RSRR Invited submissions for Volume 9 Issue 2

Board Interviewed Mr Hamid Naved

RSRR announced the winners of the RSRR Ikigai Blog series

Carpe Quartam

A Quarterly Newsletter by RSRR

RGNUL STUDENT RESEARCH REVIEW

Issue 2, January 2023

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RGNUL STUDENT RESEARCH REVIEW

Carpe Quartam

A QUARTERLY NEWSLETTER BY RSRR

JANUARY 2023 || EDITION #2

PREFACE

Carpe Quartam, a quarterly newsletter published by RSRR, is committed to democratising legal research, making it more accessible to students and professionals alike while putting a spotlight on the activities undertaken by the RSRR Board in furthering its mission.

In this quarterly issue, read our Editor's Column Series wherein Deb Ganapathy and Sarthak Sahoo, argue that the Insanity Defence under Section 84 of the IPC warrants a threefold revision: expanding its scope, standardising psychiatric necessities, and integrating neuroscientific techniques.

RSRR has also invited papers and submissions for Volume 9 Issue 2 of its journal, entitled 'Instrumentalising Arbitration: Innovation, Interaction and Impact.' This newsletter contains a detailed concept note discussing the future of arbitration in India. Further, you may also read our blog article from the 'Excerpts from Experts series' titled, 'Does Fraud Vitiate Arbitration? Revisiting Arbitrability of Frauds in India.' The article, authored by Mr. Naresh Thacker and Mr. Samarth Saxena, Partner and Associate at Economic Laws Practice, analyses the effect of fraud on arbitration, through past as well as contemporary jurisprudence on the matter.

We are also proud to announce the release of our special blog series in collaboration with Ikigai Law entitled 'Emerging Technologies: Addressing Issues of Law and Policy.' The final series will contain six submissions from professionals and students alike, tackling new and complex intersections of law and technology, and shall be released in instalments on our website. The first instalment was authored by Yash Choudhary, a student at ILS Pune on 'Legal Personhood For AI: A Possible Key for Unlocking Human-AI Symbiosis?'

Finally, RSRR is grateful for the opportunity to interview Mr Hamid Naved, a former student of RGNUL and member of the Editorial Board, on his life after law school. In this insightful segment, Mr. Naved talks about his experience at RSRR, preparation for the UPSC examinations and gives aspiring students valuable advice on life after law school.

We hope this edition is an insightful read!

RSRR Editorial Board

ABOUT RSRR

The RGNUL Student Research Review (RSRR) Journal (formerly RGNUL Student Law Review) is a bi-annual, student-run, blind peer-reviewed journal based at Rajiv Gandhi National University of Law, Punjab. It is a flagship law journal of RGNUL managed by the students of the University. It was founded with the objective of facilitating novel ideas and a research conducive environment. RSRR regularly engages the student community, as well as legal practitioners, to contribute to the legal discourse on various topics. Additionally, RSRR also runs its Blog Series, which deals with specific contemporary issues of law. The RSRR Blog Series was named as one of the top Constitutional Law Blogs internationally by Feedspot in 2022.

The journal encompasses myriad fields of law and proliferates novel legal discourse through opinions, suggestions and extensive analysis of contemporary issues from numerous areas of law, covering widely discussed topics like Tech law and antitrust law to more nascent areas like energy law, space law, Et al.

Initiatives of RSRR Law Journal

Each year, the RSRR Editorial Board selects a contemporary theme for its journal and invites research papers in the form of short articles, long articles, case comments and normative law articles, from academicians, industry stakeholders as well as law students. The Editorial Board also constitutes the Peer Review Board for the journal, comprising of distinguished experts and jurists in the field of the selected theme. The previous volumes of the RSRR Journal can be accessed here. The past Peer Review Boards and Guest Author roster can be viewed here and here respectively. No article submission or processing charge is required to be paid for the publication of any article in the journal.

Blogs

Themed Blog Series RSRR began running the 'RSRR Blog Series' in the year 2017. Periodically and typically for a month, RSRR releases a 'Call for Blogs' on contemporary and relevant themes. The Editorial Board also invites guest authors, who are distinguished experts in the selected field of law, to contribute to the Blog Series. Submissions are invited from academicians, scholars, as well as law students. A blog is typically 1500-2100 words, which are published on the RSRR website.

Editor's Column

This category constitutes blogs authored by the Editors of the RSRR Editorial Board. These blogs are written on current and relevant issues, which may be themed or open for the editors to choose.

Excerpts from Experts

Excerpts From Experts is a novel initiative by RSRR, started in 2020, initiated to bring forth discussion by experts on contemporary legal issues, belonging to their field of expertise. The aim is to provide our readers with well-researched and quality legal content written by the Guest Authors.

Research Assistantship Program

RSRR became the first Editorial Board at RGNUL, Punjab to offer Research Assistantship to its Editors and students of RGNUL. This is an opportunity to work with Guest Authors invited to contribute to RSRR's Journals and Blog Series. RSRR took this initiative to increase hands-on knowledge and to promote a culture of academic research and writing at RGNUL. With various Guest Authors invited to write for RSRR's Journals and Blog Series', RSRR is providing students with an opportunity to learn from and work under the guidance of various academicians and lawyers, pioneers in their fields. A Research Assistant (RA) works under the guidance of the Guest Author to assist with their research. An RA carries out supplementary research for them and assists in the overall research, in the instances required.

Notable Collaborations of RSRR

RSRR has occasionally collaborated with varied organisations for issues of the Journal or Blog Series. RSRR has had notable collaborations for projects with the following organisations:

- Collaboration with Ikigai Law for the Blog Series on the theme: "Regulating E-Sports: Paving the Road Ahead" and "Emerging Technologies: Addressing Issues of Law and Policy".
- Collaboration with Arogya Legal and Medical Students Association of India for RSRR Journal Volume 6.1 on the theme: "Healthcare in India: Tracing the Contours of a Transitioning Regime".
- Collaboration with Nishith Desai Associates for the Blog Series on the theme: "Digital Healthcare in India".
- Collaboration with Mishi Choudhary and Associates for the Blog Series on the theme: "Addressing Legal Concerns of AI: A Clarion Call".
- Collaboration with Mishi Choudhary and Associates for the webinar series on Artificial Intelligence.
- Collaboration with Common Cause India for panel discussion on "Citizen-Police Interaction and Policing in the Pandemic".

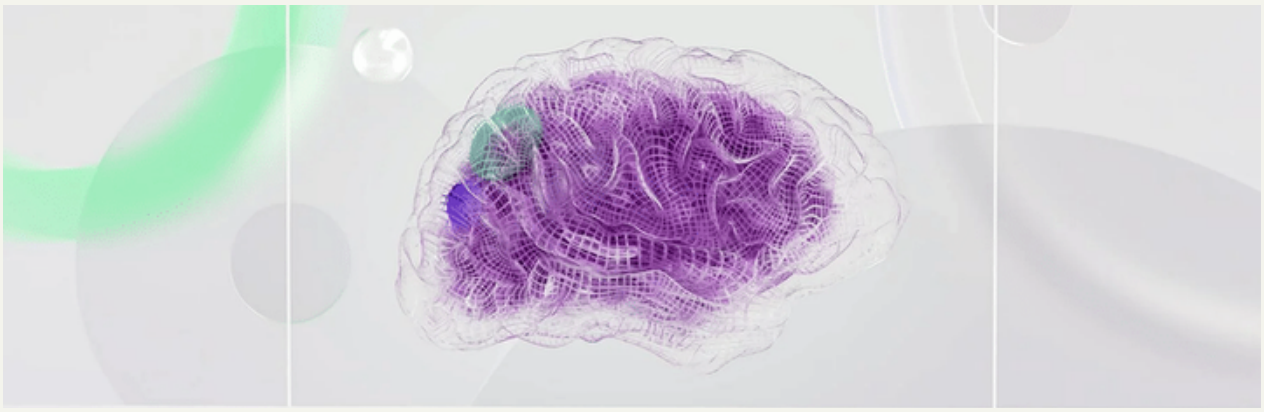
FIRST EDITION: RECAP

In the previous edition of Carpe Quartum, a quarterly newsletter published byRSRR, we read about our Panel Discussion, co-hosted by Common Cause India, revolving around the worsened interactions between the police and citizens during the lockdown. The discussion allowed the audience to appreciate myriad perspectives on police interactions and further the discourse on an acceptable policing framework in complicated sociological scenarios.

In other news, the Editorial Board of RSRR held an orientation session for the Batch of 2027. Filled with excitement and a willingness to explore, the students enthusiastically participated in discussions revolving around the mandate of RSRR, its various focus areas, and research assistantship programs which provide members with first-hand experience in legal research.

In our Editor's Column Series, Ridhi Gupta and B.D. Rao Kundan, Editors at RSRR, critically examine the 2022 Taxation Scheme of India and its influence on the cryptocurrency industry. Additionally, they help outline the various suggestions to regulate virtual assets in India while allowing for faster technological innovation and adoption. In light of the International Literacy Day celebrated around the world on the 8th of September, it becomes imperative to ensure quality, equitable, and inclusive education for all. Authored by Ms. Swati Singh Parmar, Assistant Professor at DNLU Jabalpur, the article from RSRR's Excerpts from Experts series, titled 'Academic Imperialism and Universal Academic Accessibility: Echoes from the Global South' emphasizes how the International Law discourses are marked by a glaring absence of contribution by Global South academics, raising questions about the lack of representation and spaces.

MIND THE GAP: PSYCHIATRY, NEUROSCIENCE & LACUNAE IN THE INSANITY DEFENCE



This article has been authored by Deb Ganapathy, Junior Editor at RSRR and Sarthak Sahoo, Assistant Editor. This blog is a part of the RSRR Editor's Column Series.

'My friend!' I exclaimed, 'man is but man; and, whatever be the extent of his reasoning powers, they are of little avail when passion rages within, and he feels himself confined by the narrow limits of nature.'
— Johann Wolfgang von Goethe, The Sorrows of Young Werther

Introduction

In October 2022, the Home Minister of India announced that the government would be introducing new drafts of the Indian Penal Code, 1860 ('IPC') and the Code of Criminal Procedure, 1973. This introduction comes considering the suggestions of the Committee for Reforms in Criminal Law established two years prior. With the possibility of such new legislation, criminal jurisprudence has a moment to review, update, and radically transform the understanding of crime in India. One important area of focus, especially with the trending public discourse on mental health, is the insanity defence and its state in India. This has been a pertinent issue in Indian law. For instance, a study was conducted by the Department of Psychiatry, Pondicherry Institute of Medical Sciences across 13 High Courts in India wherein the defence was invoked. Out of 102 cases, 76 (74.50%) did not fall under the scope of the defence. This was buttressed by irrelevant acquittals for lack of evidence and breach of due procedure (7.84%).[1] Therefore, with a mere success rate of 17.65%, the insanity defence is not reflective of the normative standard to be expected. In comparison, the United States of America has displayed a success rate of 26% in an eight-state survey. This does not yet account for the varying standards of such a defence in the United States across different states. In light of the same, the present article attempts to expand and explicate a more robust means of evaluating insanity pleas.

Legal Background & Affective Defence

In order to make policy prescriptions for creating a robust and contemporary legal regime, it is important to understand the scope of the insanity defence as it exists today. Section 84 of the IPC provides for the defence of an, '[a]ct of a person of unsound mind'. Placed in Chapter IV of the IPC, it is a general exception that excuses the imputability that arises from offences. The provision, based on the historical McNaughton Rule, states that if a person, owing to 'unsoundness of mind' is incapable of knowing either 'the nature of the act' or 'that he is doing what is either wrong or contrary to law', then such liability under the offence must be vacated.

These two conditions, however, are seen to be outdated given the latest understanding of psychology and criminology. Whereas both of the conditions are cognitive in nature —

they concern the knowledge of the act's nature — the affective or emotive causes that do not give rise to mens rea have been ignored. These refer to the ability to control conduct notwithstanding the knowledge of the act. The United Kingdom, with its Homicide Act of 1957 has made an exception by introducing diminished responsibility in such cases and a charge of manslaughter instead of murder.

This is not without exception in the common law either. Courts have long previously taken cognizance of the emotive aetiology of acts which negate any guilty intention. The Battered Women Syndrome, which vacates criminal liability in cases of abused wives killing their husbands, is now accepted as part of the relevant jurisprudence.

Therefore, as a preliminary step, it is imperative for the Legislature to update its understanding of criminal conduct considering updated medical consensus on what constitutes guilt for crimes.

Addressing Issues Relating to Psychiatric Evaluations

In the same study as referred to above, out of 102 cases wherein insanity was pleaded, a psychiatrist's opinion could not be obtained for 26 cases. It is relevant to mention that there is a strong correlation between the availability of psychiatric opinions and the acquittal of mentally ill accused. In addition to this there is a strong correlation between the availability of documentary evidence of one's mental illness and the likelihood of acquittal. From the relatively small sample study that has been referred to throughout this article, there is a presumed real possibility of convictions being made because of a lack of psychiatric evidence. It can also be inferred that jurisdictions such as the United States see more accused be declared Not Guilty for Reason of Insanity (NGRI) in part due to a comparatively robust mental health infrastructure.

There are several lacunae to be addressed with regard to the adjudication of the insanity defence in India. Even in cases where a psychiatrist is available, there is no standardised procedure through which a plea of insanity can be verified. Psychiatry residents in India often lack the required experience to deal with forensic issues in a holistic manner, for which only two weeks of training are mandated.[2] Beginners may be easily intimidated during cross examination. In order to provide proper psychiatric evaluations, it is essential that expert witnesses in court have the independence and training to not be pressured by any party to give false and unreliable evidence.

As opined by Suresh Bada Math et al. in 'Insanity Defense: Past, Present, and Future', psychiatric evaluations must be comprehensive, and involve a review of, inter alia, documentation regarding the accused's mental illness, history of substance abuse, 'family history, personal history and premorbid personality'. The review article also provides several standardised procedures in the form of questionnaires that have been developed to better assess the validity of the insanity plea, and provides a strong basis for standardising psychiatric evaluations.

There is, however, still a glaring issue that needs to be addressed. The lack of documentation regarding mental illness has, as previously stated, a strong correlation with convictions in cases where the defence is pleaded. The democratisation of mental health services in a country that is plagued with issues of public health access issues will require comprehensive policy overhauls that are beyond the scope of this article.

Neurolaw And Its Potential

There are still options available to buttress psychiatric evaluations and assess the veracity of insanity pleas. Recent literature in the field supports the belief that neuroscientific techniques can reliably assess an accused's capacity to understand the nature of their actions or determine any intention to commit a criminal act.

In this context, it is important to refer to two United States cases, specifically *Roper v. Simmons* (2005) and *Commonwealth of Pennsylvania v. Pirela* (2007). The former is a landmark judgement by the Supreme Court of the United States which established the unconstitutionality of awarding the death penalty to

persons under the age of 18. This decision was in part influenced by neuroimage evidence that established a connection between mental immaturity and age. The latter decision, by the Supreme Court of Pennsylvania, was to deem capital punishment to be unjustifiable for an individual whose frontal lobe was damaged in a manner that established a diminished responsibility. These adduce practical precedent to the use of such techniques.

Daniel Lawer Egbenya and Samuel Adjorlolo's work titled, 'Advancement of neuroscience and the assessment of mental state at the time of offence' argues that there are certain parts of the brain, which, when damaged, impair one's ability to make moral judgements or have intention. Specifically, portions of the prefrontal cortex are involved in assessments of wrongness of actions. Further, evidence suggests that intention is governed by the presupplementary motor area (pre-SMA), and lesions in that area can hamper self-control and decision-making. Referring back to the IPC, intention and knowledge of wrongness are essentials to establishing a defence under Section 84. Neuroscientific evidence would help solidify an insanity defence, especially under the view of the expanded scope thereof, as argued before.

However, given the logistical costs involved in the iterative use of such technology for the panoply of criminal cases that might warrant such use, it is paramount that neurolaw is limited to a secondary aid in justice delivery, giving primacy to psychiatric methods. This is confounded by the seriously impaired judicial, as well as medical, infrastructure in India, which adds to the cost of access and use of such technology, thereby rendering its consistent and practical use infeasible.

The merits of such a neurolegal regimen notwithstanding, policy recommendations in this vein further face a major infirmity. This is the crucial and cornerstone evolution of the Right to Privacy in India. The application of the neuroscientific techniques discussed above may be faced with concerns of privacy under Article 21 and the right against self-incrimination under Article 20. Informed consent and privacy safeguards must be kept in mind in the operationalisation of these techniques.

Conclusion

The current state of mental health infrastructure in India, as well as antiquated legal provisions, impair the fair and just application of such a defence when reasonable and valid. To respond to the inadequacy of the insanity defence regime in India, this article put forward a three-pronged approach that would (i) address the legal inadequacies by introducing defences that incorporate emotive reasons that vitiate mens rea, (ii) address the inadequacies of psychiatric evaluations by introducing greater standardisation, and (iii) introduce a more widespread use of neuroscientific techniques to buttress existing evidences. This approach can be contested, and its implementation would surely pose legal and practical challenges. However, it is in the interest of justice that people are not persecuted for their mental illnesses, and that legal mechanisms ensure the same.

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EXCERPTS FROM EXPERTS

DOES FRAUD VITIATE ARBITRATION? REVISITING ARBITRABILITY OF FRAUDS IN INDIA

This blog has been authored by Mr. Naresh Thacker and Mr. Samarth Saxena, Partner and Associate at Economic Laws Practice. They were assisted by Mr. Siddharth Jain, a student of RGNUL. This blog is a part of the RSRR Excerpts from Experts Series, initiated to bring forth discussion by experts on contemporary legal issues.

Introduction

In legalese, there exists a rather mundane and oft-quoted phrase – "fraud vitiates everything". While this phrase has generally stood the test of time in Indian courts, its pertinence, when arbitrating frauds, has had a truly eventful journey. A journey spanning six decades, two legislations and at least eight landmark Supreme Court ("SC") judgments. Most recently, the SC has re-examined the issue with considerable brevity in *Vidya Drolia & Ors. v. Durga Trading Corporation* ("Vidya Drolia") and *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. & Ors* ("N.N. Global Mercantile"). In this post, the authors seek to analyze the conspectus of Indian precedents on arbitrability of fraud and ascertain whether Vidya Drolia and N. N. Global Mercantile are really the final pieces to this intriguing puzzle.

Early Judicial Developments

The first authoritative precedent on the subject was laid down in the context of the Arbitration Act, 1940 in *Abdul Kadir Samshuddin Bubere v. Madhav Prabharkar Oak* ("Abdul Kadir") where 'serious allegations of fraud' were made against a party and the said party desired that the matter be tried in an open court. This was held by the SC as a sufficient cause for the court to not make a reference to arbitration. However, the SC qualified this observation by holding that not every allegation imputing some kind of dishonesty would be enough for taking the matter out of the forum which the parties themselves had chosen i.e., arbitration. In Abdul Kadir, the Court therefore, opined that mere allegations would not be enough to induce the court to refuse to make a reference to arbitration. It was only in cases of allegations of fraud of a 'serious nature' that the court would refuse such reference.

The SC's judgment in Abdul Kadir continued to hold fort over the next five decades. Even after the advent of Arbitration and Conciliation Act 1996 ("the 1996 Act"), there wasn't any major judicial pronouncement by the SC until 2010 when, in *N. Radhakrishnan v. Maestro Engineers* ("N. Radhakrishnan"), a Division Bench of the SC relying upon Abdul Kadir ruled that allegations of fraud and serious malpractices could only be settled in court through furtherance of detailed

evidence by either party and as such could not be gone into by the arbitrator.

The embargo imposed by N. Radhakrishnan didn't sit well with the pro-arbitration agenda of the Arbitration and Conciliation Act,1996 ("1996 Act"). More so, because while reaching its findings in N. Radhakrishnan, the SC had failed to consider the following key aspects:

1) Though N. Radhakrishnan referred to the case of *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums* ("Hindustan Petroleum"), it did not deal with the ratio thereof. In fact, the ratio of Hindustan Petroleum ran counter to the findings in N. Radhakrishnan. After considering the language of Section 8 of the 1996 Act, Hindustan Petroleum had held that if there existed a clause for arbitration in an agreement between the parties, it would be mandatory for the civil court to refer the dispute to an arbitrator. Similar was also held in the case of *P. Anand Gajapathi Raju v. P.V.G. Raju* ("P. Anand Gajapathi Raju"). However, the case of P. Anand Gajapathi Raju was not even considered in N. Radhakrishnan.

2) The provisions contained in Section 16 of the 1996 Act were also not considered by the court. Section 16 expressly provides that a decision by the arbitral tribunal that the contract was null and void would not entail ipso jure the invalidity of the arbitration clause.

For the aforementioned reasons, the judgment in N. Radhakrishnan was held to be per incuriam in the subsequent SC decision in *Swiss Timing Ltd. v. Commonwealth Games Organising Committee* ("Swiss Timing"). The judgement in Swiss Timing refused to affirm the contention that whenever a contract was said to be void ab initio, the courts exercising jurisdiction under Section 8 and Section 11 of the 1996 Act would be powerless to refer the disputes to arbitration. On the contrary, in a major departure from the prevailing standard set by Abdul Kadir and N. Radhakrishnan, Swiss Timing further held that arbitration ought not to be refused even in cases where the defence taken was that the contract was voidable, for instance, as provided under Section 17 of the Indian Contract Act, 1872 ("Contract Act") for fraud. The court ought to decline reference to arbitration only where it reaches the conclusion that the contract is void on a bare reading, thereof without any requirement of further proof.

Testing the 'Arbitrability' of Fraud

While the decision in Swiss Timing was a step in the right direction on the issue of arbitrability of fraud, it suffered from a malaise of a different kind and hence in *A. Ayyasamy v. A.Paramasivam("Ayyasamy")*, the same was impliedly over-ruled as being devoid of any precedential value. A necessary outcome of this was that the proposition of law laid down in N. Radhakrishnan stood revived.

Nonetheless, the fact that N. Radhakrishnan did not set out the correct position of law was well accepted. In Ayyasamy, the SC cautioned against placing reliance on N. Radhakrishnan, and further clarified the law on arbitrability of fraud in the following manner:

1) Mere allegation of fraud simpliciter is not a ground to nullify the effect of the arbitration agreement between the parties.

2) It is only 'serious allegations of fraud' leading to a criminal offence or those with complicated allegations of fraud leading to such issues necessarily to be decided by the civil court by going through voluminous evidence, that arbitration can be side-tracked. Thus, fraud which vitiates the validity of the contract itself or the entire contract which contains the arbitration clause or the validity of the arbitration clause e.g., forgery/fabrication of documents in support of the plea of fraud would require the civil court's intervention.

3) Where there are simple allegations of fraud touching upon the internal affairs of the party inter se and such allegations have no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration.

The judgment in Ayyasamy was further clarified in the subsequent case of *Rashid Raza v. Sadaf Akhtar* ("Rashid Raza").Rashid Raza ruled that to distinguish between 'serious allegations' and 'simple allegations' of fraud, the rule as laid down by

Ayyasamy could be crystallized in the following two tests:
1) "Does the plea of fraud permeate the entire contract and above all, the agreement of arbitration, rendering it void?"
2) "Whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain?"

The ratio of Swiss Timing, Ayyasamy and Rashid Raza was then approved in *Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings* ("Avitel") .In Avitel, the SC held that post Rashid Raza, 'serious allegations of fraud' would arise only in two cases:
1) When the arbitration clause or agreement itself doesn't exist, as in, the party against whom breach is alleged claims that it cannot be said to have entered into the arbitration agreement.
2) When allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct thus necessitating the hearing of the case by a writ court and the questions raised in the dispute are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.

The judgment in Avitel also clarified another important aspect pertaining to the effect of pending criminal proceedings arising out of fraud, on its arbitrability. Avitel held that if a civil dispute involved questions of fraud, misrepresentation, etc. which could be the subject matter of proceeding under Section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings could be or were already instituted in respect of the same subject matter would not lead to the conclusion that the dispute was non-arbitrable.

The Current Legal Position

Pertinently, much like Swiss Timing, both Ayyasamy and Avitel cautioned against the use of N. Radhakrishnan as a binding precedent.

Subsequently, in Vidya Drolia, a three-judge bench of the SC again considered its judgment in N. Radhakrishnan. In Vidya Drolia, the SC re-affirmed its findings in Ayyasamy, Rashid Raza and Avitel and over-ruled its judgment in N. Radhakrishnan by holding that allegations of fraud can be made the subject matter of arbitration when they relate to a civil dispute. However, fraud which vitiates the arbitration clause itself would render the dispute non-arbitrable.

The judgment in Vidya Drolia has recently been considered by a co-ordinate bench of the SC in N. N. Global Mercantile. In the said decision, while the SC has referred the findings in paragraph 92 of Vidya Drolia, which held 'existence' and 'validity' of an arbitration agreement as an intertwined concept, to the Constitution bench, it has re-affirmed Vidya Drolia's findings with respect to the arbitrability of fraud. N.N. Global Mercantile holds that all civil or commercial disputes, whether contractual or not, which can be adjudicated upon by a civil court, can also be adjudicated through arbitration unless such arbitral proceedings are expressly excluded by statute or by necessary implication. However, the criminal aspect of fraud viz. forgery or fabrication being essentially in the realm of public law, can only be adjudicated by a court. The SC has further clarified that the ground on which fraud was previously held to be non-arbitrable i.e., that the dispute would entail procuring voluminous evidence and would be thus, too complicated to be decided in arbitration is an 'archaic' and 'obsolete' view. On the contrary, the SC has observed that nowadays arbitral tribunals are required to regularly traverse through volumes of evidence.

Analysis

From N. Radhakrishnan to N.N. Global Mercantile, the courts have carefully filtered the prerequisites for referring a case to arbitration in disputes involving allegations of fraud. As on date, the decisions in Ayyasamy, Rashid Raza, Avitel, Vidya Drolia and N.N. Global Mercantile concurrently hold the field in this respect. These decisions have set forth different yet inter-linked tests on which arbitrability of fraud ought to be tested. In Ayyasamy, the SC opined that mere allegations of fraud simpliciter would not render a case non-arbitrable and it would be 'serious allegations of fraud', requiring consideration of voluminous evidence by the civil court which would be non-arbitrable. Relying on the Ayyasamy judgment, Rashid

Raza gives 2 tests to determine 'serious allegations of fraud', the first of which deals with fraud permeating the contract entirely, especially the arbitration clause, and the second being determining whether fraud is restricted to internal affairs of the parties and has implications in the public domain. Avitelhas further bucketed the tests laid down in Rashid Raza into cases where the arbitration clause/agreement itself does not exist and cases involving arbitrary, fraudulent, or mala fide conduct, which can be validly brought before writ courts. Both Vidya Drolia and N.N. Global Mercantile have now taken forward these principles by cumulatively upholding the dicta of Ayyasamy, Rashid Raza and Avitel, and by providing sanctity to arbitrating all allegations of fraud pertaining to civil disputes, until the arbitration clause itself is invalidated or allegations of fraud pertains to aspects of public law. However, N.N. Global Mercantile has further clarified that seeking adjudication of the disputes from a civil court and not by means of arbitration, for the sole reason that extensive evidence would require to be conducted, is no longer a permissible ground to side-track arbitrations.

Conclusion

As we move forward, issues of fraud would continue to be raised by Respondents wishing to avoid the arbitral process. Such cases would then have to be tested on the threshold of all the aforementioned principles. Though the principles presently governing arbitrability of frauds in India are undoubtedly sound, their effectiveness in deterring prospective Respondents willfully seeking to avoid arbitral proceedings, remains to be seen.

RSRR- IKIGAI BLOG SERIES

The RGNUL Student Research Review (RSRR) collaborated with the leading legal and policy firm, Ikigai Law to initiate a theme blog series titled *'Emerging Technologies: Addressing Issues of Law and Policy'*. This blog Series was aimed to initiate the legal discourse on the matter of Artificial Intelligence (AI) with the development of metaverse and regulations of the Over-the-Top (OTT) platforms in the background.

Due to the emerging area of law and policy, the board has received numerous interesting submissions ranging from discussing the legal personhood to AI, taxing the metaverse, regulating the Digital Lending, online streaming etc. It was a challenging task to select the best manuscripts from the various excellent manuscripts that the board received. Here, the esteemed Peer Review Board from Ikigai Law helped in the selecting the best manuscripts out of the pool.

Among the received manuscripts, the Board is delighted to announce that script titled Combating Manipulative Neuromarketing with Intermediary Regulation and Artificial Intelligence and Real Personhood (Neuromarketing) have been selected as winner and runner-up respectively. As announced, winner would be awarded with cash prize worth 10,000 and both winner and runner-up will be provided with an opportunity to intern with the Ikigai Law.

In the winner's blog, Aadesh Ramadorai, the author discusses the unconsented collection of data and targeting of customers by intermediaries and digital platforms, efficacy of current laws and alternative approaches. The runner-up article was co-authored by Sarthak Das and Gayatri Sawant provides solution to the tortious liability of AI through negligence model, level of care, by assessing the injuries to the plaintiff.

The Board congratulates the winners for their novel contribution to the existing literature and all the participants for their submissions to conclude the blog series successfully. We are grateful to all the authors who helped facilitate legal discourse on the nascent area of law and technology, and look forward to enthusiastic participation in our future endeavours!

KNOW YOUR ALUMNI

Mr Hamid Naved: Batch of 2020

RSRR is grateful to be given the wonderful opportunity to conduct an interview with Mr. Hamid Naved, a former student of RGNUL and a member of the Editorial Board, on his life after law school. In this insightful segment, Mr. Hamid talks about his time spent at RSRR and how being a part of a peer run journal is crucial for strengthening one's reading, writing and communication skills. He then goes on to describe his journey preparing for the UPSC examinations while providing valuable advice on life after law school.

Q1) What advice would you give to those who want to pursue your career path and appear for the Civil Services Examination?

Broadly speaking I think individuals need to prepare for this examination with the mindset of a 'professional'. That is, think of it as a job or a temporary career in and of itself. This requires a different approach than the semester or college exams that most students are used to. For example, college exams can be cleared without preparing your own notes, by cramming from some generic material in the last few days, without doing any significant answer writing practice and most importantly they barely last 2 weeks so the candidate only lives in 'exam mode' for a short while. Such methods will not work for the Civil Services or for that matter any reasonably competitive PCS(J) examination.

Additionally, I have noticed that certain universities have internalized a strong 'culture' of preparation, where the student body is well versed with the needs and requirements of competitive examinations. Hence, both individual and institutional preparation culture matters here.

This is possibly why certain institutions like the IITs have been so dominant in this exam, they have internalized this culture of preparation. Similarly, NLSIU has been churning out an IAS or IFS officer every year since CSE 2018 despite a fairly small batch size. I must admit that this environment did not exist in the university at the time that I was there, which is unfortunate since there were multiple individuals in every batch who were targeting this exam. I think this will improve as more people qualify and create a sense of internal-competition in the college. Hence, my advice to CSE aspirants at RGNUL would be to try and organize themselves into informal forums or groups to coordinate their preparation and share best practices for their mutual benefit. I am aware that one often does not want to reveal the fact they are preparing to others or even share material/test series papers. However, to put it in somewhat dramatic language, your batchmates/peers are the 'crucible' which shapes you- the better they are the more you'll be pushed to improve.

While I cannot exhaustively describe every aspect of the preparation let me point out some basic requirements of a 'professional' approach to the preparation-

Firstly, begin the preparation by doing some googling on the exam structure and make a habit of watching videos of successful candidates. Print out a copy of the exam syllabus (Both prelims and Mains) as well at this point of time. A lot of the minute details of the preparation like what to read, how to practice questions, choosing your optional and how to read the newspaper in an efficient fashion should be learnt about in this stage.

Secondly, start preparing early by committing short periods of time to the preparation, after which you can keep increasing your efforts as the exam gets nearer. One will learn from trial and error. As an illustration, most people find reading the newspaper to be a tedious task in the beginning of the preparation. However, those who persevere will often be able to

finish the same readings in a much shorter period after a few months. This incremental approach can be applied on all aspects of the exam. Self-study is at the core of the exam which coaching institutes can at best supplement. Getting habituated to regular study routines and disciplined schedules also allows candidates to give time to leisure activities or university social events without compromising on a steady preparation.

Thirdly, as I pointed out earlier, unlike university exams this exam requires spending long periods in 'exam mode'. It is advisable that candidates look at some form of meditation, yoga or relaxation strategy which can counteract the mental burdens that you are bound to have while preparing. Additionally, some hobbies or interests which one can stick to during long periods of study routines also help. Also, avoid extreme approaches where one either does not prepare at all or tries to cram for the entire day. (Personally, I would say these suggestions would be beneficial for other career paths as well).

Fourthly, again unlike university exams, the CSE thrives on practice and evaluation. This means solving Daily MCQs for the prelims and writing answers which are evaluated by a third person for the mains. The details of the how and where from this practice is to be done can be figured out through some online research. When the exam is about a year away it is advisable that students get a paid test series from which to practice questions and get their answers evaluated. Another thing which can be done is that previous year papers (both pre/mains) should be referred to at regular intervals so that the candidate has a sense of the pattern of questions asked.

Finally, please maintain a career backup and do not use this exam as an excuse to claim immunity from having a decent academic record or career alternatives. I would point to CSE 2021 where two NLS graduates made it to the top 100 and both were university gold medalists. In contrast there are many candidates who have sacrificed the possibility of any alternative career as well as their university marks for the examination and have yet to find their name in the final list. Personally, I found that my preparation picked up in those semesters where I had a good academic performance and classroom attendance compared to the ones with relatively mediocre scores or with low attendance. (I.E.- Being regular in one area helps regularity in other areas of life).

Q2) How did your time spent at college prepare you for your career?

In general, RGNUL had a relatively relaxed academic routine and this naturally provided the opportunity to prepare for the exam in one's ample free time. Additionally, some basic competencies like public speaking skills can be developed over the long duration of the degree.

Beyond this, there is the fact that I came to law school after having displayed extensive academic mediocrity and disinterest in the sciences in my +2. Being in classrooms where the law, history, recent judgments and contemporary events were being discussed was a welcome change from this routine which brought me back to an environment where I felt in command of the subject matter. This also meant a new found confidence and a drive to do well in one's career.

Additionally, due to a set of happy coincidences I became a quasi 'batch representative' with the authorities regarding the conduct of the 2019 farewell as well as an advisor to the Student Body's Constituent Assembly. These experiences were important lessons in negotiating with the administration and the complexities of students trying to make decisions via elected bodies.

Often the most important thing that university can do for you is provide this sort of 'personality development', since the last-minute cramming for exams and hastily copy- pasted academic assignments hardly have any relevance for life post-graduation.

Q3) How did being part of RSRR help in your academic growth?

I think any law student should acquire three basic skills, regardless of the careers that they choose post law school- Reading (which includes Research), Writing/Drafting and strong Communication skills. While important for all professionals, these skills require a higher competence from law graduates as well as the need for these skills to be learnt with respect to the context of the law.

Being a member of RSRR, or any peer run journal for that matter, contributes significantly to both the reading and writing components of law school as well as some amount of communications training. Going through different submitted papers (which often vary significantly in quality) gives you a sense of what constitutes 'good writing.'

Additionally, to thoroughly review papers requires one to do some research of their own to verify the statements made in the submitted papers. This builds some basic knowledge about different contemporary legal events. Further, as a student editor one often ends up referring to the law journals of the other NLUs which naturally exposes us to the highest quality of legal writing on a national level. (Unfortunately, I did not capitalize on my experiences by devoting time to writing a proper research article, I would advise all student editors to utilize the papers they review to begin their own legal writing and publication journeys)
In this context being with a law journal is the closest substitute for 'work-experience' available to a university student while on campus. It exposes you to working within timelines, working as part of a large team, dealing with some degree of 'office politics' and negotiating with the university regarding the resources available to the journal. These experiences are why I appreciate my time with the RSRR.

Q4) What do you know now that you wish you knew as a college student?

Mostly it would be what I mentioned earlier about having a 'professional' approach to the examination. Other than that university life teaches many lessons and there are bound to be regrets about not knowing some things in advance. But these things or lessons have to be learnt by trial and error, for the most part they simply cannot be learnt by merely being told about them. For example, I would have wanted myself to be more disciplined as well as participate more in college activities in my earlier semesters but this change of attitude took its own time and required exposure to experiences which changed my perspective.

However, there is one thing that I knew already in my college days and I would only reiterate it for any college going student, which is the fact that your college days are among the 'best' days of your life. The sense of community, the relative lack of responsibilities or obligations and a largely protected environment deserve to be appreciated. Students should try to maximise the time spent outside their rooms and keep themselves busy with the various activities going on in the campus.

Q5) When and how did you decide your career path?

Like a whole bunch of young Indians who have a decent command and interest in general knowledge I had long been advised to head for the CSE exam. But, from what I can recollect, my first reaction to getting into law school was acquiring books on Nani Palkhiwala and MC Setalvad, obviously the plan then was to target litigation. My interest in the Civil Services began post the end of 1st year and I think that it can be traced to my interest in contemporary events and the desire to be involved with policy implementation as part of government. However, I will add that I began to prepare for the exams in an irregular fashion from the 2nd year on. It was a good approach I think since it allowed me to slowly develop some semblance of a routine and strategy for the paper despite my relatively poor commitment to academics at that stage.

Even as I write these answers, I am still contemplating whether to join the service allotted to me (the Indian Trade Service), sit for another attempt or for that matter even join litigation. This might sound a bit indecisive but I would say the point of career goals is only to give yourself a target over the short to medium term (like the bird's eye for Arjun in the Mahabharat), they should not be used to bind oneself to some self-imposed lifelong do or die narratives. In that context I value the CSE preparation for inculcating in me the capacity to set daily/monthly targets and providing a goal, the pursuit of which, gave me a sense of meaningfulness or challenge. As long as you remain ambitious, consistent with your efforts and focused on the task immediately in front of you, some or the other career path will end up working out.

CONCEPT NOTE: VOLUME 9.2

The RGNUL Student Research Review invited papers and submissions for Volume 9, Issue 2, from academicians, practitioners, legal luminaries and students on the theme titled:

"Instrumentalising Arbitration: Innovation, Interaction and Impact"

Serving as a global economic powerhouse, arbitration is not a foreign concept to India as an alternative method of dispute resolution. Modelled after the UNCITRAL Model Law on International Commercial Arbitration, the Arbitration and Conciliation Act of 1996 (the "Act") consolidated previous arbitration statutes. The Act came into effect at a time when the Indian economy was experiencing the effects of globalisation and liberalisation policies and was anticipated to stimulate the market for an expedient and affordable form of alternative conflict resolution through arbitration. It was praised for modernising the legal landscape of Indian arbitration by making it more adaptable to modern needs and foreseeing collaboration between the judicial and arbitral processes while also limiting court intrusion.

However, decades after the Act's implementation, numerous critiques exposing its limitations and bottlenecks have exposed its failures in transforming India's status to that of a global arbitration hub. Indian courts have had a reputation for being interventionist and asserting jurisdiction over arbitration cases that were held overseas. Further, due to the egregious delays in the legal system, India has been generally avoided as a venue for international arbitration. According to the award issued by the ICC tribunal in the White Industries case, the Indian Government was liable for not providing White Industries with "effective means" for asserting claims and enforcing rights.

Ultimately, the landmark Supreme Court decision in BALCO 4 and various proposals to the Act culminated in the 20th Law Commission's Report No. 246. The Arbitration and Conciliation (Revision) Act of 2015 was the main amendment

made to the Act over the next few years. By providing specific accommodations, the 2015 Amendments made it clear that institutional arbitration was the preferred mechanism of dispute resolution. The 2019 Amendments also established the Arbitration Council of India ("ACI"), a new and independent statutory body that sets standards for uniform professional conduct as well as grades and accredits arbitral institutions and arbitrators.

While the proposed reforms to Indian arbitration law seem to be effective in allaying fears of additional bottlenecks, the issues surrounding a framework regarding institutional arbitration in India continue to hamper India's reputation as a global arbitration hub. In this regard, while the BALCO ruling had given the Indian arbitration sector a newfound sense of optimism, it had also indicated that top-down changes, though perhaps necessary, are far from sufficient. Bottom-up initiatives aimed at raising knowledge, promoting a culture of arbitration, and private ordering are equally important, and neglecting such aspects would lead to unsuccessful outcomes. Private institutions play a significant role in such grassroots activities in the majority of developed jurisdictions. However, India's exceptionalism in ad hoc arbitration has rendered institutions generally unable to carry out these crucial administrative and norm-setting duties required for wider recognition as an arbitration hub.

According to a 2016 NITI Aayog Report, it takes approximately 5 years even for arbitration in the construction industry to be resolved (demonstrating that domestic arbitration is starting to experience similar delays) and an additional 2.5 years in courts for any challenge to an award to be decided.8 Further, the Union of India and its agencies are the largest litigants in the nation, according to the Law Commission's 2009 findings. With assistance from the Maharashtra Government, the Mumbai Centre for International Arbitration (abbreviated as "MCIA") was established in 2015 with a set of Rules that best reflect global practices.10 By instructing parties to an ad hoc international arbitration to contact the MCIA to select an arbitrator, the Supreme Court has also aided in expanding institutional arbitration.11 Additionally, the Singapore International Arbitration Centre ("SIAC"), frequently involving Indian parties, has created a second liaison office in India. Further, institutions like the London Court of International Arbitration ("LCIA") and the International Court of Arbitration of the International Chamber of Commerce ("ICC") are similarly popular among Indian stakeholders, demonstrating a definite preference for institutional arbitration.

However, the rise of institutional arbitration in India raises several imperative concerns and questions concerning international investment and commercial arbitration cases.

International commercial arbitration is an alternative way to settle private disputes resulting from international business transactions, allowing the parties to avoid going to court. Control of the proceedings seamlessly shifts from the parties to the arbitral panel in a properly run international arbitration. The parties are initially in total control. They are the only ones aware of the problems at stake, how they plan to establish the facts they rely on, and the legal arguments they intend to make. It is "their" case that will be presented before the arbitral tribunal. Since it is "their" tribunal, the arbitral tribunal owes its very existence to the parties, but as the case goes on, the arbitral tribunal learns more about the issues at stake. It starts making decisions about which facts are relevant and which legal issues are significant. At this stage, the balance of power, in effect, shifts from the parties to the arbitral tribunal. Due to the various legal systems, the applicability of arbitration agreements, therefore, differs by country. Specifically, the New York Convention governs this matter with regard to the enforcement of the award.

Conversely, international investment arbitration becomes paramount as countries increasingly enter into bilateral investment treaties. Globally, foreign direct investment is expanding rapidly. A network of more than 2800 international agreements, known as Bilateral Investment Treaties ("BITs"), provides important legal protections, but many of the multinational corporations making such investments might not be aware of them.

One or more investment treaties have been signed by more than 150 nations. In addition to requiring host nations to offer specific protections for foreign investments, BITs also give investors a strong private right of action against the host government if it fails to uphold these duties. It is crucial to look into the prospect of bringing claims under a BIT as soon as issues arise over government action or inaction relating to an investment.14 Even if investment-related contracts (such as concession contracts) call for domestic courts to resolve disputes, BIT arbitration is an option. States guarantee specific rights and protections to investors from the other contracting State under a bilateral investment treaty (BIT). These include Protection from Expropriation, National Treatment, Most Favoured Nation (MFN), and Fair and Equitable Treatment, to name a few. In each of these cases, international law provides protection and isusually agreed upon by the contracting States. For instance, "Fair and equitable treatment generally involves consideration of the consistency, transparency, fairness and proportionality of governmental measures, as well as prohibitions against arbitrary or discriminatory state action."

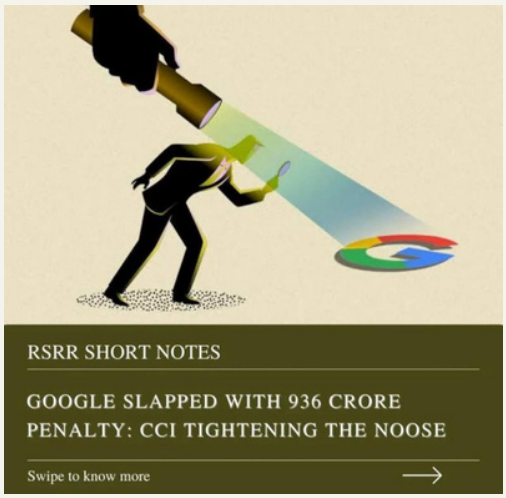
In many cases, tribunals give decisive weight to an investor's "legitimate expectations." However, a number of tribunals take a more stringent approach. For example, in Glamis Gold v. United States, the tribunal opined that a violation of the fair and equitable treatment standard requires an act that is "egregious and shocking - a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."16 International investment arbitration establishes a guarantee for foreign investors against the expropriation of their investments without due compensation.

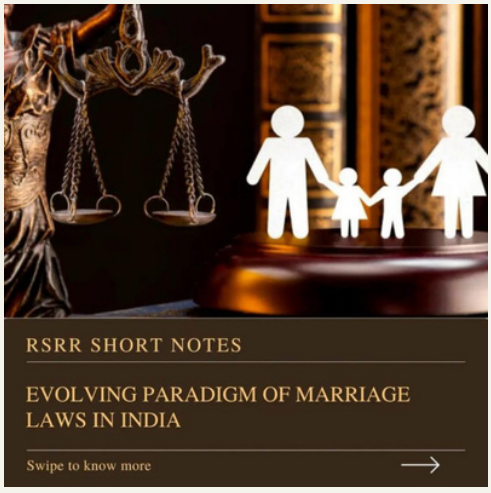
However, in the Methanex v. USA case, it was observed that "non-discriminatory regulatory actions by a contracting party that are designed and applied to protect legitimate public welfare objectives including the protection of health, safety and environment do not constitute expropriation or nationalisation except in rare circumstances where those actions are so severe that they cannot be reasonably viewed as having been adopted and applied in good faith for achieving their objectives." In light of this, a violation of these granted protections would give an investor the legal prerogative to bring a case to investment arbitration against the host country. BITs give investors a private right of action—the right to submit an investment dispute with the host government directly to international arbitration.

BITs disputes are governed by the terms of the relevant treaty and international law and not specifically by the law stated in the contracts related to investment. The Government's Compliance with the BIT awards has been generally very good. Further, the awards issued by investor-state arbitration tribunals are enforceable in the 144 countries that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In light of these developments trends in the arbitration sector, RSRR seeks to delve into the theme, "Instrumentalising Arbitration: Innovation, Interaction and Impact" to review and analyse the present legal and policy framework in light of the everyday developments in the sector. The primary objective behind this theme is to provide a platform for legal analysis, insightful commentary, and in-depth analysis that can bridge the gap between pertinent legal developments in the sector and the likelihood of their actual implementation which, in turn, will improve the discourse about such contentious issues.

QUARTER AT A GLANCE





Short Notes

Short Notes are excerpts that succinctly analyse recent major happening every week and leave the readers with food for thought to simulate their research capabilities

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