be deleted. Pursuant to this, emulating R. Rajagopal,[5] the Court held that the movie (after the deletion of scenes) was not an invasion or violation of Veerapan and his family's right to privacy as the movie was based on police records.[6]

Another instance was the Delhi High Court order concerning the film Gulaab Gang where the court granted an interim injunction against the release of the film. The Plaintiff had filed a suit for permanent injunctions and damages, alleging that the film was based on her life. It was found that the film was based on the life of the plaintiff, Sampat Lal and her organization called Gulabi Gang. There were similarities between the name and characters of the plaintiff's organization and those in the film. For example, characters in the film wore pink sarees and held long sticks, similar to the people in the plaintiff's organization. However, the treatment of the plaintiff was degrading as the organization of the plaintiff did not operate as a gang and did not use any weapons. The depiction of the life of the plaintiff was made in a crude manner wherein the plaintiff was depicted to be an antisocial personality, wielding swords and engaging in violence. The court found this depiction of the plaintiff to be defamatory and that if the movie was to be released, the plaintiff would suffer irreparable losses. The court later cleared the film for release, on the condition that a disclaimer was to be inserted stating that the film was not based on the plaintiff's life or her organization.[7]

THE HEGELIAN PERSPECTIVE: INTERSECTION WITH MORAL RIGHTS AND PERSONALITY RIGHTS:

Publicity rights are usually said to be a property claim grounded in Lockean labour theory.[8] According to this theory, one's entitlement in property is based upon the labour expended in the same. However, these can be viewed, from the Hegelian prism as well.

The personhood perspective finds its ground in the idea that property provides a unique means of self - actualization, expression and securing recognition and dignity as a person. This, naturally, finds application in intellectual property as well - that is, an idea has to belong with the creator as it is a manifestation of his self. For Hegel, the individual's will is the core of his existence, constantly seeking actuality *(Wirklichkeit)* and effectiveness in the world.

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[5] *R. Rajagopal v. State of Tamil Nadu* 1994 6 SCC 632.

[6] *M/s. Akshaya Creations v. Mrs. V. Muthulakshmi* AIR 2013 Mad 125.

[7] *Sampat Pal v. Sahara One Media and Entertainment Ltd and Ors.*, CS (OS) 638/2014, Delhi High Court.

[8] Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights", 81 CAL. L. REV. 125 (1993).

The 'personality' may be identified with the Will's struggle to actualize its self. The existence of the personal link -- that is when the object expresses or manifests part of the individual's personality -- there is a foundation for property rights over the object by which the "owner" may determine the object's future.

The alienation argument critiques this theory. When a creator - an author, or a painter parts with his work, he essentially gives up his personality stake in the work. In fact, this personality stake is crucial to determine his very right to the work. Hence, alienation renders void the very basis for the Hegelian Argument.[9]

However, the argument of the existence of a personal link (one seeking self-expression or self-actualization and hence an extension of the self) leading to property rights inherently agrees with the idea of personality rights and by extension, publicity rights. Also, 'giving up' or licensing life rights herein, amounts to alienation of such rights and hence, in a way, giving up these rights.

According to Hegelian Theory, such alienation is morally equivalent to slavery or suicide because it is the surrender of a "universal" aspect of the self, and thus wrong. However, the theory does not entirely object to the idea of alienation in the first place (Due to, inter alia, changing definitions of manifestation of the self and so on).

However, there is no doubt that Hegelian Philosophy addresses the core issues at the heart of the Biopic - Copyright debate.

In fact, such Hegelian philosophy has found a place in the German idea of moral rights as well. Thus, drawing upon the Hegelian perception of the work as the fulfilled expression of the author's personality, moral and economic rights are given equal importance.

This is the monistic theory of copyright. However, French jurisprudence, and the philosophy enshrined in Art. 6 of the Berne Convention, perceive moral and economic rights differently and as separate entities (The dualistic theory of copyright).[10] This is emulated in the Indian statute and Indian jurisprudence as well.

a) Moral Rights:

Moral rights are a bundle of privileges in relation to a work which the creator can enforce legally. In general, these privileges include the right to be identified as the author, the right to prevent distortions of the work, the right to compel changes in the work when the essence or

[9] Justin Hughes, "The Philosophy of Intellectual Property', *Georgetown Law Journal,* December, 1988 77 Geo. L.J. 287.

[10] Gillian Davis and Kevin Garnett, *Moral Rights,* (London: Thomson Reuters (Legal) Ltd., 2010), p. 24.

integrity of the work has been altered, and the right to withdraw the work from publication or exhibition.

As per Section 57 of the *Indian Copyrights Act,* 1957, the author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the work, if such distortion, mutilation, modification or other act is prejudicial to his honour or reputation. Moral rights are available to the authors even after the economic rights are assigned. Alternatively, according to the monistic theory, for instance, in Germany, the economic and moral rights are given equal importance and are to be vested together.

The question of moral rights in the context of such biographical films had been brought to light in one of the pleadings in the case of *Phoolan Devi v. Shekhar Kapoor.*[11] Here, the moral rights aspect comes into the picture as an account of her life existed in a tangible form - by way of her writings and that of her authorized biographer. A distortion of the same would result in a violation of moral rights.

In the said case, the Delhi High Court was faced with the question of whether 'public figures' are entitled to any degree of control over the representation of their lives. Here the Defendants were the director and the producers who wanted to make a film on her called 'Bandit Queen'. The Plaintiff had 'licensed' the production of a biopic on her life to the defendant, a reputed film director, who was to consult the plaintiff's own writings and those of her authorized biographer in making the film. However, the defendant – the director of the biopic, also depicted incidents that were never admitted by the Plaintiff and were not mentioned in her writings and those of her biographer. These were sourced from newspapers. They included a graphic gang rape scene where the plaintiff was the victim, and a scene where she was paraded naked. Although generally known, neither of these incidents were either admitted to by the plaintiff herself or mentioned in the plaintiff's own writings and those of her biographer. Also, the film had not been shown to her even several months after it had been released to national and international audiences.

The Court had stated that even if the subject of a biographical work were consent to its creation and dissemination, this cannot extend to creation of the work in total disregard to his or her right to privacy.

One of the contentions that the petitioner's advocate had advanced was that the defendant had no right "to mutilate or distort the facts as based upon prison diaries" and that any such distortion would violate her right under Sec. 57 of the *Indian Copyright Act*, 1957. This section confers certain 'special rights' or moral rights on the author include the right to claim authorship and to restrain any distortion/mutilation or modification of the work that would beprejudicial to his/her honour or reputation.

[11] *Phoolan Devi v. Shekhar Kapoor* 1995 (32) DRJ142.

b) Personality Rights:

The idea of personality rights is not new. In particular, it may be drawn from classical natural law, and its notion of innate, inalienable human rights, which included various rights relating to personality, and forms the background to the modern concept. In 1877 Gareis, and after him Gierke and Kohler, postulated right to personality from which particular rights or interests of personality may develop, such as the rights to physical integrity, freedom, and protection of dignity.

Some legal systems have developed comprehensive protection for personality rights. French law provides a clear example. Here the courts developed an extensive protection of personality interests on the basis of the general delictual provisions, and especially by extending the concept of damage to personality harm. Some of these interests are physical integrity, dignity, good name, feelings (sentiments d'affectiori), privacy and identity (including name and image), and may be identified by the courts as objects of personality rights.[12]

PERSONALITY RIGHTS: RECOGNITION IN INDIA

With a burgeoning celebrity culture, and the constant presence of media, it is necessary that the legal stance of personality rights is clarified. In India, there is no separate legislation dealing with an individual's right to publicity or personality rights.

Traditionally the right to privacy has been invoked to resolve these issues. It has also been largely enforced in India under the common law tort of passing off, to establish which it is necessary to show that the disputed mark possessed goodwill and reputation, that there was misrepresentation of the mark creating likelihood of confusion or deception and there was actual damage or likelihood of damage.

The essence of the right and the enforcement of the same, depends greatly on the commercial exploitation of the plaintiff's mark. Hence, establishing repute of the mark and commercial viability of the same becomes pertinent here. In a similar manner, the celebrity nature of subject becomes a point of argument in publicity disputes. Thus, this justifies why a commoner's name may not be protectable under the tort of passing off.

Section 2(1)(m) of the *Trade Marks Act* that defines 'marks' also includes names within its ambit, but the Act does not make any specific provision for Publicity or Personality Rights.

The right to publicity as a form of the right of privacy was recognized in India by the

[12] Johann Neethling, "Personality Rights: A Comparative Overview', *The Comparative and International Law Journal of Southern Africa,* Vol. 38, No. 2.

Supreme Court in *R. RajaGopal v. State of Tamil Nadu,*[13] where the Court stated that *"the first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent".*

One of the earliest cases that expounded on personality rights was *ICC Development (International) v. Arvee Enterprises and Anr.*[14] The case was regarding the defendants publishing advertisement associating themselves with the plaintiff and the "Cricket World Cup" and passing off plaintiffs indicia and the marks and indulging in unfair trade practice misappropriating its publicity rights. It was herein decided that personality rights cannot be grated to non living entities; the publicity rights in that domain also being taken care of by trademark law, anti-dilution provisions, unfair trade practices and so on.

Thus, it was stated that the right to publicity is one that extends only to persons. It was emphasised that, *"The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event..."*

In *D. M. Entertainment v. Baby Gift House.,*[15] the Defendants had a business wherein they sold toys modeled on Daler Mehendi, a very popular Punjabi pop star. Hence, it amounted to commercial appropriation of his reputation. A permanent injunction was granted in favour of the Plaintiff restraining the use of the trademark "Daler Mahendi", thus recognizing the fact that an entertainer's name may have trademark implications.

In the case of *Titan Industries Limited v. Ramkumar Jewellers,*[16] the celebrity couple Amitabh and Jaya Bacchan had assigned all personality rights to the Plaintiff with regard to print and video in a jewellery advertisement campaign under the brand Tanishq. The defendant, a jeweler dealing in identical goods to those of the plaintiff, was found to have put up a hoarding identical to that of the Plaintiff's including the same photograph of the couple displayed on the plaintiff's hoarding. The defendant had neither sought permission from the couple to use their photograph, nor been authorized to do so by the plaintiff. The court held it liable for infringement of the plaintiff's copyright in the advertisement, as well as for misappropriation of the couple's personality rights, thereby recognizing the same.

Liability for infringement of the Right of publicity thus depended on proving the existence of two factors:

[13] R Raja Gopal v. State of Tamil Nadu 1995 AIR 264.
[14] ICC Development (International) v. Arvee Enterprises and Anr., 2003 VIIAD Delhi 405.
[15] *D. M. Entertainment v. Baby Gift House* [CS (OS) No. 893 of 2002].
[16] *Titan Industries Limited v. Ramkumar Jewellers* CS(OS) 2662 of 2011.

- *Validity: The plaintiff owns an enforceable right in the identity or persona of a human being.*
- *Identifiability: The Celebrity must be identifiable from defendant's unauthorized use. Infringement of right of publicity requires no proof of falsity, confusion, or deception, especially when the celebrity is identifiable. The right of publicity extends beyond the traditional limits of false advertising laws.*

In the suit, *Shivaji Rao Gaikwad (aka Rajinikanth) v. Varsha Production*[17] sinternationally acclaimed actor and cultural icon Rajinikanth had approached the Madras High Court to primarily stay the release and screening of the Hindi film 'Main Hoon Rajinikanth'.

The plaintiff stressed on certain factors. In the first place, the plaintiff is a famous and acclaimed actor and had attained the stature of a cultural icon with his manner of performance, stylized delivery of dialogue, charismatic nature and larger than life persona on screen. Moreover, he had a massive fan base all over the world due to his acting ability, charisma, distinct personal style, and mannerisms. Thus, being a well-known personality, any use/misuse of his name/ caricature/ image/ style of delivering dialogues would amount to infringement of his personality rights as well as passing off. Moreover, such appropriation would deceive the public who would view projects utilizing his name and person as those approved by him or created under his umbrage.

The Plaintiff had also refrained from authorizing any biopic over past decades, as he was against gross commercialization of his name and reputation.

The defendant had unauthorized used the plaintiff's name/image/caricature/style of delivering dialogues to promote their forthcoming feature film to illicitly derive benefit and the same amounted to causing confusion and deception amongst the trade and public and further consequential acts of passing off. Also, the film had scenes of immoral nature, which was entirely antithetical to the nature of films chosen by the plaintiff and his image/reputation amongst the public

In fact, the Madras High Court stated in its judgment that "... *of the opinion that the personality right vests on those persons, who have attained the status of celebrity. Infringement of right of publicity requires no proof of falsity, confusion, or deception, especially when the celebrity is identifiable.*"

The said case thus seeks to establish that once the nexus is established with the person in question, even if not portrayed in negative light, personality rights are attracted; stressing however, on the attainment of "celebrity status". The ratio in this case, thus enunciates the aspect of celebrity status and consequent exploitation of personality rights in the given matrix

[17] *Shivaji Rao Gaikwad (aka Rajinikanth) v. Varsha Productions* 2015 (62) PTC 351 (Madras).

of facts. From this judgment it can be seen that commissioning of a biographical film shall be essential so as avoid legal hassles, due to commercial appropriation of one's persona.

CONCLUSION

The issue of copyright pertaining to biographical films may be approached in several ways - an invasion of privacy, personality rights or moral rights pertaining to documented sources of the work. Personality rights, historically arise from the natural rights perspective. Again, the Hegelian Theory concurs with the idea of protection of personality rights, and in particular, with regard to biopics. As per this theory, the individual may have an inherent right of property with respect to one's life (as aiding in the manifestation of self).As such no substantial jurisprudence has been developed by the Indian courts with regard to publicity rights. The lack of sufficient statutory authority seems to contribute to the same. It is yet to be seen if the Courts espouse the above theories.

In a few scattered cases, the position on celebrity or publicity rights have been elucidated by the Courts wherein the celebrity nature of the subject has been discussed and also the fact that no proof of falsity is required when it is once proved that the likeness is to the subject in question. However, there arises a conflict between the portrayal of facts, which are not copyrightable, but infringes upon the privacy of the subject, also pointing to a larger dilemma of creativity as opposed to protection of rights in question. Here, the affected party may try to enforce the claim of violation of privacy. A lacuna exists with regard to personality rights. The traditional defence in such cases has been that of right to privacy. However, when the facts are in public domain, aspects of publicity rights and commercial appropriation of one's image are usually brought to the fore. Besides claims due to personality rights, in the light of prospective claims of commercial appropriation and violation of privacy as well, it is advisable to adhere to a process of commissioning of biographical works, before commencing work on such films.

THE NEED FOR A CODIFIED LEGISLATION IN THE ARENA OF SPORTS AND MEDIA (RESTRICTED TO SPORTS ARENA) IN INDIA

- Mr. Abhishek Sharma and Ms. R. Santhosh Bharathi***

ABSTRACT

"Sports", the word in itself arouses immeasurable sensation and passion in most of the world's human population. India is not an exception to this scenario. Though, there are numerous conventions and rules laid down by various world authorities including the International Olympic Committee from time to time, it is still a drawback that India does not have codified legislation with respect to the aforementioned fields. First aspect of this paper draws our attention to the lacunae of not having a codified legislation for the realm of sports and media (restricted to sports arena) in India. The second aspect of the paper is regarding how media plays a crucial role in making or breaking the field of sports and the players of the sport(s). The role of media has been mishandled in various situations, which is extremely intolerable. Therefore, the aim of this paper is to bring out various circumstances where the aforementioned need has been overlooked by our law making authorities in India for various reasons untold and lays emphasis on the dire and urgent need to enact relevant legislations for the said realm. Further, the paper also answers the question of how media should be employed ideally for the promotion or even criticism of sports in the most judicious manner. The term "ideal" is very much inclusive of the various practical difficulties that are to be faced before reaching the said goal. The paper hence aims to bridges the gap between such ideology and practical implementation also. The paper employs secondary sources of data only.

1. INTRODUCTION

The history of sports extends as far back as the existence of people as purposive, sportive

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and active beings. It also shows how society has changed its beliefs and therefore how changes in the rules are brought. The history of sports in India dates back to the Vedic era.[1] Chess, wrestling, polo, archery and hockey are some of the games believed to have originated in India. But somewhere between the historical lineage of sports and sports in the modern era there is a gap of enthusiasm and encouragement. Little importance is left for sports at grass root level in India with every school concentrating only on academics. Though there are various federations in India that provide sports facilities India is largely failing in every major event for sports such as Olympics, one of the main reasons for it is the lack of uniform regulation in India for sports. There is a need for a legislation that governs sports and brings various authorities under one roof.

1.1 SPORTS LEGISLATIONS IN INDIA

There is no national or state legislation for regulation of sports in India. The Ministry of Youth Affairs & Sports was set up by the Govt. of India to create the infrastructure and promote capacity building for broad-basing sports as well as for achieving excellence in various competitive events at the national and international levels. Sports promotion is primarily the responsibility of the various National Sports Federations (NSFs) which are autonomous in nature. The Ministry of Sports and Youth Affairs issues notifications and guidelines from time to time for the purpose of regulation of NSFs.

1.2 ORGANIZATION OF SPORTS IN INDIA[2]

The Sports Law in India is governed and regulated by:

- National Sports Policy
- Sports Law and Welfare Association of India
- Sports Authority of India
- The Sports Broadcasting Law in India.

1.3 NATIONAL SPORTS POLICY, 1984/2001

- *The objective of the guidelines of National Sports Policy 2001 is three fold: Firstly to define the areas of responsibility of the various agencies involved in the promotion and development of sports,*
- *Secondly, to identify National Sports Federations eligible for coverage under these guidelines, to set priorities, and to detail the procedures to be followed by the Federations, to avail of Government sponsorship and assistance.*
- *Thirdly, to state the conditions for eligibility which the Government will insist upon while releasing grants to Sports Federations.*

[1] http:/www.thehindu.com /news/national article532101.ece Last visited on March 15 2017.

[2] sportsmaginindia.wordpress.com/category/sports-law/- Last visited on March 28 2017.

In accordance with the provisions of the National Sports Policy, 2001 the Central Government pursues the objectives of "Broad-basing" of Sports and "Achieving Excellence in Sports at the National and International levels" in a combined effort with the State Government, the Olympic Association and the National Sports Federation.[3] The Government of India and the Sports Authority of India, in association with the Indian Olympic Association and the National Sports Federations, are expected to focus specific attention on the objective of achieving excellence at the National and International levels. The National Sports Policy aims to pursue inclusion of "Sports" in the Concurrent List of the Constitution of India and introduction of appropriate legislation for guiding all matters involving national and inter-state jurisdiction.

2. SPORTS AND COMPETITION LAW[4]

Sports law has an unusually well-developed pattern of globalized regulation and overlaps substantially with labour law, contract law, criminal law, public law, administrative law, antitrust law, competition law, intellectual property rights law, law of tort, media law, company law, human rights law etc. These laws have been applied to sporting context involving public order, drugs, safety, disciplinary measures, conduct and wider issues relating to restraint of trade, anti-competitive behaviour, match fixing and the commercial exploitation of sports. Issues like defamation and privacy rights are also an integral aspect of sports law. In India sports figures in the State list of the Seventh Schedule (Entry 33) of the Constitution.

Two teams playing against each other are like two corporate firms producing a single product. The product is the game, weighted by the revenues derived from its play. In one sense, the teams compete; in another, they combine in a single firm in which the success of each branch requires efficiency. Unequally distributed playing talent can produce "competitive imbalance". Remuneration of the team members largely depends on the level of competition between the teams in the particular sports. sport is generally organized in a kind of a 'pyramid' structure, with a single governing body controlling most regulatory and commercial aspects of each sport, the governing body appears to be de facto 'dominant' and therefore claims relating to the abuse of monopoly.

Sports governing bodies such as BCCI, often attempt to preserve for themselves the sole ability to regulate the sport and to organize events. In order to prevent the development of rival organizations, they have sought to tie players in by prohibiting them from competing in otherevents, on pain of exclusion from 'official' events, and such rules have been the subject of challenge under competition law.

[3] http:/franciskuriakose.blogspot.com/2010/09/need-for-sports-law-in-india-published.html – Last visited on March 21 2017.

[4] Noll, Roger. (2007). Broadcasting and team sports.Scottish Journal of Political Economy. 54. 400-421. 10.1111/j.1467-9485.2007.00422.

When the Zee launched Indian Cricket League, the BCCI sacked Kapil Dev. as chairman of the National Cricket Academy for aligning with ICL and barred all the 44 defecting players from playing for India or at the domestic level.[5] It made clear that any cricketer who aligns with ICL will be banned for life from playing for India. Such practice on part of the BCCI may attract liability under the provisions of the Competition Act, 2002. As per Section 4(2) (c) of the Act if any enterprise "indulges in practice or practices resulting in denial of market access in any manner", then it shall be liable for abuse of dominant position. Thus, such practice of banning players from domestic tournaments on account of joining the rival leagues may prove expensive for the BCCI, which may face a challenge on grounds of abuse of dominant position.

3. SPORTS LAW AND ARBITRATION

The Indian Arbitration Act is broadly divided into two parts. Part I applies to arbitrations held in India, whether domestic or international, and Part II applies to arbitrations held outside India. Part II, incorporates the rules related to international arbitrations governed by the New York or Geneva Conventions. In sports, the disputes are first referred to the federations that govern a particular sport and subsequently the international authorities that govern the sport.[6] For instance, in hockey disputes are referred to the Indian Hockey Federation and after that the International Hockey Federation.

At a time when sports are becoming more professional and the stakes are becoming higher than ever, dispute resolution takes on an increasingly important role. In many respects arbitration offers the most suitable solutions with regards to the rapidity, diversity, incontestability and professionalism of the decisions rendered. With regular increase in the number of sports-related disputes in the country, India requires an independent authority that specializes in sports-related problems and that is authorised to pronounce binding decisions. The disputes when referred to courts take a long time to come up with the final decision since the Indian courts are already piled up with a number of pending cases. There is a need to have an authority for sports that offers flexible, quick and inexpensive method of resolution of disputes. With the inauguration of India's first arbitration centre in Delhi in 2009, India is recognizing the necessity of arbitration for quicker disposal of cases. The increasing use of arbitration in sport over the last decade has challenged the legal framework in which arbitration disputes are addressed in many jurisdictions.

[5] http://www.sportstarlive.com/multimedia/archive/02682/ lodha_full_2682954a.pdf Last visited on March 15 2017.

[6] Law, Alan & Harvey, Jean & Kemp, Stuart. (2002). The Global Sport Mass Media Oligopoly The Three Usual Suspects and More. International Review for the Sociology of Sport. 37. 279-302. 10.1177/1012690202037004025.

3.1 COURT OF ARBITRATION FOR SPORT-A NEW STEP TOWARDS RESOLVING SPORTS DISPUTES

Arbitration exists in international sport through the Court of Arbitration for Sport. All international disputes relating to sports are referred to it. The most prominent sports dispute resolution forum is the Court of Arbitration for Sport (CAS)which has its headquarters in Lausanne, Switzerland. The CAS was created by the International Olympic Committee (IOC) in 1983.[7] It also has two permanent outposts in Sydney, Australia and New York, USA. It has a minimum of 150 arbitrators from 37 countries, who are specialists in arbitrations and sports law. They are appointed by the International Council of Arbitration for Sports (ICAS) for a four year renewable term and need to sign a 'letter of independence'. The CAS also has a permanent President who is also the President of ICAS. The body was originally conceived by International Olympic Committee (IOC) President Juan Antonio Samaranch to deal with disputes arising during the Olympics.[8] It was established as part of the IOC in 1984. However in a case decided by the CAS, an appealed was made to the Federal Supreme Court of Switzerland, challenging CAS impartiality. A dispute may be submitted to the CAS only if there is an arbitration agreement between the parties which specifies recourse to the CAS. The language for the CAS is either French or English.

In principle, two types of dispute may be submitted to the CAS:
1. those of a commercial nature, and
2. those of a disciplinary nature.

4. NEED FOR A SPORTS LAW

From a mere source of entertainment and personal recreation, sports have grown into a highly competitive industry with global pervasiveness. It is one of the largest revenue generating industries in the world comprising 3%of the world trade.[9] It has also metamorphosed into an important and inevitable political and social activity. The Beijing Olympics did more for the Chinese soft power in three months, than what diplomacy could do in three decades. The successful bidding to host an international sporting event is a unique opportunity for developing countries to showcase their progress, development and their world standing through their soft power.

India hosted the Commonwealth Games, a sporting fiesta with 5000 competitors from 85 countries, more than 1.2 million spectators and an estimated 26000 crore rupees invested to

[7] Cowie, Campbell, and Mark Williams (1997). "The Economics of Sports Rights." Telecommunications Policy 21(7), pp. 61934.

[8] http://www.investopedia.com/articles/personal-finance/063015/espn-sport monopoly. aspLast visited on April 5 2017.

[9] http/lawquestinternational.com/emerging–sports –law-India Last visited on April 5 2017.

make Delhi the cynosure of the sporting world. Such an event of mind boggling proportions entails problems unique and complex related to infrastructure, licensing, sponsorship, media rights and ethical sporting practices. It is an appropriate moment to analyse the need for lucid legal provisions pertaining to sports in India.

4.1 SPORT'S LAW-A DRAFT MODEL

The Law should establish and promote rules of ethics and spirit of sportsmanship among competitors and the bodies involved in decision making.[10] Ethical solution to legal issues in sports is the core idea behind the vision. This will enhance the morale of the players by improving contractual dynamics among them and the administrative bodies. Contracts must clarify expectations and commitments from the players and agents. Consultancy services must be provided to the sport's bodies and players. Co-ordination of the legal fraternity and the sporting community is a prerequisite for such a healthy interaction.

National identity and the spirit of representing India must supersede political decisions. It would be highly advisable to include a former player of a game at the helm of affairs rather than a mere administrator or politician with vested interests. To check corruption, tenure caps and age restriction on office bearers of federation must be brought in. Denial of essential facilities and exclusionary policies that are intentional for a player or a rival organization should result in the termination of the services of the administrator concerned. Misuse of authority must be severely dealt with.

Salary caps on players and teams should be brought in. Practices that create a barrier for new entrants, draw out the existing players and lead to the foreclosure of a competition must not be tolerated.

A greater sensitivity and legal support must be provided for women players. Perpetrators of harassment and discrimination should be severely punished. Research of excellent quality must be encouraged in the area of sports through continuing education.

The area of sports law is relatively new in our country. Nevertheless, it is an area of study that is worthy of definition and in depth academic inquiry and practice. A well planned exhaustive competition compliance programme can be of great benefit to all enterprises. A fresh perspective, an independent authority and a comprehensive law is the need of the hour.

5. MEDIA LAWS

5.1 A BRIEF HISTORY

Mass Media laws in India have a long history and are deeply rooted in the country's colonial experience under British rule. The earliest regulatory measures can be traced back to 1799

[10] *State of Bombay v. R.M.D. Chamarbaugwala,* AIR 1957 SC 699.

when Lord Wellesley promulgated the Press Regulations, which had the effect of imposing pre-censorship on an infant newspaper publishing industry.[11] The onset of 1835 saw the promulgation of the *Press Act,* which undid most of, the repressive features of earlier legislations on the subject.

However, the most significant day in the history of Media Regulations was the 26th of January 1950 – the day on which the Constitution was brought into force. Although, the Indian Constitution does not expressly mention the liberty of the press, it is evident that the liberty of the press is included in the freedom of speech and expression under Article 19(1) (a). It is however pertinent to mention that, such freedom is not absolute but is qualified by certain clearly defined limitations under Article 19(2) in the interests of the public.

It is necessary to mention here that, this freedom under Article 19(1)(a) is not only cribbed, cabined and confined to newspapers and periodicals but also includes pamphlets, leaflets, handbills, circulars and every sort of publication which affords a vehicle of information and opinion: Thus, although the freedom of the press is guaranteed as a fundamental right, it is necessary for us to deal with the various laws governing the different areas of media so as to appreciate the vast expanse of media laws.

5.2 INSTANCE OF EXPLOITATION BY MEDIA THE MONOPOLY IN SPORTS ADVERTISING[12]

Professional sports play an impactful role in our society and have an extensive reach over the general population. Media networks have a way of influencing thought and opinion regarding athletes, teams, owners and fans alike. A true definition of monopoly lacks any form of competition, which truly isn't the case in sports media. What is certain is that content is king in the business of sports media and coverage. Ultimately, the network that can perform the toughest bidding and grasp the most in-demand sporting events will enjoy a prosperous business for a long time to come.

Sports as an event is not just restricted to entertainment it has transformed itself into an economic activity with a great potential to generate huge amount of money through broadcasting and advertisement. Sports events generate huge revenue even before it is played by way of sale of broadcasting rights which fetch a huge amount to the organisers. Few Media houses are using their dominant position and huge monetary powers to buy broadcasting rights of the Sports events and are creating monopoly.

[11] Noll, Roger. (2007). Broadcasting and team sports.Scottish Journal of Political Economy. 54. 400-421. 10.1111/j.1467-9485.2007.00422.

[12] Law, Alan & Harvey, Jean & Kemp, Stuart. (2002). The Global Sport Mass Media Oligopoly The Three Usual Suspects and More. International Review for the Sociology of Sport. 37. 279-302. 10.1177/1012690202037004025.

MONOPOLY in sport is suddenly a sensitive issue. The escalating cost of watching games is pushing anti-trust authorities to examine the deals between sporting bodies and broadcasters. Britain's competition watchdog is scrutinising English football.[13] The European Commission now has several investigations under way into restrictive practices in European football and monopolistic behaviour in Formula One motor racing and an American Court recently ruled that the National Basketball Association (NBA) could not prevent the Chicago Bulls selling rights to games that are not broadcast as part of the NBA's exclusive television deal.

Money is pouring into sport because viewers are willing to cough up a lot to watch it. They pay for it in different—and mainly indirect—ways: through taxes to finance public-service television; through time spent watching additional advertising during matches broadcast on commercial networks; in subscription fees to cable or satellite channels; or directly, on a pay-per-view basis. But viewers are paying over the odds because sporting authorities are able to use their control over the supply of games to force up the price of TV rights. America's National Football League (*NFL*) is negotiating eight-year deals worth a total of $15 billion with several American TV networks. BSkyB, which broadcasts via satellite in Britain, is paying the English Premier League £620m ($1 billion) over four seasons for the rights to a fraction of its matches.[14]

Striking down exclusive broadcasting deals might somewhat lower the cost of watching sport. But this would not solve the problem entirely; in the case of the NFL, the league has managed to apportion rights among several broadcasters in such a way as to maximise its profits. This suggests that the purveyors of sport are exercising monopoly power.

There are two ways to curb monopoly power: inject competition or regulate the monopoly. The first of these is hard to apply to sports. Although team owners often assert that they compete not just with other teams but with other forms of entertainment, that is true only to a limited extent. Football fans are unlikely to find cricket, much less Titanic, an acceptable substitute for a soccer match.

Competition between authorities within a particular sport is also a non-starter. Fans prefer a single World Cup because they want to know which country's football team is the best in the world; a rival tournament would defeat that purpose. Just ask boxing fans. They are fed up with the endless punch-ups between the four boxing organisations, which rarely deliver the bouts that would establish undisputed "world champions". Sustained competition has been rare. Once the American Football League gained a foothold, the NFL's bosses quickly realised that

[13] Smith, Paul & Evens, Tom &Iosifidis, Petros. (2015). The regulation of television sports broadcasting: a comparative analysis. Media, Culture & Society. 37. .10.1177/ 016344371 5577244.

[14] Szymanksi, Stefan (2000). "Hearts, Minds and the Restrictive Practices Court Case." Football Governance Research Center, University of London.

all concerned would make more money if the upstart league merged with the NFL instead of competing against it.[15] Regulation is a more plausible option. It is recommended that a government agency to control the prices broadcasters charge viewers. That, in turn, would hold down the fees broadcasters would pay for sports rights. As in other regulated industries, prices could be set to ensure a reasonable return for teams and broadcasters.

This would not be as simple as it sounds. Because viewers pay mainly in indirect ways, the price is difficult to determine and hence hard to cap. Some broadcasters would surely find clever ways around the rules. Moreover, there is no obvious way to determine the "right" price. If it is too high, consumers will not benefit. If it is set low and teams' revenues fall, fans may moan if top stars move abroad to earn higher wages.

Perhaps the solution is competition—among teams. They could be forced to sell broadcasting rights to their home games individually, rather than as a cartel. Boxers already do this. Germany's competition authority recently told German football clubs to do the same for international matches, and is considering applying that rule to domestic ones too.[16]

Competition may work well where viewers' loyalties to a particular team are primarily based on how good it is and how well it is marketed—as in most American sports. Competition among teams would boost the number of games shown and keep broadcast fees low. But selling rights individually may work less well where fans' support is more tribal—as is still mainly the case in European football. If, say, Inter Milan charged more for the right to broadcast its matches, its fans would not, by and large, switch to other teams' games. Indeed, supporters of the most successful teams could end up paying far more to view broadcasts than they do now. That would be doubly bad, because a wider gap between rich and poor clubs would make sport more predictable and so less fun to watch.

Many Media houses are misusing this dominant position and depriving the rights of other media houses of broadcasting the sports events. Although the Indian Competition Act does have provisions to deal with abuse of dominant position by any entity but it is not applied to Sports Broadcasting Rights as the same is governed by Private Contracts which remove the applicability of Competition laws.[17] Hence there is a need to have a Sports Legislation to deal with the sale of broadcasting rights to ensure there is free and fair competition in the media houses in respect of sale of broadcasting rights.

[15] Gruneau R, Whitson D, Cantelon H, "Methods and media: studying the sports/television discourse", *Society and Leisure* 1988; 11(2):265-81.

[16] New, Bill & Le Grand, Julian.(1999). Monopoly in sports broadcasting. Policy Studies.20.. 10.1080/01442879908423764.

[17] Section 4 of *Competition Act,* 2002.

6. CONCLUSION

Sports are not only an event but phenomena which has immense respect and patriotism attached to it. Sports have great potential to generate revenue also. There is no concept of national boundary in sports and hence, India, must formulate a codified legislation which is also in line with the Global Sports Law and must make sure that the commercial aspects are also covered in the same. The legislation must have provisions for breach of IP Contracts, Competition Law matters and such other aspects. Sports Law in India must aim at curbing the monopoly gained by Media when it comes to broadcasting since, the same is dominated and monopolized only by a handful of market players. Therefore, legislators must ensure that India has a robust Sports Legislation in the nearest future.

SPORTS LAURELS: PLAYER'S INCENTIVE OR PUBLIC REVENUE? (AN OVERVIEW OF TAXATION OF AWARDS AROUND THE WORLD)

*- Ms. Sugandha Chowdhry**

INTRODUCTION

P. V. Sindhu and Sakshi Malik are two names that every Indian revered with great honour and joy at the conclusion of Rio Olympics 2016. These young women showed the world outstanding performances and raised the Indian flags up high at the world's most celebrated sports event. P. V. Sindhu, by winning silver at the Olympics in Badminton, became the first ever Indian woman to win a silver medal and Sakshi Malik, with her bronze medal in 58 kg freestyle wrestling, became the first Indian woman to win at a wrestling event, in Olympics.

With all the national and international recognition, the two wereconferred Rajiv Gandhi Khel Ratna Awards by the Government of India for their achievements. Apart from this, they received abundant amount of prizes in the forms of cash, and movables like jewellery and vehicles. PV Sindhu alone received awards more than twenty crore rupees. The question that needs consideration is how much of such awards do these players actually take home and how much is deducted as tax.

There is now a different regime emerging in several countries which deals with taxation matters for sportspersons, with Sweden being the only country that has a specific legislation dedicated to it. The following essay specifically illuminates the issue of taxation of the awards received by athletes. The author has explained the taxation trends as prevalent in England, Australia and India. The provisions of the *Indian Income Tax Act,* 1961 are analysed in light of

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the 2013 *Abhinav Bindra* taxation case,[1] which laid down several landmarks in this field for the country.

TRENDS AROUND THE WORLD

a. ENGLAND

In England, testimonial matches are kept out of the purview of taxation, provided that there is no contractual right of the sportsmen towards any benefit arises from such matches.[2] One of the first taxation cases in sports industry was recorded in 1972.[3] England became the 1966 Fédération Internationale de Football Association (FIFA) World Cup Champions after a hard fought match against West Germany. Mr. Bobby Moore, the Captain and a lead player of the team, was given several awards from the Football Association (FA) of England and Radox Bath Salt Corporation. These rewards were regarded by the Inland Revenue as part of his taxable income.

Justice Brightman of the British Court rejected the claims of the taxation authority, holding the award to the team as applause for his victory in an exceptional event, rather than an income earned by rendering any services. The conclusion was made on the basis of non-foreseeability principle that the player in question was unaware of the payment until the time of its receipt, as the payment was neither announced nor expected prior to the event.

Accordingly, the payment made to Moore by FA was held to be a 'testimonial' for his participation and the reward made by Radox Bath Salt was regarded as nothing more than its advertisement.

The general principle was thus established that payments received by sportsmen as rewards could be taxed, but where it could be proved that such payment was made as a mark of appreciation and esteem, it was not to be taxed.

b. AUSTRALIA

Australia has developed its law to distinguish between amateur and professional players. In 1978, Phillip Vincent Kelly was awarded with the "Channel 7 Sandover Medal" by receiving the most votes from umpires for being the 'fairest and best player' in that season's West Australian National Football League (WANFL), along with a cash award worth

[1] *Abhinav Bindra v. Deputy Commissioner of Income-Tax, Central-2, Dehradun,* 2013 (8) TMI 56 ITAT Delhi.

[2] James Malcolm, *The Taxation of Small Businesses* 2016-17182 (Spiramus Press Ltd 9th ed., 2016).

[3] *Moore v. Griffiths* (Inspector of Taxes),[1972] 1 WLR 1024.

$20,000.Kelly did not have a contract with his club; however he received a fixed 'remuneration' for each game played. Contrary to the British case of *Moore,* there was a pre-season announcement made that such a payment would be made along with the award in the years 1978, 1979, 1980 and 1981. Justice Franklyn of the Supreme Court of Western Australia held this payment to be a direct incident of the Kelly's employment as a footballer with his club, the East Perth Football Club.[4]

Thus, any receipts in the form of prize money or awards would be taxable in Australia if the player is a professional, because these players play with a business motive and, any property, movable or immovable, received in accordance with such awards are to be regarded as business receipts.[5]

c. INDIA

The Income Tax Act, 1961 was passed with a framework to tax only those receipts which are construed as income. The term "income" as defined under Section 2(24) of the Act, includes gifts of immovable or movable property that exceed the value of fifty thousand rupees.[6] Such gifts are taxable under the head 'Income from Other Sources.'[7]

Following this, a question arises as to whether the prize money received by sportsperson on their achievements can be construed as gifts to be taxable. The most recent controversy which answers this question to an extent is the case of Abhinav Bindra.[8] The case explicates his journey with the laurels received after the Beijing 2008 Olympics and the efforts of the revenue authorities to tax these laurels.

In 2008, Abhinav Bindra, made a historic record of becoming the first ever Indian to win a gold medal at Olympics. He was showered with awards by several governments, institutions and corporates, which were subsequently taxed as 'income from other sources'. He claimed an exemption under Circular No. 447[9] issued by the Income Tax Department, which similarly to the Australian Courts, made a distinction between the professional and non-professional (amateur) players and made the receipts of only professional players taxable. The awards of a non-professional player were classified as gifts and personal testimonials.

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[4] *Kelly v. FCT,* (1985) 85 ATC 4283.

[5] *Stone v. FCT,* (2005) 2005 ATC 4234.

[6] *Income Tax Act,* 1961, Section 2(24)(xv) read with Section 56(2)(vii).

[7] *Income Tax Act,* 1961, Section 56(2).

[8] *Abhinav Bindra v. Deputy Commissioner of Income-Tax, Central-2, Dehradun,* 2013 (8) TMI 56 ITAT Delhi.

[9] Circular No.447 [F.NO.199/1/86-IT(A-I)], dated January 1st, 1986, issued by the Income Tax Department, Government of India.

In the case, Bindra claimed himself to be an amateur player. He claimed shooting to be his hobby, just like his other interests like painting and sculpting. This claim was disputed neither by the Assessing Officer nor the CIT. In the light of the facts presented, the Court accepted his claim of being an amateur, applied the Circular and held the rewards as gifts. Hence, he neither had to pay taxes for any rewards or prizes, nor werethere any enhancements in his income.

ANALYSIS

Hence, it all boils down in these cases to ascertain the motive behind the player, whether it is for business or for recreation.

The Circular referred by Abhinav Bindra has now been superseded by Income Tax Department Circular No. 2 of 2014.[10] The 2014 Circular was passed as the earlier Circular had become 'inapplicable' with the current developments in the taxation laws.[11] The awards received by the non-professional sportsmen are now taxable under 'gift tax'.

Section10 of the *Income Tax Act* provides exemptions to total taxable income. Here clause 17A is relevant. It provides for payments made in cash or kind by the Central or State Government either in public interest[12] or for any purpose approved by the Central Government.[13] This implies that where awards are granted by government, there is scope of sports persons to get exemptions, if they can prove that their payments are under the purview of Section 10(17A). However, the 2014 Circular read with this Section, makes it clear that all payments received by private entities would be treated as gifts and taxed accordingly.

The current subject of taxation requires more clarity, as to which government awards can be exempted and whether it is upto the awarding State or the Union Ministry to grant such an exemption. As mentioned earlier, Sweden has an exclusive legislation that governs taxation matters regarding sportspersons. However, since India already has exhaustive tax legislation, it would be unreasonable to make another for this specific aspect. However we can adopt provisions like that of Income Tax Law of Tukey (ITL), which lists out what payments received by sportspersons are taxable. Article 29 of ITL allows amateur sportspersons to exclude their bonuses and awards from tax liability. Thus, in Turkey, bonuses and awards paid to professional players are taxable.

When it comes to Olympic awards, there are countries which have specifically made funds for awards, as a part of their National Olympic Committees, such as Canadian Olympic

[10] Circular No. 2 [F.No.199/01/2014-ITA.I], dated January 20th, 2014, issued by the Income Tax Department, Government of India.

[11] *Finance* (No. 2) Act, 2004.

[12] *Income Tax Act,* 1961, Section 10(17A)(I).

[13] *Income Tax Act,* 1961, Section 10(17A)(ii).

Committee's Athlete Excellence Fund grants awards of $20,000, $15,000 and $10,000 for winning Olympic gold, silver and bronze medals respectively.[14] At the time of giving these awards, it is made clear to the players the tax liability attached to the receipts. Similar practice can be adopted by India, wherein the Central Government or the respective State Governments can specify whether such awards are in public interest or a part of a purpose approved by the Central Government.

CONCLUDING REMARKS

Sports players make huge investments with respect to time, money and efforts in their sports, be it amateur or professional players. There are many developed countries, such as United Stated, Germany, Canada etc., with well-established sports systems, where joining sports is considered a lucrative option right from the childhood. This in turns reflects in the outstanding performances in international arenas. But then on the other side, there are developing countries, where issues such as health, education and transportation take priority over sports. Sports players, eventually face several hindrances in their road to international competitions, such as proper coaching facilities, budget approvals etc. in such countries, including India, it becomes all the more necessary to grant awards in cash and kind to give incentives to players, to train hard and win for the country. However, the purpose to incentivise may not be achieved if these awards also come under the purview of taxation, especially where there are high taxation rates.

In Indian content, there is a pressing need for clarity and simplification of taxation rules in this aspect, especially when we look from a broader perspective of India's overall achievements at the global level. Out of a huge contingent of 119 players sent to Rio in 2016 Olympics, only 2 of them brought back medals and were awarded for the same. These awards should be a means to incentivise the players and not seen as a source of taxable public revenue by the government.

[14] Canadian Olympic Committee Athlete Excellence Fund (AEF), http://olympic.ca/programs /athlete-excellence-fund/ (last accessed April 26 2018 at 2200 hours).

TECHNOLOGY IN SPORT AND ITSLEGAL ASPECTS

*- Mr. Wilfred A. Synrem**

ABSTRACT

The field of Sport when merged with Technology indicates its massive potential. However, in order to attain it, the study of the legal implications of Technology in Sport is crucial. This is because only through extensive analysis on cases and Judgments, can one set up apt rules and regulations to monitor a particular Sport. Cases such as Oscar Pistorius' appeal to the Court of Arbitration for Sport and the banning of Speedo LZR swimsuits, is thoroughly analyzed in this article. This paper primarily focuses on the impact of new technologies, on sportspersons and the Sport itself. These technologies include the brand new wearable technology, athlete biological passports and revolutionized sport's equipment. Though the main highlight of this paper is the study on data privacy issues caused by wearable technology, ancillary research has also been done on Hypoxic environments and the use of Prostheses in the Olympics.

RESEARCH PAPER

Tommy Lasorda, a famous Major Baseball league player, once quoted, "The difference between the impossible and the possible lies in a person's determination". But we do forget the importance of science which helps in bridging the gap between the impossible and the possible; Technology. Yes, technology has played a massive part in the evolution of sport since the inception of the former. From the use of 'Photo Finish', 'Electronic scoring'[1] and 'instant replays' to inventions of Goal-line technology, Athlete Biological passports and wearable

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[1] The Boston Globe, https://www.bostonglobe.com/sports/2012/11/03/brief-history technologysports/GwvgQafARUbW5SG5ep3cyM/story.html, last visited on May 30, 2017.

devices,[2] technology has been integrated with sports in order to better the sport. When we talk about new technology, we refer to the improved performances of top notch professionals with the help of materials such as fiberglass, carbon-fiber and polyurethane.[3] Fiberglass was implemented in pole vault and javelin, carbon-fiber made the hull in ship- sailing competitions light and stiff, whilst polyurethane had discarded the stiff leather footballs.

To elucidate, technology has helped to overwrite 43 swimming world records in a matter of eight days[4] with the help of the new Speedo LZR swimsuits, it has made the impossible possible. But with new science and technology come new legislations, new legal aspects and various legal problems. To keep this brand new integration of science in check with the spirit of the game, legislations are being passed to monitor the sport and its institutions. Through this very article we can discover the legal implications, both positive and negative, of the technology used in various sports. Ultimately, we need to assess the present technologies and the upcoming ones, and fill in the gaps of our legislations so as to monitor the growing sport.

WEARABLE TECHNOLOGY AND DATA PROTECTION

Being very much in vogue, wearable technology is growing day by day in the tech industry. For the past couple of years, performance analysis software has been superimposed with the evolution of wearable technology in the name of a medical tool, coaching tool and a fitness one. The idea of "quantified self" movement i.e. monitoring personal data through the use of technology has resulted in the growth of this tech industry in sport, enticing consumers from both ends of the spectrum- the fitness and health enthusiast, and the professional athlete.[5] The annual sales of 70 million fitness and health monitoring devices (2014) and a surplus sale of 68 million (2015) depicts the true colours of this exciting project.[6] The industry is expected to be worth over 53 billion U.S. Dollars by the end of 2019.[7]

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[2] Catapult USA Wearable Technology for Elite Sports, http://www.catapultsports.com/media/how-wearable-technology-will-change-sports/ last visited on May 30, 2017.

[3] Technologist Innovation. Explained., http://www.technologist.eu/the-sports-revolution/, last visited on May 30, 2017.

[4] Krush Performance, [The World Leader in Performance Information], http://www.jeffkrush.com/technology-sports-doping/, last visited on May 30, 2017.

[5] Jonny Madill, "Wearable tech in sport: the legal implications of data collection", https://www. lawinsport.com/articles/item/wearable-tech-in-sport-the-legal implications- of-data collection, last visited on 5 Apr. 2015.

[6] Samuel Gibbs, "The future of wearable technology is not wearables – it's analysing the data", https://www.the guardian.com/technology/2015/jan/06/future-wearable-technology analysing-data, last visited on Jan 6, 2015 at 21:18.

[7] Juniper Research, https://www.juniperresearch.com/press/press-releases/smart-wearables market-to-generate-$53bn-hardware, last visited on May 30, 2017.

Aside from the fact that top notch sports teams implement this technology upon their players, wearable technology also aids in medical analysis and prevents injury through data. This application is clearly seen in the National Football League (NFL) and other various Rugby clubs, in the form of Athlete Biometric Data (ABD). The NFL has in fact, partnered with Zebra Technologies to analyze the athlete biometric data to capture each athlete's acceleration rate and distance covered by the player.[8] But the highlight of the impact sensors worn behind the ear lobes is that it records data and calculates the extent of the injury impacted onto the head.[9] These impact sensors which help in measuring concussions to the brain were developed by the X2Biosystems.

The main problem with this technology is that who would be in control over this biometric data; the athlete or other anonymous organizations. A NFL player himself stressed on the issue that the player's absolute right on the data is being taken away. This hi-tech not only detects minute changes in a player's performance but also predicts the longevity of the player on the pitch.[10] For example, a player could see a decrease in his pay on macro factors such as age, prior sustaining injuries and biometric data. Ultimately, this technology of ABD has a massive backdrop in terms of its legal aspects. There are no existing laws and legislations in the US which directly addresses the legal challenges posed by ABD. It is of no certainty as to who owns the biometric data. Biometric data is interchangeable with the term "sports statistics" and therefore could be placed under free speech of the First Amendment, yet biometric data could predominantly be treated under the Health Insurance Portability and Accountability act of the US.[11] Eventually this leads to the big sphere of concerns comprising intellectual property rights, privacy rights, publicity rights and obviously data protection rights.[12] Furthermore, athlete data is being defined as a 'right' belonging to an athlete, under NFL player contracts which may be used by the NFLPA and the NFL in connection with products, services, etc.

Looking at the bigger picture, wearable technology has a major discrepancy: Is the vulnerable data extracted from professionals well protected. For example, the latest Google

[8] Kristy Gale, "Data Generated By Wearable Tech Presents Many challenges In Sports", https://www.sporttechie.com/data-generated-by-wearable-tech-presents-many-challenges in-sports/ last visited on 13 May 2016.

[9] Paul Bolton, "Saracens take fight against concussion to new level", http://www. telegraph. co.uk/sport/rugbyunion/club/11324385/Saracens-take-fight-against-concussion-to-new level.html, last visited on Jan 4, 2015, 22:30.

[10] Jared Lindzon, "Wearable tech will transform sport – but will it also ruin athletes' personal lives?",https://www.theguardian.com/technology/2015/aug/09/wearable-technology sports-athletes-personal-lives, last visited on 9 Aug. 2015.

[11] *Supra* 8.

[12] Kristy Gale, "3 Things You Need to Know About How Sports are Impacted by Athlete Biometric Data - Tao of Sports Podcast",https://www.linkedin.com/pulse/3-things-you need-know-how-sports-impacted-athlete biometric-gale, last visited on 8 June 2016.

Therefore, ABD contracts must be well defined and careful consideration must be given to the rights of athletes, league, teams, and their sponsors so as to maintain a sense of unity and harmony.

Glass, a fantastic wearable embraced by sportspersons all across the globe.[13] Significant grey area of this technology is pretty similar that it has the potential to enable anything heard or seen by the smart glass user to be captured, shared and archived. This danger of unsolicited image sharing inevitably leads to a privacy issue surrounding internet enabling devices.[14]

The gravity of the situation is alarming because technology has climbed up the ladder so fast that an individual's distances, speed, temperature, heart rate, sleep patterns and calorie intake is easily quantified.[15] US laws on data protection have not been straight forward, but UK laws on the other hand have approached the matter in a more clarified way.

In the United Kingdom, data and information is governed by the *Data Protection Act,*[16] 1998 (DPA). The cardinal rule of this act is that is applicable only when the use is for business purposes or when personal information is processed by organizations (sporting organizations), but not when used in personal capacity. The DPA mainly directs its wordings on three categories of persons. First, the 'data controller', is the one who directs the purpose and the manner in which the data is processed. Second, the 'data processor' is in reality a third party which processes the data on behalf of the controller. Third, the 'data subject' is the athlete or the individual who is the subject of the personal data.[17]

The DPA has 6 principles that are very closely related to athletic and sports data in schedule 1 of the act.[18] First, *'consent';* the consent of the data subject (the athlete) prior to data collection is to be taken into consideration with the help of agreements. Second, *'awareness';* the data subject must be made aware of the specific purpose of the use of such data and that the application of such data outside the specified purpose is strictly prohibited. Third, 'personal data must be up to date'; the data must be updated and accurate else likely to lead to liability of the data processor and subject. Fourth, 'time period'; personal data must not be retained for a

[13] John Koetsier, "Pro sports first: Tennis player to wear Google Glass at Wimbledon this week",https://venturebeat.com/2013/06/20/pro-sports-first-tennis-player-to-wear-google glass-at-wimbledon-this-week/, add last visited on 20 June 2013, 9:44.

[14] Tom Page, "A forecast of the adoption of wearable technology", 6 *IJTD* 12, 25 (2015).

[15] *Supra* 5.

[16] *Data Protection Act,* 1998.

[17] ▪ 1(1), *Data Protection Act,* 1998.

[18] Iain Taker, "Data protection and Sport – an uncertain partnership", https://www. lawinsport. com/articles/intellectual-property-law/item/data-protection-and-sport-an-uncertain partnership, last visited on 15 Feb. 2012.

time period longer than actually needed. This personal data was collected in the anticipation of a one-off event and therefore it should not extend the necessary time limit. Fifth, 'precautionary measures', appropriate measures should be taken such as adequate back-ups of the data. The security of the data is important; therefore there should be succinct procedures and penalties for the violation of the same. Last, information in the form of data must not be transferred outside of the UK, unless the recipient country has an adequate level of safeguards for this technology.

Let us take up a real life illustration to explain data protection better; the German National Football team *('DieMannschaft')*. In 2014, they had implemented the Adidas miCoach system into their practice and training sessions for their World Cup preparations.[19] It is an advanced physiological monitoring system which included a small player cell device worn by the players. Not only did it have additional heart beat sensors but also iPads connected to it. The coaches along with the performance innovation team at EXOS and Adidas used this technology through in depth analysis, thus the success story of Joachim Loew's men.

The legal pointers concerning this illustration are as follows:

- The player (say Thomas Mueller), has specific rights over his personal data. He has to be aware as to why and where the data is being used whether it is performance analysis, injury prevention or marketing. Apart from this, an athlete has the right to even request the data controller to correct any inaccuracy. This is because it could potentially influence selectors in the wrong way.
- Here, Adidas and EXOS are the third parties *i.e.* the data processors, whereas the German National Football team is the data controller. Still the concern is that which party is the actual owner of that personal data, other the subject data themselves, so as to manipulate it. Holistically, the main debate still remains as to what extent could these third parties use the personal data of the players which could include some sensitive data like health, sex life, religious beliefs, etc.[20]
- With the growth of technology, the employment contracts and ancillary agreements between the players and their respective clubs are becoming more important. The drafting of key provision is crucial in these agreements also comprising third party ties which require data to be entered with device manufacturers, broadcasters, sponsors and other anonymous organizations. So much is the advancement in the tech world that these wearables have the capacity to store personal data in the cloud[21] as well as smartphones. Therefore, an organization or party

[19] SportTechie, https://www.sporttechie.com/how-the-adidas-micoach-system-has-helped germany-in-the-world-cup/, last visited on May 30, 2017.

[20] *Ibid.*

[21] Samuel Gibbs, "Court sets legal precedent with evidence from Fitbit health tracker", https://www.theguardian.com/technology/2014/nov/18/court-accepts-data-fitbit-health tracker, last visited on 18 Nov. 2014, 16:03.

borrowing this data must be well informed about the laws and provisions governing such obligations.

Last but not the least we come to what Indian law says about, the rising wearable technology and data protection. Initially the country had no direct laws governing personal data. Therefore the courts had interpreted "data protection" within the ambits of right to privacy governed by both articles 19[22] and 21[23] of the Indian Constitution. Furthermore, section 43A[24] of the *Information Technology Act* states, "Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected." Thereafter, section 72 of the same act concurs for liability, in cases of disclosure of information, against the sanctity of contracts.[25] In 2011, following stringent laws of Europe on data protection,[26] the Government of India enacted a new legislation namely, the *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules.* In strict juxtaposition with the UK laws, this legislation has very similar rules and principles, thus encouraging the amalgamation of technology and sport in India.

As iterated before, the age of wearable technology has incorporated a new textbook into the field of law. In fact, wearable technology has been very helpful to the courts as reliable evidences. In a recent such case of a woman named Nina Risley who claimed herself raped at night; it was found that she was awake and walking all night, with the help of her Fitbit data.[27] Hence, she was charged with a false report and tampering with evidence. Another such important case was when Fitbit technology was used to detect whether a Canadian woman's physical activity was affected following a car accident.[28] This very personal injury lawsuit has set up Fitbit health trackers as a precedent.[29]

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[22] Art. 19, Constitution of India, 1949.

[23] Art. 21, Constitution of India, 1949.

[24] Section 43A, *the Information Technology Act,* 2000.

[25] Section 72, *the Information Technology Act,* 2000.

[26] Vaibhavi Pandey, *India: Data Protection Laws In India: The Road Ahead,* http:// www. mondaq.com/india/x/408602/data+protection/DATA+PROTECTION+LAW +IN+INDIA+THE+ROAD+AHEAD, last visited on July 1, 2015.

[27] Le Trinh, "Can Your Fitbit Data Be Used Against You in Court?", *FindLaw,* http://blogs.findlaw.com/blotter/2015/07/can-your-fitbit-data-be-used-against-you-in court.html, last visited on 14 July 2015, 14:59.

[28] Alexandro Alba, "Police, attorneys are using fitness trackers as court evidence", http://www.nydailynews.com/news/national/police-attorneys-fitness-trackers-court evidence-article-1.2607432, last visited on 19 Apr. 2016 T 15:20.

[29] *Supra* 21.

ATHLETE BIOLOGICAL PASSPORT

As an independent governing body, WADA's goal is to "promote, coordinate, and monitor the fight against doping in sports in all its forms.[30] Before the introduction of the biological passport, players were kept in check through direct medical tests. This was the "no start rule" which aimed to prevent athletes from competing if their hemoglobin levels crossed the established limits.[31] Then came the more advanced method of detecting doping *i.e.* through the Athlete Biological Passport.

When compared to the traditional methods of detecting doping, the Athlete Biological Passport (ABP) monitors selected variables that reveal the effects of doping, over time.[32] When compared to the traditional methods of detecting doping, the Athlete Biological Passport (ABP) monitors selected variables that reveal the effects of doping, over time. To be more precise and technical, the principle is based on Bayesian networks through a mathematical formalism based on probabilities shown on a graph.[33] That in itself is a modern day technology.

To eradicate problems relating to leaking of sensitive personal information about athletes, the WADA has a developed a well designed code, International Standard for the Protection of Privacy and Personal Information (ISPPPI). The ISPPPI code ensures and recognizes the importance of privacy rights of the sports persons. This International Standard provides mandatory rules and standards relating to the protection of Personal Information by Anti-Doping Organizations.[34] The usual norm of securing, processing, disclosure, retaining and handling of personal data has been enlisted into the Standard. However, the main highlight of the code is that, in order to coordinate distribution of tests and to avoid unnecessary duplication of test samples by various anti-doping organizations, each organization shall report all In-Competition and Out-of Competition tests on such Athletes to the WADA clearinghouse as soon as possible.[35]

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[30] James Halt, "Where is the Privacy in WADA's "Whereabouts" Rule?", 20 *Marq Sports L Rev* 267, 268 (2009).

[31] Zorzoli M, "Biological passport parameters", 6 *J. Hum. Sport Exerc.* (I), (i) (2011).

[32] World Anti-Doping Agency, https://www.wada-ama.org/en/questions-answers/athlete biological-passport, last visited on May 30, 2017.

[33] Fabian Sanchis Gomar, "Current limitations of the Athlete's Biological Passport use in sports", *Opinion Paper in Clinical Chemistry and Laboratory Medicine,* 2011.

[34] International Standard for the Protection of Privacy and Personal Information, 2015, https://www.wada-ama.org/sites/default/files/resources/files/WADA-2015-ISPPPI-Final EN.pdf, last visited on 30 May 2017.

[35] Art. 14.5, International Standard for the Protection of Privacy and Personal Information, 2015.

The Court of Arbitration of Sports (CAS) has treated athlete biological passports as reliable means to prove doping.[36] There have been many successful cases in which the passports have been used as evidence. High profile sportspersons such as German speed skater Claudia Pechstein (2009), Russian cyclist Denis Menchov (2010), Russian walker Igor Yerokhin (2013), Portuguese marathon runner Helder Ornelas and the legendary US cyclist Lance Armstrong, were caught for doping with the help of ABP's.[37] However, there have been some stellar cases where the defence has tried to prove the discrepancies of the biological passport. They are as follows:

- In 2014, Former Team Sky cyclist Jonathan Tiernan-Locke was given a two year ban by the UK Anti-Doping (UKDA) for manipulation of the drug EPO into his system.[38] The defence contended that he had a binge drinking session which could have resulted into "wildly abnormal" readings. Unfortunately for him, the three man panel stripped him off his 'Tour of Britain' title.
- A more controversial case was that of the Italian cyclist Franco Pellizotti in 2011. The defence team had argued before the Italian anti-doping tribunal that, the blood variations in the biological passport was due to altitude training and was not significant enough to prove his guilt. The Italian tribunal had adjudged the defendant innocent, but on an appeal to the Court of Arbitration of Sports by the Union Cycliste Internationale (UCI), he was penalized with a two year ban.
- The infamous case of superstar cyclist Alberto Contador was an illustration of inadvertent doping. The defence claimed that he had eaten contaminated beef; proving his innocence. However, the ruthlessness of CAS had prevailed as they banned him.[39]

SPORTS EQUIPMENT AS TECHNOLOGY

The most effect any sports equipment has had in any sport, in terms of technology, is in the world of swimming. Prior to the Beijing Olympics of 2008, Speedo with the help of the NASA team had developed a spectacular sportswear called the Speedo LZR Racer swimsuit. The design was tested in a NASA wind tunnel and tested through advanced computational models. Swimmers who wore this suit broke 23 out of 25 records in the Olympics.[40] What made headsreally turn to this new controversy, was when 43 new world records were broken during

[36] *Supra* 31.

[37] Matt Slater, "Has the biological passport delivered clean or confused sport?",*BBC Sport,* http://www.bbc.com/sport/cycling/29959937, add last visited on 12 Nov. 2014.

[38] UKAD, http://www.ukad.org.uk/news/article/ukad-confirms-two-year-ban-for professional-cyclist/, last visited on May 30, 2017.

[39] *UCI v. Alberto Contador & RFEC,* Case No. CAS 2011/A/2384 (Feb. 6, 2012); WADA v. *Alberto Contador & RFEC,* Case No. CAS 2011/A/2386 (Feb. 6, 2012).

[40] *Breaking Muscle,* https://breakingmuscle.com/learn/technology-doping-in-the-olympics cheating-or-progress last visited on 30 May, 2017.

the eight day FINA World Championship (2009) by athletes wearing the same swim suit.[41] In a span of 23 months and by the end of 2009, a staggering 255 new records were set. To exemplify the impact of this technology, we take the example of Russian great Alex Popov who held the 100m freestyle record for a decade. The new swimsuit technology was so powerful that by the end of 2009, he was not even ranked in the top 100.[42]

The polyurethane swimsuit covers the whole body from shoulder to calf and was designed to optimize body compression and hydrodynamics.[43] In layman's terms, it was built to reduce swimmer's drag, to supply adequate oxygen to the muscles and to trap air in order to add to the buoyancy.[44] Actually, this type of Hi Tech suit was legalized in 1999, when FINA approved the "Full Bodysuit" and the "Long John suit" manufactured by Adidas and Speedo respectively.[45] However, there was a FINA rule (SW 10.7) which prevented the use of devices which could the swimmers in speed, buoyancy, or endurance during the competition (such as webbed gloves, flippers, fins, etc.). But FINA did not interpret the swimsuits as the devices with the brackets, thus the legalization of the suits. Ultimately, following the rise of technology, FINA adopted the "Dubai Charter on FINA requirements for swimwear approval" which specified that the materials of the swimwear should not create any air trapping effects. Therefore the LZR suit was banned. In fact, in *Amaury Leveaux & Aurore Mongel v. Fédération Internationale de Natation (FINA),* the appellants tried to arbitrate for their swimwear, before the Court of Arbitration for Sports (CAS).[46] Unfortunately, along with their Tracer B8 suit, the other competitor's polyurethane suits were banned.

Cycling has also been revolutionized by technology to the extent that performances have been improved by 221% in last 111years with the help of new Hi-tech bikes.[47] In addition to the transition from the original metal frames to the carbon fiber ones, the new bikes have Bluetooth integrated GPS systems, electronic gears, power meters, etc.[48] Nonetheless with technology,

[41] *Supra* 4.

[42] *Britannica Blog,* http://blogs.britannica.com/2010/02/performance-enhancing-high-tech swimsuits/, last visited on 30 May, 2017.

[43] Jon Bardin, "Is technological doping the strongest force in the Olympics?", http://articles.latimes.com/2012/jul/24/science/la-sci-sn-is-technological-doping-the strongest-force-in-the-olympics-20120724, last visited on 24 July 2012.

[44] PDD, http://www.pddinnovation.com/blog/2012/07/technology-in-sport-competitive edge-or-unfair-advantage/ last visited on 30 May, 2017.

[45] Advisory opinion: Australian Olympic Committee (AOC), Case No. CAS 2000/C/267 (May 1, 2000).

[46] *Amaury Leveaux & Aurore Mongelv. FINA,* Case No. CAS 2009/A/1917 (July 29, 2009).

[47] *Supra* 43.

[48] Nick Legan, "You Can Build A Bionic Cycle", BBC, http://www.bbc.com/autos/story /20160707-you-can-build-a-bionic-bicycle, last visited on 7 July 2016.

came the term 'motorized doping'. The jargon first surfaced when David Cassani accused Fabian Cancellara in the 2010 Paris-Roubaix and Tour of Flanders of riding with a motor in his frame.[49] Then, when Ryder Hesjedal's bike was spinning on the ground, whilst on the ground, during the 2014 Vuelta a España, the UCI took clear note of it and investigated. Ultimately, the jargon proved to be true when a spare bike of Femke Van den Driessche at the U23 Cyclo-cross World Championships (2016) was discovered to contain a 'Vivax Assist' motor. Not only did the UCI ban her for six months but was also fined for 50,000 Euros. Article 1.3.010 of the 'Clarification guide of the UCI technical regulation' clearly stated the bicycle should not be pcopelled by any electric assistance.[50] The motor is normally enclosed inside the seat tube with a gear which powers the bracket axle to move the pedals.

Actually, in order to restrict the applications of technology in cycling, the UCI had produced the Lugano charter which basically aimed to maintain constant efficiency in the bikes.[51] This was done so as to witness that technology did not aid the current day riders in breaking old records. Once, a British cyclist Graeme Obree had developed a cycle made out of washing machine parts such that it generated excess power through his thighs.[52] He even invented a 'superman' position to aerodynamically support him.[53] Unfortunately for him, the UCI had banned his two innovations.

As we discussed earlier about the impact sensors by the X2Biosystems, implemented in rugby for detecting concussions in the head. However, in a more preventive approach, smaller rugby leagues and junior leagues decided to use extra padded helmets. A product called the "Guardian Cap" was introduced to reduce head impacts up to 33%. It had compartments fitted with extra foam, which dissipated more energy compared to the solid shells.[54] Unfortunately, the caps could not gain validity because of its non-compliance with the National Operating Committee on Standards for Athletic Equipment (NOCSAE). The NOCSAE is of the view that any addition to the helmet that alters the protective system, through extra padding, would

[49] Stuart Clarke, "Everything you need to know about the motorised doping", *Cycling Weekly,* scandalhttp: //www.cyclingweekly.com/cycling-weekly/everything-you-need-to-know about-the-motorised-doping-scandal-209635, add last visited on 22 Apr 2016.

[50] Art. 1.3.010, Clarification Guide Of The UCI Technical Regulation, 2014.

[51] Sarah Boseley, "London 2012 Olympics: How athletes use technology to win medals", *The Guardian* (July 4, 2012, 00:03), https://www.theguardian.com/sport/2012/jul/04/london 2012-olympic-games-sport-technology, add last visited on.

[52] *Supra* 44.

[53] Andi Miah, *Rethinking Enhancement in Sport,* 1093 ANN. N.Y. ACAD. SCI.301, 308 (2006).

[54] Gary Micohes, "More padding the issue of concussions and better helmets", *USA Today Sports*, https://www.usatoday.com/story/sports/ncaaf/2013/07/30/ concussions-college football-nfl-guardian-caps/2601063/, (last visited on July 30, 2013, 18:26).

change the geometry of the helmet and increase its weight. In 2012, Unequal Technologies had introduced the Unequal Dome which contained a padded skull cap. After NOCSAE testing, it was highly recommended by doctors for high risk players who require proactive protection.[55]

When it comes to golf and technology, we refer to the high profile case of professional American golfer, Casey Martin, who suffered from a left leg circular disorder known as Klippel-Trenaunay-Webber syndrome.[56] Therefore he required to move around in a buggy (motorized car) in between his shots. The US Professional Golf Association decided to ban the technology, citing that it gave him an unfair advantage over the other golfers and change the nature of the game.[57] However, the Supreme Court of the US overruled the association's decision by stating that the use of the buggy did not alter the nature of the game, as it was not a fundamental part of the sport.

The golf ball has been altered many times down the years. First, it took its transition from the old traditional 'gutta percha' ball to the rubber one which had more flight.[58] Obviously, the professionals who were skilled with the old ball protested the move to replace the same. Decades later, the Polara golf[59] was introduced which had a dimple pattern all over its surface. It reduced the ball from being hooked or sliced, hence, benefitting the amateur players. For that very reason it was banned. Another technology that was also banned was the golf club heads which was shaped in 'U' or square grooves.[60] This innovation changed the traditional and typical nature of the sport by reducing the skill to play it.

The most unique piece of technology that has embarked upon the field of athletics is the 'prostheses'. The famous Paralympian, Oscar Pistorius, used lower limb prostheses made out of carbon fiber, during his events.[61] With this he had the intention to try his steel out in the Olympics. In fact, his skill and strength combined with the technology made him a strong

[55] PR NEWSWIRE, http://www.prnewswire.com/news-releases/unequal-technologies debuts-the-latest-innovation-in-supplemental-head-padding-201238441.html, last visited on May 30, 2017.

[56] Bryce Dyer, "The controversy of sports technology: a systematic review", 4 *Springer Plus* 1, 1 (2015).

[57] Brendan Burkett, Mike McNameeb and Wolfgang Potthastc , "Shifting boundaries in sports technology and disability: equal rights or unfair advantage in the case of Oscar Pistorius?", 26 *Disability & Society* 634, 649 (2011).

[58] Wray Vamplew, *Playing with the Rules: Influences on the Development of Regulation in Sport*, 24 INT'L J HIST SPORT 843, 855 (2007).

[59] Bryce Dyer, Siamak Noroozi, Philip Sewell, and Sabi Redwood, "The Fair Use of Lower Limb Running Prostheses: A Delphi Study", 28 *Adapt Phys Activ Q* 16, 17 (2011).

[60] *Supra* 56.

[61] *Supra* 56.

contender for the 400m in the Beijing Olympics (2008). But the conundrum lied in whether he would be at an advantage compared to fully able bodies. Adding to that, in 2007 the International Association of Athletics Federations (IAAF) Rule 144.2 forbade the usage of any technological device that "incorporated springs, wheels or any other element" and which gave an unfair advantage over other competitors.[62] The IAAF conducted tests on Oscar Pistorius and five other able athletes and compared them with the help of the expert Dr. Brüggemann. The tests concluded that the prostheses when juxtaposed with normal leg strength, gave a mechanical advantage[63] of 30%, thus yielding a 25% lower oxygen uptake by the athlete bearing the prosthetic technology.[64] Taking this Cologne Report into consideration, the IAAF banned Oscar Pistorius from the Beijing Olympics.

Eventually, Oscar appealed to the Court of Arbitration for Sport citing his right to run in the Olympics. The CAS ultimately ruled in his favour for four main reasons.[65] First, the Cologne report was only based on the part where the appellant ran the fastest, and not the overall race. The report excluded the slow start and the acceleration phase of Mr. Pistorius, which created a distorted view. Second, Dr. Brüggemann was not made known of his role by the IAAF. He was not told that the report was to determine the advantages and disadvantages of the *Cheetah Flex Foot* Prostheses, and the IAAF submitted an inaccurate brief summary of the report without the authentication by the Doctor himself. Third, the IAAF did not allow the scientist nominated by the appellant to actively take part in the tests. He was just made an "observer" of the proceedings, and, his questions and suggestions were out rightly ignored. And, fourth, the Rule 144.2 was ambiguous. Since, there was no solid evidence regarding the advantages of the prosthetic technology and considering the low standards of IAAF, the CAS ruled to allow Oscar Pistorius to take part in the London Olympics, 2012.

In 2015, following the Pistorius case, Paralympic long jump master, Markus Rehm decided to force in a similar judgment for himself. However, IAAF's new rules required one to prove that the technology did not give the bearer an unfair advantage. Not only did the prostheses better takeoff efficiency, but the fact he used his prosthetic leg to jump, added to his detriment.[66] Another illustration of the legal problems concerning the prosthetic technology is the controversial double legged amputee. Unilateral amputees are of the same view that the

[62] *Supra 57*, at 644.

[63] Stuart Miller, "Should prosthetics be allowed in non-amputee events?",https: // uksportsci. wordpress.com/2012/11/26/prosthetics-in-sport/comment-page-1/, add last visited on. 26 Nov 2016.

[64] *Pistorius V. IAAF,* Case No. CAS 2008/A/1480 (May 16, 2008).

[65] *Ibid.*

[66] Larry Greenemeier, "Blade Runners: Do High-Tech Prostheses Give Runners an Unfair Advantage?", https://www.scientificamerican.com/article/blade-runners-do-high-tech prostheses-give-runners-an-unfair-advantage/, last visited on 5 Aug. 2016.

double legged amputees were at an advantage because the latter could easily increase the height of their prostheses.[67] On the contrary, tests and researches did not prove that the bilateral amputees were at an advantage. The bilateral amputees were not in contravention of article 3.3.2(b) of the IPC's Athletics rulebook i.e. unrealistic enhancement of stride length. This current issue is still in debate because facts like "Seven of the fastest eight times in the 200m and the top six times in the 400m belong to bilateral",[68] speaks volumes.

The final element that could be brought within the ambit of sports equipment is 'Hypoxic Environments'. It is a performing enhancing and expert administered technology that aims to reduce athlete effort by making the athlete more efficient.[69] The hypoxic artificial environment is an alternative to techniques like altitude training, since the latter led to side effects such as insomnia, headache, dizziness, hyperventilation, etc. These environments have air pressure corresponding to altitudes ranging from 4000 to 5000 meters, thus, helping to improve the oxygen carrying capacity of the red blood cells in the body.[70] Despite its pros, the technology is under debate as to whether it should be banned by WADA since it can be seen as another form of 'blood doping'.

WADA's criteria for banning Hypoxic environments are- 1. It should have the potential to enhance performance, 2. It should have potential health risks to athletes, 3. It should violate the spirit of sport. In relation to the second criteria, it is a fact that an extensive exposure to hypoxia causes epithelial injury, hence, culminating in thrombosis. Therefore, it boils down to the last criteria, as to whether this technology is an ethical one. Can the argument, that "sport should be based on virtuous perfection of natural talents", be an important one.[71] Initially, the WADA Ethical Issues Review Panel (2006) endorsed the same opinion on the ethical issue of the matter. But after receiving heavy criticism, the inquiry declined not to ban the hypoxic chambers. On a brief analysis, there were mainly three reasons why there was no violation of the third criteria vis a vis the WADA code. First, if sport was only to be based on natural talent,

[67] Garett Ross, "Technology at Paralympics sparks advances and controversy", https://commmedia.psu.edu/special-coverage/story/2016-paralympics-games/technology at-paralympics-sparks-advances-and-controversy, last visited on 17 Sep 2016.

[68] Joe Lemire, "Tech Doping: How Paralympic Sprinters Game The System",http:// www. vocativ.com /354886/tech-doping-how-paralympic-sprinters-game-the system/?wpsrc= theweek,last visited on 8 Sep 2016, 17:03.

[69] Sigmund Loland, "The Ethics Of Performance- Enhancing Technology In Sport", 36 *J Phil Sport* 152, 159 (2009).

[70] Giuseppe Lippi, Massimo Franchini, and Gian Cesare Guidi, "Prohibition of artificial hypoxic environments in sports: health risks rather than ethics", 32 *Appl. Physiol. Nutr. Metab.* 1206, 1206 (2007).

[71] David James, "The Ethics of Using Engineering to Enhance Athletic Performance", 2 *Procedia Engineering* 3405, 3407 (2010).

then artificial heat chambers and weight training facilities would simultaneously be banned. Removal of artificial aids would not only deter the progress of Sport but also act as a detriment to Sports.[72] Second, the Hypoxic machine does not level out natural, inborn or genetic differences between the competitors.[73] Third, the spirit of sport does not signify complete or universal leveling of athletes' circumstances.[74] If that were the case, then athletes living on sea level could file an injustice. On a bigger note, a Hypoxic environment is a Human Enhancement Technology and not a sports engineering development.-

CONCLUSION

Technology had integrated into sports as early as, 1888, when the Photo Finish was adopted. Not only has technology gathered pace with time but also added a new dimension to sports. To elucidate we take the example of, the operation of video cameras and computers in international sports federations and top notch competitions. In competitions such as the Olympics, the responsibility upon judges is extremely high. Although these judges are the competent ones, they are prone to simple errors just like every human is. Therefore, video camera replays and computers assist the judges in determining results and also reviewing controversial decisions.[75] Other applications of the devices are the Goal line Technology (Football), 3rd umpire (cricket), Hawk Eye electronic line judgment (Tennis), etc. Yet, in a more pragmatic view, the video and camera technology is being highly scrutinized by International Federations because it could potentially destroy the nature and the tradition of the concerned sport.

We need to realize that there is a lag between technology in sport and legislations governing the same. There is a desire for laws which could provide which technologies are acceptable in any concerned sport and which isn't. Technology which destroys the spirit of the sport or alters the typical nature of the game should be scrapped. In actuality, the preceding statement is easier said than done because different circumstances tend different solutions. For example; the debate as to whether Paralympians should have a shot in the Olympics. The overall advantage of the technology must be taken into consideration with the help of intense research, and, the disabled region of the body must also be noted. Therefore, with each case the circumstances are different which in turn makes it difficult for the organizations to maintain a common code.

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[72] M. Spriggs,"Hypoxic air machines: performance enhancement through effective training—or cheating?", 31 *JMed Ethics* 112, 112 (2005).

[73] T Tannsjo, "Hypoxic air machines: Commentary", 31 *J Med Ethics* 113, 113 (2005).

[74] Andi Miah, "Rethinking Enhancement in Sport", 1093 *Ann. N.Y. Acad. Sci.* 301, 315 (2006).

[75] James A.R. Nafziger, "Avoiding and Resolving Disputes During Sports Competition: Of Cameras and Computers", 15 Marq Sports L Rev. 13, 26 (2007).

Nonetheless, International Federations have done their utmost best to leave no stone unturned. From WADA's data privacy standards to the Lugano Charter of the UCI, the legislations have helped in maintaining the essence of the Sport in relation with the rights of the sportspersons. The legal implications of technology in sport are vast and changing with time. Therefore organizations like IAAF, WADA, UCI, etc. and even more importantly the Court of Arbitration for Sport (CAS) must be on their toes. You never know; their next predicted challenge could be Genetic modification in athletes.

IN LOCO PARENTIS – NEED OF STRINGENT LAW

- Ms. Krithika K. G.[*]

Sports is the spirit of the life and the involvement of human being in it is from times immemorial. The origin of sports cannot be traced. It is the one which prompts the human being to energetic and healthy. Generally, sports is divided as Indoor sports and outdoor sports. Indoor sports are the activities that takes place in a closed premises or building[1] where as Outdoor sports are the one which takes place in the open premises. These sports are not just limited for humans, certain of the sports involve animals as well.

It is to be noted that any game for that matter will have its own set of rules and regulations that is to be adhered. The regulations of the game may be with respect to safety concern or healthy play or for any other justified reason. For all the reasons the Coach/Trainer/Teacher plays a vital role. He is the one who teaches trainees and moderates the game. According to Oxford Dictionary, "An instructor or trainer in sport is the Coach."[2]

Primary responsibility of the Coach is to assist athletes to prepare training programs, communicate effectively with athletes, guide athletes to develop new skills, use evaluation tests to monitor training progress and predict performance.[3]

Apart from the rules of the game, a set of laws and authorities regulate the sports activities and the same is termed as Sports Law. Sports law is a branch of law which is applied law in the field of sports, physical education and its related fields.[4] It is to be noted here that Sports has been enlisted under the State list as 'Entry 33 of List II of the Seventh Schedule of the *Constitution of India.*[5] 'There are commissions and committees formed by the Government to

[*] Legal Counsel at Rai Technology University, Dodaballapur.

[1] http://dictionary.reverso.net/english-cobuild/indoor%20games, (last visited on17.02.2018).

[2] https://en.oxforddictionaries.com/definition/coach, (last visited on 14.02.2018).

[3] http://www.topendsports.com/coaching/role.htm, (last visited on 14.02.2018).

[4] http://www.sportslawindia.info/sportslaw.htm, (last visited on 12.02.2018).

[5] http://lexquest.in/saga-sports-law-india/, (last visited on 19.02.2018).

run the show of the Sports Law. Sports law still continues to be as a grey area as there is no concrete and special enactment for the same. Sports law thus depends on *Indian Contract Act,*[6] *Competition Act,*[7] Law of Torts and other allied laws.

There is no national or state legislation for regulation of sports in India. The Government has however created The Ministry of Youth Affairs & Sports, National Sports Federations (NSFs) but it has failed to serve the purpose. In addition to this National Sports Policy, Sports Law and Welfare Association of India, Sports Authority of India and The Sports Broadcasting Law in India were brought in force.

It is very much evident that India is missing Sports Law as a form of legislation. There is need for a stringent law to govern the overall sports activities in the country.

Today, India has made landmark achievement in the field of sports. With reference to sports age is just a number. Currently, we are witnessing the young sports icons, who have achieved and have reached unimagined milestones.

Hence amongst all others, the prominent area in which law should concentrate is on that of Minor Sportspersons. These days' children do actively involve themselves in the sports activity irrespective of gender. Schools have adopted modern method of teaching and sports are encouraged to the maximum extent. Parents motivate their children to play sports and also support them so that they can opt for it as a career. Contrary with the growth of the same, the country is facing issues of child labor, selling of children, sexual abuse and other issues under the heading of sports. In this direction the children should be safeguarded and the relationship between the coach and the student should be well defined. It would not be offensive to state that the existing laws have no room and space for the role of minors in the developing Indian Sports.

Gurgaon Police in *Guidelines for Safety of Children in Schools* quoted that "4.5.8. In case children have to stay back for after school activities, there should be a reliable authorized adult in charge, preferably a permanent teacher who takes responsibility to ensure safety of children till the final dispersal. (if there is a stay back for sports or swimming, then besides the teachers/masters involved for the subject, a female teacher must mandatorily also be present to supervise)." It has made the school and faculty responsible for the safety of the students.

School Education and Sports Department of Mumbai made a notification[8] that it the responsibility of the schools to encourage the students to involve in sports and take care of the same by monitoring and regulating. The school should possess necessary equipments for the sports activities. This notification defines child as the one between age group of 6 to 14 andit

[6] Act No. 9 of 1872, dated 25th April, 1872.
[7] Act 12 of 2003.
[8] No. PRE-2010/C.R-211 (B)/PE-1.

will extend up to 18 years for specially abled children. Even Bengaluru Police has passed an official notification mentioning about the liability of the schools in ensuring the safety of the students.[9] The drawback of this notification is that this applies to a particular geographical boundary and so is not definite law.

In spite of these notifications, in July 2009, the Manager of the Indian women's cricket team was alleged for Harassment and sexual exploitation of female athletes. The female athletes stated that he sent them embarrassing messages and complained of sexual harassment and nepotism.

The case of a child runner in India provoked much media interest and led to accusations that the boy had been sold by his mother, trafficked, and sexually and physically abused. Such issues raise not just physiological and social questions but also test the ethical basis of youth sport.[10]

In May 2015, four female athletes attempted to commit suicide by eating a local poisonous fruit. One of them could not be saved whereas the other three were saved. This event took place at Water Sports Centre of the Sports Authority of India at Punnamada near Alappuzha.[11]

In June 2015, an athlete aged 18 years attempted suicide by slashing his wrist in a branch of SAI. He was immediately hospitalized and there the athlete left hospital before he could complete the treatment.[12] This is a clear example that shows the mental trauma that athletes are facing.

In order to combat the issues involving coach and student, courts are facing trouble. There is no definition for the legal relationship that exists between them.

As there are no specific legislations, Indian Courts would have to refer to Law of TORT.[13] Latin Maxims are the core source of Tort Law. The appropriate maxim that is to be applied for the relationship of the Coach and Minor sportsperson would be *IN LOCO PARENTIS.* Literally, this means "in place of parent."[14]

The *in loco parentis* legal doctrine can be applied to both governmental and non-governmental entities, and is implicated "when a person [or legal entity] undertakes the care

[9] http://www.bcp.gov.in/doc/Steps%20Taken%20for%20School%20Childrean%20Safety.pdf, (last retrieved on 16.04.2018).

[10] Rowland, Thomas, 'Child Marathoners, Cont'd: The case of the "Indian Boy" ', *Pediatric Exercise Science,* vol. 18, no. 4, (2006), pp. 369,373.

[11] The Hindu, dated May 2015.

[12] The Hindu, dated June 15 2015.

[13] Tort is a branch of law that deals with that of the civil liability.

[14] http://www.quaqua.org/inlocoparentis.htm, (last visited on 14.02.2018)

and control of another [person of legal incapacity] in the absence of such supervision by the latter's natural parents and in the absence of formal legal approval."[15] The doctrine most commonly applies to minors, but can apply in other contexts, such as adult-age persons who are suffering from permanent and severe medical incapacity.

For the application of the Loco Parentis there should be a minor,[16] his parents should be absent voluntarily or reasons beyond his control, Adult care taker who is not his legal Guardian and adult guardian who has assumed control over the activities of the minor temporarily.

This Doctrine of *Loco Parentis* has been established by Indian Courts in many instances and has held up the applicability of the same. In *AvinashNagara v. Navodaya Vidya Samithi*[17] the Honorable Supreme Court opined that "It is, therefore, the duty of the teacher to take such care of the pupils as a careful parent would take of its children and the ordinary principle of vicarious liability would apply where negligence is that of a teacher". In the same case Honorable Supreme Court also opined that "His/her character and conduct should be more like Rishi and as loco parent is and such is the duty, responsibility and charge expected of a teacher".

In this sense it can be derived that the Coach as a teacher owes Duty of Care to the Trainees under him.

The Immediate question that arises is whether the teacher/coach can impose corporeal punishment[18] for the minor under him by exercising the power empowered under this legal maxim. The answer is No. The duty of care which is split as Legal Duty of Care and Moral Duty of care bounds the coach to act in a reasonable manner. The maxim has entrusted the duty of the parent and not that of the right.

In USA, there is separate legislations for Amateur sports, Professional sports and International sports.[19] In India there is no such classification. With respect to Sports law other countries of the world have progressed. It is a misery that India has not developed or

[15] Black's Law Dictionary 787 (6th Ed. 1990)(quoting Griego v. Hogan, 377 P.2d 953, 955-56 (N.M. 1963)).

[16] In India under Section 4 (a) of Hindu Minority and Guardianship Act, 1956: means a person who has not completed the age of eighteen years

[17] 1997 (2) SCC 534.

[18] "any punishment in which physical force is used and intended to cause some degree of pain or discomfort" – as commented by Committee on the Rights of the Child in the General Comment No. 8.

[19] http://www.indialawjournal.org/archives/volume3/issue_2/article_by_Gaurang.html, (last visited on 14.02.2018).

progressed in this regard. Sports Bill is been kept pending due to difference of opinion. The situation is alarming the needs of a definite law. The recent trends in games require it in India.

Though there are Juvenile Justice Act, POCSO Act, IPC and other legislations to govern, there is a need of the stringent law in India. Latin Maxim quotes that "Justice Delayed is Justice Denied". Henceforth it is to be considered in the disputes arising with respect to the minor sports athletes there is a need of specific legislation before the situations grow out of control.

CBFC'S RIGHT OF PRE-CENSORSHIP: HOW RELEVENT IS IT IN TODAY'S TIMES?

- Mr. Shashwat Nayak and Ms. Shruti Poddar***

ABSTRACT

India is the largest producer of films in the world and also happens to be the second oldest. The Indian film industry, which includes films made in languages such as Hindi, Bengali, Tamil, Telugu, Malayali, Marathi among many others, is not only one of the most popular movie industries of the world with demand across the globe but also one of the largest revenue generating sectors of the country. One of the controversies relating to this industry that have come to light in recent years and have large scale polarised opinions, is the question of Pre-censorship in films and the powers of the CBFC, which is the regulatory body of film certification in India. Rampant orders for censorship in movies based on various grounds ranging from public decency to law and order situations have led to the filing of PIL before the Supreme Court of India challenging the powers of the CBF to that effect. This paper seeks to understand the proposition laid down by the Supreme Court on this issue, in the landmark judgment of K.A. Abbas, and analyse its applicability in today's times especially whether the impugned provisions of the Cinematograph Act and Rules stand the test of Article 14 or not. This paper also seeks to analyse the merits of the petition filed by Mr. Amol Palekar, and review the Shyam Benegal Committee Report on CBFC and whether or not 'documentary films' should come under the ambit of the impugned Act.

I. INTRODUCTION

In what can be referred to as the single most revolutionary move to challenge the powers of "censorship" entrusted with the Central Board of Film Certification ("CBFC") for more than 4

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decades, the Writ Petition filed by veteran actor and director, Mr. Amol Palekar before the Supreme Court of India on the 17th of April, 2017 as a Public Interest Litigation, seeks to bring to an end, orders for "cuts" in films to be exhibited. The Petition challenges the Constitutional validity of various provisions of the *Cinematograph Act of* 1952, *Cinematograph (Certification) Rules of* 1983, and various guidelines made under the former. The crux of the contention as enlisted in the Petition is based on the violation of Fundamental Rights enshrined under Articles 19(1)(a)[1] and 14[2] of the Constitution of India i.e., Right to Freedom of Speech and Expression and the Right to Equality, respectively. The Petition contends that the trend followed by the CBFC of ordering cuts or other type of modifications to titles, dialogues, scenes, or lyrics of songs for viewing in theatres is redundant because the same can be viewed either on the internet or otherwise in the digital platform due to the vast dissemination of information that is predominant in the 21st century. Thus, the very concept of such censorship is violative of the Right to Equality, let alone the creative freedom of the maker of the films. The Petition also seeks to question the constitution of the Board and selection of the members of the CBFC along with a plea to enforce the *Shyam Benegal Committee Report*[3] on the functioning of the CBFC.The petition has propelled the Supreme Court bench consisting of Hon'ble Justice A. K. Sikri and Hon'ble Justice Ashok Bhushan to issue notices to the CBFC and the Information and Broadcasting Ministry of the Central Government and awaits a reply to the plea questioning the censorship law.

Before we go any further into the merits of the Petitions, we must first list out the claims sought for. The writ petition© No. 187 of 2017 filed by Mr. Palekar through eminent Senior Advocate Gopal Subramanium seeks the following remedies as stated by a write up shared by the Mr. Palekar himself on a blog:[4]

1)To quash Section 4(1)(iii) of the *Cinematograph Act,* 1952 which empowers the CBFC to carry out excisions amounting to pre-censorship, which is an unreasonable restriction.
2)To declare the present CBFC as incompetent to carry on functions under the *Cinematograph Act.*
3)To declare Section 5-B inapplicable to Section 4(1)(iii) since the guidelines under Section 5-B are for 'certification' and not for 'pre- censorship'.

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[1] Article 19 (1)(a), *Constitution of India,* 1950.

[2] *Ibid, Article* 14.

[3] Press Information Bureau, Government of India, Ministry of Information & Broadcasting, ShyamBenegal Committee submits its report on Cinematograph Act/ Rules to Shri Jaitley, available at http://pib.nic.in /newsite/Print Release.aspx?relid=142288, last accessed on 31 May 2017, 20:35.

[4] Amol Palekar, "In India, the Very Process of Film Certification is a Punishment," available athttps://thewire.in/125084/amol-palekar-film-censorship-supreme-court-petition/, last accessed on May 30 2017, 21:00.

4)To quash the said guidelines which are abstract, vague, imprecise leading to rampant erratic, subjective interpretations of scenes/language in a film amounting to unfair curtailment of the filmmakers' freedom of expression.

5)To increase the categories for certification under Section 4(1) or 5A(1) considering the age group and commensurate sensibilities of the audience in mind.

6)To remove 'documentary' from the ambit of definition Sections 2(c) and (dd), and to only require documentaries to include a disclaimer for audiences (eg. about its suitability for persons above a certain age) that the CBFC can review and approve.

7)To quash certain provisions which provide for appointments of the members of the board and/or the examining committee, or the revising committee, or even the Film Certification Appellate Tribunal (FACT), without specifying any qualifications – leading to subjective, erratic, arbitrary interpretation of over broad, imprecise guidelines by unqualified members, which in itself is very unfair and amounts to an unreasonable restriction on the filmmakers' freedom of speech.

8)That the recommendations of the Shyam Benegal Committee be given effect during the pendency of this petition.

II. SETTLED POINT OF LAW: *K.A. ABBAS v. UNION OF INDIA*

The power of the CBFC to censor movies was first and possibly last raised in the case of *K.A. Abbas v. Union of India.*[5] In the case that was heard by the 5-Judge Constitutional Bench of the Supreme Court, the merits were perused in due light of Article 19(1)(a) of the Constitution.[6] It is pertinent to note that at this juncture, Section 4 (1)(iii) of *The Cinematograph Act,* 1952[7] did not exist, but nevertheless the power of censorship as a whole was endowed upon the CBFC. The Court, in this case, did resonate the pains of the movie makers and asked for not just a clearer procedure being laid down for such censorship but also sought for a quicker remedy. However, the Court in a cost benefit analysis between the Rights under Article 19 and the restrictions under the same, gave leverage to the latter. The Court refused to do away with censorship entirely and concluded that,

> *"Although we are not inclined to hold that the directions are defective in so far as they go, we are of opinion that directions to emphasize the importance of art to a value judgment by the censors need to be included. Whether this is done by Parliament or by the Central Government, it hardly matters. The whole of the law and the regulation under it will have always to be considered and if the further tests laid down here are followed, the system of censorship with the procedural safeguards accepted by the Solicitor General will make censorship accord with our Fundamental Rights."*

[5] *K.A. Abbas v. Union of India,* AIR 1971 SC 481.

[6] *Supra* note 1.

[7] Section 4(1)(iii), *the Cinematograph Act,* 1952.

The Court held that censorship "does not offend, Article 19(1)(a) as the restriction by *censorship is within the ambit of Article 19(2)as reasonable restriction.*" With respect to the question of pre-censorship, the Court also held that,

> *"Pre-censorship is but an aspect of censorship and bears the same relationshipin quality to the material as censorship after the motion picture has had a run. The only difference is one of the stage at which the State interposes its regulation between the individual and his freedom. Beyond that, there is no vital difference. That censorship is prevalent all the world over in some form or another and pre-censorship also plays where motion pictures are involved,shows the desirability of censorship in this field."*With the lack of a reference point for guidelines assigned particularly for films, the Court referred to the case of *Ranjit D. Udeshi*[8] in which the Court laid down certain principles on which the obscenity of a book was to be considered with a view to deciding whether the book should be allowed to circulate or withdrawn. Those principles were said to apply *mutatismutand* is to films.

III. MISUTILIZATION OF SECTION 4(1)(iii), CINEMATOGRAPH ACT, 1952

The most important amongst the impugned provisions in the petition is that of Section 4(1)(iii) of the *Cinematograph Act* of 1952. Section 4 titled, *"Examination of films"reads- "Any person desiring to exhibit any film shall in the prescribed manner make an application to the Board for a certificate in respect thereof, and the Board may, after examining or having the film examined in the prescribed manner" in sub-section 1 with the most important provision covered in clause (iii), "direct the applicant to carry out such excisions or modifications in the film as it thinks necessary before sanctioning the film for public exhibition under any of the foregoing clauses."*[9]

It is essential to note that this provision did not exist in the original Act of 1952, but was added as a part of an Amendment in the year 1981 and effected from the 1st of June 1983. This is the only provision that talks about a *modification or excision* giving effect to 'censor' under the Act which otherwise is about certification of films as clearly laid down by the Preamble of the Act, *"An Act to make provision for the certification of cinematograph films for exhibition and for regulating exhibitions by means of cinematographs."*[10] Thus, whether the original intention of the framers of this regulatory legislation is censoring is otherwise debatable.

This provision, thus, acts as a tool to direct the makers of the film to 'cut', 'remove' or otherwise 'change' a part of the film that is deemed to be unfit for public exhibition at large. It is not difficult to find an example of such a situation as there are plenty in the recent history.Recent examples of the exercise of this Section is movie *Sameer* (2017) where the

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[8] *Ranjit D. Udeshi v. State of Maharashtra,* AIR 1965 SC 881.

[9] *Ibid.*

[10] Preamble,*Cinematograph Act,* 1952.

phrase "*Mann kibaat*" was sought to be removed from a dialogue because it was the name of a radio show hosted by Prime Minister, Shri Narendra Modi. Another recent instance is where the makers of the movie *Modi ka Gaon* (2017)were asked to seek permission to use this name from the Prime Minister's office before the grant of title to the film. In the 2014 *film Munna Pandey Berozgaar,* the CBFC ordered for the removal of an entire song from the film, followed by muting words such, *"pharan," "kidnap", " ye sala", "pradhanmantri." Gurjarati film Salagto Sawaal Anamat* (2017) was directed a mammoth 100 cuts from the movie primarily because it was based on the theme of the quota system in India which was considered too controversial. In the Hollywood movie *Spectre* (2015) based on the James Bond franchise a scene involving the protagonists kissing was ordered to be cut for the film to become eligible for public viewing. Now, it is no surprise that in modern day, there have been very few films released in Hindi language in India which did not have a kissing scene as such, thus establishing that such scenes have become a normal part of the psyche of the movie goers. Despite that a cut was ordered to such a scene which leaves us gasping in wonder questioning why.

III. REDUNDANCY OF THE K.A. ABBAS CASE

The decision of K.A. *Abbas,*[11] despite being a complete judgment in its own right is more than 45 years old. Not only has there been a substantial development in jurisprudence of Article 19(1)(a) during this time, but a lot of significant social change has also taken place as a result of technological advancement and globalization. Even 10 years after the judgment of the Supreme Court, in 1980, Doordarshan was the only Television channel existing in India. The access to information and the dissemination of information through televisions was naturally limited to the rich who were the minority in the country. The only way to view a film was through the medium of theatrical releases and exhibition of it in cinema halls. It must be noticed that there has been significant change in the last 45 years. There are currently 800 registered television channels in India with over a 1000 local cable channels operating. The total viewership of the television in India stands at a whopping 750 million as of today.[12] Moreover, the television has ceased to be the primary source of entertainment or information in the country, with the front seat taken by the internet. It has become unbelievably easy to watch a movie in its unabridged version on the internet alone. Standing in 1970, such a world would have been unthinkable, but given the technological development that we went through over the course of 4 decades, the enormously changed social reality is undeniable. Back when the judgment was deliberated, censoring of literature in such films was relevant because once censored, accessing such films or certain censored scenes in those films would have been impossible and thus the aim of censoring served a purpose. Unfortunately, in the given time and day, such censoring holds absolutely no water and can, at best, be said to be irrelevant.

[11] *Supra note* 5.

Another significant point to be noted is that the contention put forth in the *K.A. Abbas* case[13] was with respect to the violation of Article 19(1)(a) only i.e., the Right to Freedom of Speech and Expression. Under the reasonable restrictions imposed under Article 19(2)[14] censoring could be protected. However, in the petition at hand, not only has Article 19(1)(a) been claimed to be violated but also and most importantly Article 14,[15] i.e., Equality before law. It is pertinent to note that with respect to films, all the sources or methods of exhibiting such a film must be treated equally. Thus, not just films being theatrically released but also through the medium of the internet and television be treated at par and on equal footing. However, that is not the case. Pre-censorship does not exist for television, especially for news channels, and most definitely not for the internet. This clearly treats equal objects unequally. Many argue that mediums such as the television and the internet cannot be equated to cinema in theatres. This was resonated in the majority opinion in the case of *S. Rangarajan v. P. Jagjivan Ram*[16] where the Court held,

> *"The focusing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will have a complete and immediate influence on, and appeal for everyone who sees it."*

This drew a gap between how cinema and other forms of visual exhibition have varied impact. According to the judgment,

> *"The movie cannot function in a free market place like the newspaper, magazine or advertisement. Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses."*

This take of the Supreme Court dates to the year 1989, and the authors disagree to its current relevance. Despite appreciating the vivid description of the effect of theatrical films as explained by the Court, it must be stated that in modern day, it falls short of a proper rationale primarily because of the aforementioned reasons. Given the number of modes through which such films can be accessed, the theatres have become a secondary source of viewing. Thus, even if a film is viewed behind closed doors on a computer or a laptop screen, it can make the same impact. Or even for that matter, a film which is aired on television without abridging certain scenes can make the same impact as that of a theater. Thus, the very rationale of

[12] Telecom Regulatory Authority of India (TRAI), Recommendations on Restructuring of Cable TV Services, available at http://www.trai.gov.in/sites/default/ files/ recom25 july08. pdf, last accessed on 31 May 2017, 21:40.

[13] *Supra note*5.

[14] Art. 19 (2), *the Constitution of India,* 1950.

[15] *Supra* Note 2.

[16] *S. Rangarajan v. P. Jagjivan Ram,* 1989 SCC (2) 574.

blocking films or ordering for cuts in their theatrical release under the *Cinematograph Act* for certification hardly serves the desired purpose in modern day.

IV. VIOLATION OF ARTICLE 14, CONSTITUTION OF INDIA

Now it is pertinent to understand why the claim for declaring this provision as unconstitutional has been prayed for. The Petitioner claims in the Writ Petition[17] that the purpose of making such cuts is redundant in the modern age of technology. If the CBFC feels that a particular scene or dialogue of a movie is not meant of public consumption, and it is struck out of the film for the same purpose, it can be said to be futile in the very least. This is primarily because of the rise in the number of sources through which such films can be disseminated otherwise. The television and the internet play a major role in such dissemination in the 21st century which the petitioners claim to be free from censor. Thus censoring such parts of films from exhibition by means of a theatre is not just futile but also violates the Right to Equality[18] of such makers of films under the Indian Constitution.

The above mentioned reasoning is based on correct appreciation of modern day facts. Now, the authors will peruse through the various mediums of exhibition which are similar to cinemas and discuss the restrictions relating to censorship imposed on them.

1. Cable TV

If the example of film exhibition by means of cable TVs is taken, it is pertinent to note that films exhibited through the medium of television, i.e. televised in any channel must adhere to *The Cable Television Network Rules.* Rule 6[19] talks about a Program Code which must be fulfilled before any broadcast of films on television. Apart from criterion based on 'good taste' and 'decency' etc., clause (n) talks about any material broadcasted in contravention to the provisions of the *Cinematograph Act,* 1952. The most important aspect of this rule is laid down in the proviso to this rule which reads as, *"Provided that no film or film song or film promo or film trailer or music video or music albums or their promos, whether produced in India or abroad, shall be carried through cable service unless it has been certified by the Central Board of Film Certification (CBFC) as suitable for unrestricted public exhibition in India."* This proviso is important to note as it expressly reiterates the power of the CBFC even for broadcasting of films on television. So in case a film was modified by the CBFC for theatrical release, the same modification would apply to its broadcast on television. However, this power of censorship despite being similar to the powers under the *Cinematograph Act* has a minor yet significant difference. Pre-censorship does not exist in the case of television, which is to saythat there is no censorship carried out before the telecast of the program. A perfect example

[17] Writ Petition No. 187 of 2017.
[18] *Supra* note 2.
[19] Rule 6, *the Cable Television Network Rules,* 1994.

of this was in the case of the broadcast of the English language film, *"It's a boy girl thing"* on WB TV on 17-01-2013 which led to a show cause notice being served by the Information & Broadcasting Ministry on the parent channel of WB TV, M/s Turner International India Pvt. Ltd. The CBFC during the theatrical release of the film in India had ordered for 15 voluntary cuts and 16 compulsory cuts which Turner International claimed to be unaware of. Thus, charges were imposed on the channel for violation of Rule 6(1)(a)[20], 6(1)(d)[21], 6(1)(k)[22], 6(1)(o)[23] and 6(5)[24] of Cable Television Network Rules. Rule 6 (l) (a) of the Programme Code contained in the Cable Television Networks Rules1994 provides that no programme should be carried out in the Cable Service which offends good taste or decency. Rule 6 (l) (d) provides that no programme should be carried in the Cable Service which contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half-truth. Rule 6 (l) (k) provides that no programme should be carried in the Cable Service which denigrates women through the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to women. Whereas, Rule 6 (l) (o) & 6 (5) provides that no programme should be carried in the Cable Service which is not suitable for unrestricted public exhibition and children viewing. So despite there being punitive measure existing, there can be no censorship prior to the release of the program on television.

2. News Channels

News Broadcasters Association (NBA) a representative body of news and current affairs channels has set up an independent body 'News Broadcasting Standards Authority (NBSA)' to consider content related complaints against news broadcasters, and regulates consonance to the News Broadcasting Standards Regulations Code. *The Press Council Act, 1978 and the Press Council (Procedure for Inquiry) (Amendment) Regulations, 2006 were passed "to establish a Press Council for the purpose of preserving the freedom of the Press and of maintaining and improving the standards of newspapers and news agencies in India."* [25] The Regulations specify a grievance redressal mechanism by virtue of which a complainant may initiate a scrutiny against a specific news report. Thus if the procedure is to be observed we see that the News channels can attract punitive measures but however, there is no provision for pre-censorship.

3. Internet

If the case of the internet is seen, India is currently at the far end of its technological transformation phase where access to internet is safely guaranteed to more or less all parts of

[20] Rule 6 (1)(2), The Cable Television Network Rules, 1994.
[21] *Ibid,* Rule 6 (1)(d).
[22] *Ibid,* Rule 6 (1)(k).
[23] *Ibid,* Rule 6 (1)(o).
[24] *Ibid,* Rule 6 (5).
[25] Preamble, *the Press Council Act,* 1978.

the country with the urban part covered entirely and the rural still in the process of being covered. The *Information Technology Act,* 2000 was amended on 22nd December 2008 and the *Information Technology (Amendment) Act,* 2008 was passed to regulate transactions carried out by means of electronic data interchange and other means of electronic communication etc. Even under this Act, the content uploaded on for or used to communicate with the audience via internet is not required to be certified prior to its exhibition or presentation, and is therefore without pre-censorship. It is no surprise that films are easily accessible on the internet either by way of download from illegal websites such as Torrents or others, or by direct viewing on websites like YouTube which are very much legal. It cannot be denied that piracy of films is a huge phenomenon that the Government has not been able to tackle by way of legislative mechanisms. However, more than piracy, it is the access to such unabridged or uncut versions of movies which are censored for theatrical viewing that is relevant here. Examples of such films are in hundreds. Movies such as *Black Friday* (2004), *Bandit Queen* (1994), *Fire* (1996), *Kama Sutra- A Tale of Love* (1996), *Paanch* (2003), *Parzania* (2005),are only a few of such movies which were banned by the censor board from theatrical release but nevertheless are widely viewed or downloaded on or from the internet. Examples of movies which had scenes cut or modified yet easily viewable in the uncut version, on the internet is also in plenty. By June 2017 India would have 450 million internet users[26] in the country, which hints at a paradigm shift from situation where theatrical viewing was the only source of watching a film to a situation where films can be easily accessed in their original versions on the internet with much ease. Thus, it begs the question of relevance of the provision of Section 4(1)(iii) of the *Cinematograph Act* whereby scenes are deleted or cut to make them viewable by the public. The grounds for such orders are often based on morality, decency or public order. Thus, these grounds cannot be said to have disappeared once made accessible on the internet medium and the petition correctly points out this provision to be irrelevant in modern times that does not serve any purpose.

V. CRITISISM OF THE GUIDELINES

The Central Government issued guidelines to the process of certification under Section 5-B(2) of the *Cinematograph Act,* 1952 which are available on the official website of the CBFC. From the very phrase of the heading of Section 5-B: *"Principles for guiding in certifying films"*, [27]it becomes amply clear that such guidelines formed under this Section are not for the purpose of censoring films but for the purpose of certification only. The process of certification must be done in adherence to these guidelines set forth by the Centre. However, it would be pertinent to note that some of the guidelines mentioned under Clauses 1 and 2 are, to say the

[26] Arushi Chopra, "Number of Internet users in India could cross 450 million by June: report", available at http://www.livemint.com/Industry/QWzIOYEsfQJknXhC3HiuVI/Number-of Internet-users-in-India-could-cross-450-million-by.html.

[27] Section 5(b), *the Cinematograph Act,* 1952.

least, arbitrary and ambiguous and leaves an extremely grey ambit left for interpretation which is often used as a tool to substantiate claims of "cuts". Right at the onset of the guidelines, the Objectives of such guidelines have been expressly mentioned:

> *"Objectives of Film Certification:*
>
> *a) The medium of film remains responsible and sensitive to the values and standards of society;*
> *b) Artistic expression and creative freedom are not unduly curbed;*
> *c) Certification is responsible to social changes;*
> *d) The medium of film provides clean and healthy entertainment; and*
> *e) As far as possible, the film is of aesthetic value and cinematically of a good standard."*[28]

We see that clauses (a), (c), (d) and (e) are vague, overbroad and cause ambiguity in interpretation primarily because of the subjective nature of its interpretation. It has been rightly held by the Petition that it is the film makers' prerogative to make a film of *'aesthetic value'* and of *'cinematically good standard'*. When what constitutes *'values and standards of society'* is in itself not definitive at any given time, empowering the Board to hold the moral compass leads to subjective, arbitrary and erroneous decision making.

Though some of the guidelines laid down under Clause 2, do make much sense and are required such as, "the sovereignty and integrity of India is not called in question", "the security of the State is not jeopardized or endangered", or "national symbols and emblems are not shown except in accordance with the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950"[29] unfortunately the majority of it are extremely arbitrary and leave room for varied interpretations. Phrases such as *"pointless or avoidable scenes of violence, cruelty, horror", "scenes which have the effect of justifying or glorifying drinking", "scenes involving ridicule of physically and mentally handicapped persons", "human sensibilities are not offended by vulgarity, obscenity or depravity"* are inter alia, some of the guidelines which are abstract, unclear, imprecise and ambiguous. Ultimately it is a single member of the board who will interpret a scene which is otherwise supposed to be for a public viewing and the fate of the film will ultimately depend upon his or her discretion. An illustration put forth by the Petitioner is that in a film which seeks to create awareness about child labour, will inevitably have to show scenes which depict the abusive practices against and cruelty to children. In such

[28] Dr. Kalyan C. Kankanala, "Film Expression and Censorship in India: Film Certification Principles, CBFC Guidelines and Principles" (Part 2), available athttp://www. bananaip. com/ip-news-center/film-expression-and-censorship-in-india-film-certification-principles cbfc-guidelines-and-principles-part-2/.

[29] Central Board of Film Certification, Guidelines, available at https://www.cbfcindia. gov.in/main/59/guidelines.html, last accessed on 31 May 2017, 22:15.

situation the guidelines give enough power to the individual members to demand a cut which would inadvertently lead to a violation of the Right to Freedom of Speech and Expression under Article 19(1)(a) of the Constitution. Thus, the Courts must immediately look at these guidelines and check for its relevance and the arbitrariness of the powers entrusted under it.

VI. DOCUMENTRIES

The treatment so extended to feature films, which are often based on fiction or recreation, must not be extended to documentary films. The Oxford dictionary defines a documentary as *" A movie or a television or radio program that provides a factual record or report"* thus emphasising on the aspect of it being real and based on true facts or events. Thus, documentaries in essence depict real life events or narrate details of any event based on facts that are inherently incapable of being pre-censored. However, the unfortunate state of arbitrary sanctions extends to such works as well. It can thus be safely assumed that documentaries act as an information dissemination mode used by filmmakers. Though every citizen of the country has the right to access such information, be it socio-economic or political, the State, in the course of history has often resorted to modes of pre-censorship to curtail uncomfortable truths or to propagate the State sanctioned narrative of the said event. The number of examples has been immense. *Waves of Revolutions* (1975) was refused during the emergency, but was issued a 'U' certificate immediately after. *Prisoners of Conscience* (1978), *A time to Rise* (1981), *In Memory of Friends* (1990), *In the Name of God* (1992), and *Father, Son and Holy War* (1995) are amongst such examples where the CBFC or the Central Govt. had withheld the release owing to content that they felt would have caused either uproar or stir public peace. The authors feel that this approach is wrong and in the process, severely hampers one's Right to Freedom of Speech and Expression. A documentary is the representation of one's ideology which cannot be said to be right or wrong. Such right to expression of one's ideology must be treated as cornerstone of democracy which India as a nation is proud to behold. If a documentary based on the lives of prisoners in India, throws light on the ill-treatment of prisoners and their pathetic conditions of living, it cannot be withheld from release merely because it shows the Government authorities in bad light. A recent example substantiating this point, which had also garnered immense mass attention, was a documentary titled *India's Daughter* (2015) directed and produced by British filmmaker, LesleeUdwin. This was based on the infamous "Delhi Gang Rape" case, popularly known as the "Nirbhaya case"[30] where a 23-year-old female physiotherapy intern of a Delhi Hospital was fatally raped and assaulted and eventually succumbed to her injuries. The documentary was primarily narrated through the parents who wanted the story of their daughter to be publicly told. The documentary also involved an interview with the main accused of the case and one of the defense lawyers, who in the video had made chauvinistic remarks calling the victim/deceased to be responsible for her fate. The documentary, which was meant to be telecast on National Women's Day on a popular News

[30] *Mukesh& Anr. v. State for NCT of Delhi & Ors, S.L.P.* (Criminal) No. 3119-3120 of 2014.

channel was subsequently banned from any kind of exhibition. It was also largely criticised by the Govt. and the grounds for such ban were said to be the following:

(1) Broadcasting or otherwise disseminating *India's Daughter,* and especially the interview with the accused, will threaten public order by "encouraging and inciting violence against women," instilling fear in them, and leading to "a huge public outcry and serious law and order problem;

(2) Providing a platform for a man convicted of rape and murder to "use the media to further his own case" when an appeal is pending in the Supreme Court of India is *sub judice.*

(3) The "permission conditions" laid down by the Tihar jail administration were "violated" by the documentary film-maker.

Now, despite sufficient counter arguments given by the filmmakers against the third reason with substantial proof of correspondence between them and the concerned authorities, authors will not get into its technical procedural details as that would lead to a digression. What is rather pertinent to note are the first two reasons which have been cited and its lack of standing. The first reason, concerning the documentary to prospectively cause public outcry and violence against women is absolutely incorrect and contrary to the point of the documentary. The documentary had purposefully aimed at glorifying the immense courage that girl (victim) had shown, towards fulfilling her dreams belonging to a conservative background and the unfortunate incident that had cut short the journey. The documentary also aimed at shunning the despicable mentality that some of the people have in the country with regard to women. Thus, the question of public outcry and law and order problem is contrary to not just the intention of the filmmaker but also improbable and clearly doesn't hold water. The interviews of the accused was said to be chauvistic, anti-women, sexually violent and disgusting. The claim that such an interview will cause violence against women is appalling. If at all the interview should do something, is invoke a sense of disgust towards the interviewee and introspect what we have become collectively as a society. Thus, this reason too is ill founded. The second reason given was that a platform was provided for a man convicted of rape and murder to "use the media to further his own case" when an appeal is pending in the Supreme Court of India is *sub judice.* This reason directly attempts to undermine the capability of the Supreme Court. Judges, particularly in the Supreme Court, are by training and temperament immune to the happenings in the public sphere outside the court, and it is an insult to the Supreme Court to suggest that the airing of the convict's perverted views would tend to interfere with the course of justice.

The broadcast of news, editorial or investigative reports are presented on the television and/or internet, and are free from pre-censorship i.e., it is not meant to be submitted to an authority prior to exhibition, for certification or scrutiny. The said content freely reaches the

audience without editing/alterations or omissions demanded from any authority whatsoever and thus is principally against the Right to Equality,[31] if such treatment is applied to documentaries. However, certification can be enforced to assure that the viewing audience is of a certain age (eg. above the age of 18). Also, a disclaimer about the contents of the documentary film can be mandated at the start of the film which can run for as long as 60 seconds or even more to assure proper consent. These can be ways to assure proper and responsible viewing but banning a film completely or ordering of cuts for significant scenes or words will inevitably lead to the violation of Fundamental Right to Free Speech and Expression and the Right to Information for the audience at large. Thus, the attitude of brushing away issues of public importance or concealing information from public dissemination using the tool of censorship under the Act, must be avoided and not set as a precedent.

VII. STUDY OF THE SHYAM BENGAL REPORT

On 1st January 2016, to fulfil the vision of Hon'ble Prime Minister of India and Hon'ble Union Minister of Information & Broadcasting, to lay down a holistic framework for certification of films, an Expert Committee was set up under the Chairmanship of Shri Shyam Benegal to lay down norms for film certification that take note of best practices in various parts of the world and give sufficient and adequate space for artistic and creative expression, lay down procedures and guidelines for the benefit of the CBFC Board to follow and examine staffing patterns with a view to recommending a framework that would provide efficient and transparent user friendly services. Other members of the Committee are Shri Kamal Hassan, Shri Rakeysh Om Prakash Mehra, Shri Piyush Pandey, Shri Goutam Ghose, Ms. Bhawana Somaaya, Ms. Nina Lath Gupta, MD, NFDC and Shri K. Sanjay Murthy, Joint Secretary (Films) as Member-Convenor.

The Committee took into account various facets of film making, threw light on the procedural obstacles in release of a film due to the regulations of the CBFC.

The Committee made the following recommendations:

1. At the very onset, the Committee held that the owner of a film has an absolute right over it, and any changes or modifications made to such film must be with the owner's consent. Thus, the Board should do away with ordering modifications or amendments to the film and should restrict themselves to certification.

2. The Committee held that the guidelines introduced under Section 5-B in the year 1991 were beyond the powers of the CBFC and therefore the need for new guidelines had come. To this effect, the Committee introduced a few new guidelines, such as the following:

[31] *Supra note 2.*

(i)The artistic expression and creative freedom of filmmakers is protected through parameters that are objective.

(ii)The audiences are empowered to make informed viewing decisions.

(iii) The process of certification is responsive to social change.

The guidelines also state that an applicant must mention in his application, the category he seeks to apply for along with his target audience. Further, any cuts in a film can only be made by the applicant, depending on the certification he needs for his film.

3. The Committee also recommended that two categories of certification, that is UA (films that contain certain scenes not suitable for children below the age of 12) and A (films suitable for adults only), should be further subdivided into sub-categories. The UA category should be divided into two sub-categories: UA 12+ and UA 15+. While UA 12+ will cater to young teenagers yet to be exposed to the adult world, UA 15+ will cater to young adolescents at an age where they are being exposed to issues in the adult world, in a moderate manner. The A category should include an AC(films suitable for adults only, with caution) sub-category, for films that may contain explicit material, such as nudity, violence, etc. This categorisation will help audiences to make distinct choices.

4. The Committee has also divided the guidelines under three broad heads, such as the follows:

(i) General, which will define the approach to be followed while certifying a film, with respect to general factors in a film, such as context, theme, etc.,

(ii) Issue related, which lists issues in a society that apply to all categories of certification.

(iii) Category specific, which specifies guidelines that lay down the approach which the CBFC should take with respect to various categories of film certification.

5. The Committee also recommended that the CBFC should confine itself to:

(i) Submission of an annual report to the central government, containing an analytical study of the trends in the film industry, to be tabled in Parliament each year,

(ii) Prescribing the manner in which the records and accounts of the Board will be kept,

(iii) Reviewing the work of regional officers and the Regional and Central Advisory Panels,

(iv) Periodical review of guidelines laid down for certification of films, etc.

6. The Committee also recommended for the establishment of an online application procedure for the certification of films and also for appeal before the Revising Committee.[32]

The aforementioned recommendations made by the Shyam Benegal Committee are apt in the times of growing needs for liberalizing the certification process of films in the country. The recommendation regarding the sub-categorization of certification is perhaps what stands out. It provides for sub-categories to facilitate the inclusion of a greater number of viewers for particular age group. Previously, people above the age of 12 and below the age of 18 were treated similarly. This in the authors' opinion was not correct, as the age of 12 to 18 contains a wide gap within which there are primarily two types of children. Children aged 12 to 15, have a certain level of maturity that is quite different from the age range of 16 to 18. Thus by making this sub-classification, the Committee has taken a step forward.

VII. CONCLUSION

There can be no doubt to the fact that a film is a creative product, made by the director based on a script developed by a screen writer. The entire process is a creative one which somewhere down the line minimizes the quantum of rationale. The entire idea of a film is based on the foundation of relativity. The liking of film can be relative and is in no way bound to appease everyone who is viewing it, or for that matter even appease the majority of people viewing it. Thus any ideology, either political or religious, expressed in the film is not bound to appease anybody or be liable to offend anyone. This is the very crux of creative freedom that must be endowed upon every individual who sets out to make a movie. There is another relevant point in extension to this that must be kept in mind. Every work of literature including a book or a film which is contemporary in nature is in essence a reflection of society more than it is a tool to change or influence society. Thus, a concept on which a modern day film is based would inevitably have to be a modern concept in itself. Language used in a film must also thus be a reflection of language that is used in society. If the story of a boy from *Wasseypur* in Bihar is depicted on celluloid, the language used by that person has to be similar to one who has grown up in such a region to assure realism. For that if language of bad taste is used, it must be accepted as being a part of common parlance, again, to assure realism. It must be understood that cinema as much as capable of influencing people, is also at the same time a reflection of society. Ingredients of a movie are generally not created from thin air but influenced by the status quo already existing in society. If a movie released in 2012-13 dealt with the theme of *black money* stashed up on offshore banks, it is probably because the theme was very much on vogue at that given point in time and is perhaps a reality. The idea of corruption, prostitution, rape, murder, abuse of drugs etc. are often the subject matter of films, mainly because they are

[32] Shashi Deshitti, "How is a Film Certified by the Censor Board (CBFC)?", available at https://factly.in/how-is-a-film-certified-by-the -censor-board-cbfc-film-certification process-in-india/., last accessed on 31 May 2017, 22:45.

social realities. Merely because a subject matter is considered a taboo, or unethical cannot be grounds for it to be blocked from public exhibition. That would amount to the violation of the Right to Freedom of Speech and Expression on the part of the creators of such content and also at the same time violate the rights of the audience to access such content. An essential example which was much in the news recently was the case of the movie *Udta Punjab* (2016) which stirred a controversy when the CBFC demanded cuts of several scenes that highlighted the usage of drugs in the state of *Punjab* and also went to the extent of ordering the dropping of the word 'Punjab' from the title as it would, in their wisdom, amount to the defaming of not just the state in general but also its authorities and their lack of regulation to control drug abuse. In the authors' opinion, this is absolutely arbitrary and serves no purpose. The problem of drug abuse in Punjab has been a matter of great media reporting in the recent years. It cannot be denied that this problem is indeed an issue that does exist. Thus, shying away from acknowledging it on a creative platform for mass consumption is futile to say the least. Now many can argue that putting it up on celluloid is not a problem solving mechanism and it is the authorities who must take action. The point that I try to make is that films must not be presumed to be responsible for solving social problems or for that matter even bring to light problems that are otherwise brushed away. A film is merely a creative medium which has the right to incorporate ingredients from reality by the virtue of the fact that it exists. For example, if a film theme which does not even deal with corruption, has in its backdrop, a character who happens to be a public official serving the Central Governments and is shown to take a bribe, the films cannot be said to be bad or the scene involving the character taking a bribe, cannot be ordered to be cut merely because it questions the integrity of public servants in general. The fact that bribes are often taken, is a harsh reality of the social structure of our nation and can most certainly be shown on celluloid and if there is an order to cut such a scene it would be violating one's right to creative expression.

Thus, it can be summed up based on all the aforementioned points that the provision under Section 4(1)(iii) of the impugned Act has bestowed upon the CBFC certain unfettered powers which have the tendency to be misutilized as is evident from the recent cases. Thus, this provision must be done away with completely. It must be declared unconstitutional as it violates Article 14. Having said that, the reasonable restrictions must be protected with the tool of film certification. A film must be certified based on its content and a film not suitable for public viewing may not be certified. However, the right to modify or amend a scene must be left with the owner of the film and cannot be a mandate put forth by CBFC.

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