

**CONSTITUTIONAL SPACE AND LEGISLATIVE DEVELOPMENT IN INDIA ON  
EXTRA-TERRITORIAL OPERATION OF LAW**

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**Abstract**

The extra-territorial operation of law signifies the exercise of jurisdiction, or legal power, outside territorial borders. The advancements in science and technology have led to a substantial increase in trade, commerce, services, communication, cross border terrorism and other similar transactions. The Constitution of India article 245(2) read with article 245(1) solely authorises the parliament of India to make extra-territorial operation of law. Any legal investigation within the ambit of extra-territorial operation of law basically explores the situation, when any enactment of Indian Parliament exercises legal power beyond Indian borders. This research article explores the constitutional space and legislative development on extra-territorial operation of law in India. The study also particularly focuses on the efficacy of enacted laws with judicial response which have extra-territorial operation of law. This study also analyses the specific sections of various enactments that possess extra-territorial operation within the legislative sphere of India.

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## I Introduction

THE WORLD that we all live in is a global village. On account of the scientific and technological developments that have taken place over the years, the magnitude of cross border travel, trade, services and transactions has increased tremendously. Global criminal and terror networks activities from outside one's own borders could affect the interests, welfare, well-being and security of a country. The growing sense of social, economic, and political interdependence among nations has led to a substantial increase in cross-border activities, recognized and unrecognized. Within international law, the principles supporting strict territorial jurisdiction have been relaxed to create a greater sense of interdependence and awareness of various extra-territorial aspects and causes although the fine line between 'concern' and 'interference' over extra-territorial matters is evidently notable. Over the course of modern history, such interferences have been deemed as hindrances to the autonomy and sovereignty of nations and the very belief of peaceful co-existence as well. This has eventually led to altercations and disputes among nations, their people and their business enterprises.

The Constitution is not an ordinary statute made in the ordinary legal procedure. It is an embodiment of higher order, multiple values and an enunciation of aspirations, and it is also a solid stanchion of inspiration and diligence for the generations to come. The grid of Constitutional mechanism and structure in a practical sense spells out new working paths with achievable goals.<sup>1</sup> In this rapid changing world and globalised era every written constitution should have efficacy to deal the matter of extra-territorial operation of law related to matters of trade, commerce, services, communication and cross border terrorism and other similar transaction occur outside of the country.

The concept of classical sovereignty outlines a nation's exclusive right to govern itself. The 'extra-territorial operation' constitute of two key words, 'extra-territorial' and 'operation'. The term extra-territorial connotes the exercise of jurisdiction, or legal power, outside territorial borders. The concept of 'extra-territorial operation of law' is an extension as well as a contradiction to the concept of sovereignty and refers to the application of the laws of one country to persons, conduct, or relationships outside of that country. The Constitution of India authorizes the Parliament to legislate with extra-territorial operation of law. Any legal investigation within the ambit of extra-territorial

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1. D K Singh and A Singh, "The Constitutional Spirit of Word 'Union' and the Colonial Hangover of the Word 'Central' in the Federal Structure of India", *Statute Law Review*, (2017). doi:10.1093/slr/hmx027(Early Online Issue), available at <https://academic.oup.com/slr/advance-article-abstract/doi/10.1093/slr/hmx027/4652251> (last visited on May 23, 2018).

operation of law basically explores the situation, when any enactment of Indian Parliament exercises legal power beyond Indian borders.

The objective of this research article is to analyse the constitutional space and legislative development on extraterritorial operation of law in India. The research paper also explores the constitutional norm and its judicial interpretation when extra-territorial operation can be validly allowed. The study also particularly focuses on the efficacy of enacted laws with judicial response which have extra-territorial operation of law.

## II Pre Constitution Scenario of Extra-territorial Operation of Law

The concept of extra territorial operation of law evolved in India with the Government of India Act, 1935 (Herein after referred as Act of 1935). This Act was made by the British Parliament with an aim to grant a large measure of autonomy to the provinces of British India. The Act of 1935 was applicable to the territories in India for the time being vested in His Majesty the King, Emperor of India. The sections 99(1) and 100 of the Act of 1935 had empowered the Federal legislature to make laws for the whole or part of British India or any Federated State. Sub-section (2) of section 99 provides that ‘without prejudice to the generality of the powers conferred by the preceding sub-section no Federal law shall, on the ground that it would have an extra-territorial operation, be invalid so far as it applies; to certain persons and things.’ It is true that India was not a sovereign country at that point of time but the Act was made under the sovereign function of British Parliament that empowered the Federal legislature to make extra-territorial operation of law beyond the territorial boundary of Federation of India.

The Privy Council interpreted the section 99(2) of Government of India Act 1935 in *British Columbia Electric Railway Co. Ltd. v. King*<sup>2</sup>, Viscount Simon, J. gave an unambiguous dictum regarding extra territorial operations:<sup>3</sup>

A legislature which passes a law having extraterritorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that

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2. MANU/PR/0103/1946.

1. *Id.* at para 10.

account, and the courts of its country must enforce the law with the machinery available to them.

In the same vein, in the case of *Governor General in Council v. Raleigh Investment Co.*<sup>4</sup>, the question of competence was raised to enact extra-territorial laws in respect of matter other than those enumerated in section 99(2) of the Act of 1935. Spens, C.J. held that as the impugned provisions were within the ambit of legislative power under sections 99(1) and 100 of the Act of 1935, they were not extra- territorial in operation and that even if they were, the words ‘without prejudice to the generality of the powers conferred by the preceding sub-section’ occurring in section 99(2) posited the existence of a power from another source, and that the enumeration of the specified topics in that sub-clause was by the way of abundant caution.

The draft Constitution prepared by the constitutional advisor<sup>5</sup> in October 1947 contained seven clauses (179-85) prescribing the distribution of legislative power.<sup>6</sup> The provision of the extra territorial operation of law was found in clause 179<sup>7</sup> of Constitutional Advisor draft Constitution. Clause 179 possesses all the attributes of section 99(1) and 99(2) of the Act of 1935 except it did not subject the Federal Parliament’s extra-territorial jurisdiction to any qualification. The drafting Committee of the Constituent Assembly redrafted the clause 179, split into two parts and reproduced it as article 216 (1) and 216 (2) in the new draft<sup>8</sup> Constitution. Finally, the article 216(1) and 216(2) of the draft constitution were adopted on 13<sup>th</sup> June, 1949 as such in the Constitution of India, as article 245(1) and 245(2) that paved the way for the principle of extra territorial operation of ‘existing law’<sup>9</sup> and future legislation of the Parliament of India.

### III Constitutional Space of Extra-territorial Operation of Law

Constitutional structure, values and scheme ensure that the powers vested in the organs of the government are not being transgressed, and that they are being used to realise a general welfare of the

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4. AIR 1947 PC 78.

2. Sir Benegal Narsinga Rau was a constitutional architect of the Constitution of India, he was appointed as the Advisor of the Constituent Assembly in 1946.

6. B. Shiva Rao, *The Framing of India’s Constitution: A Study* 614(N. M. Tripathi Private LTD., Bombay 1964).

7. "Subject to the provisions of this Constitution, the Federal Parliament may make laws, including laws having extra-territorial operation, for the whole or any part of the territories of the Federation...."

8. Draft Constitution of India, Prepared by Drafting Committee, 100 (Government of India Press, New Delhi 1948).

9. Article 366 (10) of the Constitution of India, 1950 define ‘existing law’ means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation.

populace. Legislative powers are granted to enable the accomplishment of the goals of the nation. The powers of judicial review are granted in order to ensure that legislative and executive powers are used within the limits specified in the Constitution. Nevertheless, the very essence of constitutionalism is also that no organ of the state may arrogate to itself powers beyond what is specified in the Constitution. Judicial restraint is necessary in dealing with the powers of another coordinate branch of the government; but restraint cannot simply imply the abdication of responsibility of walking on the defined domain.

The very first line of the preamble of the Constitution of India declares that India is a Sovereign country. Chapter-1 of the Part XI of the Constitution of India provides distribution of legislative powers. Article 245 provides for the extent of laws made by Parliament and by legislatures of States subject to the provisions of the Constitution. The Parliament makes laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of State<sup>10</sup>. Clause 2 of article 245 provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation<sup>11</sup>. The Legislature of State has no power to legislate on the matter of extra-territorial law.

The Constitution of India article 245(1) read with article 245(2) solely authorises parliament of India to make laws related to extra-territorial operation of law. The article 245(2) contains the phrases ‘no law made’, ‘deemed to be invalid’, ‘extra-territorial operation’ and in article 245(1) the use of word ‘for’ have possesses some specific significance. The relationship between article 245 (1) and 245 (2) and also between article 245 and 260 and its significance is described below.

### **Make/Made laws under article 245**

The article 245(1) uses the verb ‘make’ with respect to laws, indicating the Parliamentary power to make laws. The subject of article 245(2) is the law made by the Parliament, pursuant to article 245(1). The opening clause of article 245(2) with the phrase ‘No law made by the Parliament’ clarify that the article 245(2) is not an independent source of legislative powers. It is dependent on article 245(1) because power to make law is enumerated in the article. Article 245(2) uses the past tense of make, ‘made’, connoting laws that have already been enacted by the Parliament.

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10. The Constitution of India, art. 245(1).

3. The Constitution of India, art. 245(2).

In the *GVK Case*<sup>12</sup> the learned Attorney General G.E. Vahanvati relied on abovementioned history of changes to the constitutional advisor draft Constitution clause 179 to the article 245 of the Constitution of India and argued that that the framers of the Constitution intended the two clauses to have a separate existence, independent of each other. But the Constitutional Bench was not convinced of the argument of Attorney General and the Court opined that the drafters were acutely aware of the difference between the meaning of the phrase ‘operation of law’ and the ‘making of law’. Further, by beginning clause (2) of article 245 with the phrase ‘No law made by the Parliament...’, it is clear that the drafting committee intended to retain the link with clause (1) of article 245. Thus we cannot view clause (2) of article 245 as an independent source of legislative powers on account of the history of various iterations of the pre-cursor to article 245 in the Constituent Assembly.

### **The implication of word ‘for’ in article 245(1)**

The word ‘for’<sup>13</sup> is used as a preposition in article 245(1) of the Constitution of India and connects ‘the whole or any part of the territory of India’ to the legislative powers of the Parliament. In the *GVK Industries Limited v. Income Tax Officer*<sup>14</sup> case Court signify the meaning of ‘for’ from on *Oxford English Dictionary*<sup>15</sup> observed that the range of senses in which the word ‘for’ is ordinarily used would suggest that are in the interest of, to the benefit of, in defence of, in support or favour of, suitable or appropriate to, in respect of or with reference to ‘the whole or any part of the territory of India’.

The territory of India is explicitly specified under article 245(1) in the phrase ‘for the whole or any part of the territory of India’. In the *GVK case*, the Court further observed that if the power to enact laws for any territory, including a foreign territory, were to be read into clause (2) of article 245, the phrase ‘for the whole or any part of the territory of India’ in clause (1) of article 245 would become a mere surplus sage.<sup>16</sup> In this case, the Court structurally analysed the legislative powers of the Parliament with the help of the Latin maxim ‘*Expressio unius est exclusio alterius*’<sup>17</sup> that the phrase

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12. *GVK Industries Limited v. Income Tax Officer*, MANU/SC/0163/2011, at para 24.

1. The Constitution of India, 1950, clause (1) of article 245 specifies that it is the territory of India or a part thereof ‘for’ which the Parliament may make laws.

2. *Supra* note 12 at para 33.

3. Concise Oxford English Dictionary 8th Ed., OUP (Oxford, 1990).

4. *Supra* note 12 at para 31.

17. *Id.* at para 54.

'for the whole or any part of the territory of India' explicitly enunciates that one may not read that the Parliament has been granted powers to make laws 'for' territories beyond India.

In *GVK case*<sup>18</sup> a question arose whether the Parliament was empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India, and furthermore if such laws be bereft of any benefit to India?' The clue of answer to this question also lies in word 'for' used in article 245(1). The Court derived the responsibility of the Parliament with the help of word 'for' used in article 245(1) and stated that Parliament of India is to act as the Parliament of India and of no other territory, nation or people. The Court also derived two related limitations in this regard, the first being that the Parliament may only exercise its powers for the benefit of India in regard to the necessity. The laws enacted by Parliament may enhance the welfare of people in other territories too but the benefit to or of India remain the central and primary purpose. The second limitation that the law made by Parliament with regard to extra-territorial aspects or causes that do not have any, or may be expected to not have nexus with India, transgress the first condition. The Sudershan Reddy J. for Constitutional bench negated the answer of question logically and held that the Parliament's powers to enact legislation, pursuant to clause (1) of article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India.

### **Is article 245(2) a specific exception to article 245(1)?**

The object of article 245(2) is to state that a law so made by the Parliament, for the whole or any part of territory of India, should not be held to be invalid solely on the ground that such laws require extra-territorial operation. The words and phrases 'make Laws' 'extra-territorial operation' and 'invalidate' have been used in a manner that clearly suggests that the addressees implicated are the legislature, the executive and the judiciary respectively. The judicial review is the inherent basic feature of the Constitution of India but the article 245(2) creates a question mark on judiciary power to invalidate laws on the ground of the extra-territorial operation of law. In this regard, in *A.H Wadia v. Income Tax Commissioner*<sup>19</sup> the observation<sup>20</sup> of Federal Court by Kania, C.J. is important:

In the case of sovereign legislature,... questions of extra- territoriality of any enactment can never be raised in the municipal courts as a ground for challenging

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18. *Id.* at para 42 and 43.

4. MANU/FE/0004/1948

5. *Id.* at para 16

its validity. The legislation may offend the rules of international law, may not be recognised by foreign courts or there may be practical difficulties in enforcing them but these are the questions of policy with which the domestic tribunals are not concerned.

The above observation of Federal Court shows that the enactment possesses provision of extra-territorial operation of law cannot be challenged in municipal Court. The Constitution Bench<sup>21</sup> in number of cases laying down judicial review as an integral part of the basic structure under the constitutional scheme. Thus, any proposition of law contrary to the general and inherent powers of judicial review would be invalid and against the basic structure of the Constitution. In *GVK case*<sup>22</sup> Court observed that the only organ of the State which may invalidate laws is the judiciary. Consequently, the text of clause (2) of article 245 should be read to mean that it reduces the general and inherent powers of the judiciary to declare a law ultra-vires only to the extent of that one ground of invalidation. Furthermore, clause (2) of article 245 acts as an exception, of a particular and a limited kind, to the inherent power of the judiciary to invalidate, if ultra-vires, any of the laws made by any organ of the State. Generally, an exception can logically be read as only operating within the ambit of the clause to which it is an exception.

Therefore, the law made by the Parliament related to extra territorial operations is within judicial scrutiny but can never be deemed as invalid on grounds of its extra territorial nature and in this way, article 245 (2) reduces the power of judiciary to invalidate such laws. The Parliament of India is empowered to make laws beyond territorial boundary of India but the law must have a nexus or an impact on India. If the parliament makes laws having extra territorial operation without having any nexus with or any impact on India, then under such circumstances; judiciary has the power to invalidate such a law because it does not fulfil the condition of article 245(2). Thus, the words of article 245(2) create a specific exception for the law made by Parliament in respect of article 245(1).

### **The balance between article 51 and 245**

Article 51 of the Constitution of India contains important positive policy statements for promotion of international peace and security, fostering of respect for international law and treaty obligation. The

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21. *I R Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1. Also see, *Woman Rao v. Union of India*, (1981) 2 SCC 362. *Minerva Mills v. Union of India*, (1980) 3 SCC 625.

6. *Supra* note 12 at para 52.



article 51<sup>23</sup> of the Constitution of India plays a crucial role while dealing the correlation between extra-territorial operation of law and International peace and security. The Constitution of India charges the various organs of the State with affirmative responsibilities to endeavor to achieve the goals set forth in article 51 and also protecting the interests of, the welfare of and the security of the nation as being vital for the interests of India. Thus the balance between article 51 and 245 of the Constitution of India is needed in the making of laws related to extra-territorial operation.

In *GVK Case*, the Apex Court concluded the role of article 51 in respect to extra-territorial operation of law in the following words: <sup>24</sup>

Article 51, a Directive Principle of State Policy, though not enforceable in a court of law, nevertheless fundamental to governance, lends unambiguous support to the conclusion that Parliament may not enact laws with respect to extra-territorial aspects or causes, wherein such aspects or causes have no nexus whatsoever with India.

**The distinction between article 260 and article 245(2)**

The article 260 of the Constitution of India empowers the Government of India to enter into agreement with foreign territory that is a basic feature of Sovereign nation. It is an explicit provision under the Constitution of India which solely deals with the jurisdiction of the Union in respect to legislative, executive and judicial functions over territory outside of India. The article 260 empowers the Parliament to enact the law and it provides that every agreement with foreign jurisdiction shall be subject to and governed by such law for the time being in force. The Parliament has enacted the Foreign Jurisdiction Act, 1947 for this purpose to provide for the exercise of certain foreign jurisdiction of the Central Government.

In *GVK Case*, the Court observed that the Government of India, pursuant to article 260, acts on behalf of a foreign territory; there is always the Parliament to make sure that the Government of India does

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23. Article 51. The State shall endeavour to— (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (d) encourage settlement of international disputes by arbitration.

7. *Supra* note 12 at para 73.

not act in a manner that is contrary to the interests of, welfare of, well-being of, or the security of India<sup>25</sup>. Further, the Court also draws the inference from sub-clause (c) of clause 3 of article 1 and *Berubari Union and Exchange of Enclaves case*<sup>26</sup> and derived that unless a territory is a part of the territory of India, Parliament may not exercise its legislative powers in respect of such a territory. In the constitutional scheme, it is clear that the Parliament may not make laws for a territory, as a first order condition, unless that territory is a part of India.

The above discussion elucidates that the Government of India can enter into an agreement of foreign jurisdiction subject to the Foreign Jurisdiction Act, 1947. The mandate of article 260 clearly rules out the possibility of parliament under article 245(2) acting outside the territory of India without having any nexus. Therefore, article 245(2) requires nexus with India. For article 260, the only condition is agreement subject to the Foreign Jurisdiction Act of 1947. The extra-territorial operation of law are allowed under article 245(2) of the Constitution of India because the phrase ‘operation of law’ and ‘making of law’ do not possess the same meaning.

#### **The dimension of ‘extra-territorial operation of law’ and its distinction with ‘make law’**

The distinction between the phrases "make laws" and "extraterritorial operation of law" is important to understand the Constitutional scheme envisaged under article 245(1) and 245(2) of the Constitution of India. The conflict between “Principle of Sovereignty of States” that reflects in the phrase “make law” (the laws made by one State can have no operation in another State) and ‘extra-territorial operation of law’ reflected in the article 245(2) was drawn in *Electronics Corporation of India Ltd. v. CIT.*<sup>27</sup> In this case, the three judges Bench of Apex Court relied on the ratio of *British Columbia Railway Company Limited v. King*<sup>28</sup> that the problems of inability to enforce the laws outside the territory of a nation state cannot be grounds to hold such laws invalid. For the Bench R.S. Pathak, C.J. held that a Parliamentary statute having extra-territorial operation cannot be ruled out from contemplation. The operation of the law can extend to persons, things and acts outside the territory of India<sup>29</sup>

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25. *Id.* at para 63

8. *In Re:* AIR 1960 SC 845.

9. MANU/SC/0331/1989.

10. *Supra* note 2 at para 10.

11. *Supra* note 27 at para 8.

In *ECIL case*<sup>30</sup>, the Court distinguish the phrase ‘make law’ and ‘extraterritorial operation of law’ on the basis of provocation for the law, object of law and its relationship with India. In both the situation, the provocation for the law must be found within India itself. But in the situation of extraterritorial operation, in order to subserve the object, the law may have exercises beyond the territorial boundary of India and in such conditions; the object must be related to something in India. The court also stated that it is inconceivable in a situation of extra-territorial operation that law made by Parliament in India has no relationship with anything in India.

Finally, the Apex Court in *ECIL case* defined the parameter of ‘extra-territorial operation of law and held that Parliament have competence to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, solely within India. The operation of the law can extend to person, things and acts outside the territory of India. Parliament will have no competence to make the laws unless a nexus with something in India exists. In view of the substantial importance of the question, the bench referred the case for determination by a Constitution bench.

The dimension of extra-territorial operation of law was again substantially discussed in *GVK Industries Limited v. Income Tax Officer*<sup>31</sup> by five-judge Constitution bench of the Supreme Court of India which opined that the distinction drawn in *ECIL case* between ‘make laws’ and ‘operation of law’ is a valid one, and leads to a correct assessment of the relationship between clauses (1) and (2) of article 245. In this case, the Court applying the novel interpretative methodology observed: <sup>32</sup>

[The] Constitution [may be viewed] as [being] composed of constitutional topological spaces. Each Part of the Constitution deals with certain core functions and purposes, though aspects outside such a core, which are contextually necessary to be included, also find place in such Parts. In the instant case Chapter 1, Part XI, in which article 245 is located, is one such constitutional topological space. Within such a constitutional topological space, one would expect each provision therein to be intimately related to, gathering meaning from, and in turn transforming the meaning of, other provisions therein.

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30. *Id.* at para 9.

12. *Supra* note 12 at para 17.

13. *Id.* at para 30.

The ‘topological space’ theory was applied in the interpretation of article 245(1) and article 245(2) and derive contextual necessary support from article 1(3)(c), article 51 and article 260 as abovementioned from other part of the Constitution of India. The Court also analysed the textual<sup>33</sup> and historical<sup>34</sup> arguments of article 245(1) and 245(2) of the Constitution of India and arrived at the conclusion that article 245 does not empower the Parliament to make laws beyond territorial boundary of India except in the case that extra-territorial operation of law has a nexus with or an impact on India. The other provisions of chapter 1, part XI of the Constitution of India create a topological space referred to laws made ‘for the whole or any part of the territory of India’ alone.

The Court after analysis of ratio of *ECIL Case*<sup>35</sup> and wider structural analysis<sup>36</sup> of the Constitutional provision, finally held that the Parliament is constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any direct or indirect, tangible or intangible impact or the effect or consequence for the territory of India, or any part of India or the interests of the welfare of the well being of or security of inhabitants of India and Indians.<sup>37</sup>

Therefore, in present times, the Parliament may enact a law related to extra-territorial operations. The only problem is the enforcement of such extra territorial operations of law, because it is the beyond the executive and judicial domain of India. If an extra-territorial law cannot be enforced, then it is useless to enact it but no one can suggest today that a law is void or ultra-vires which is passed by the Parliament on the ground of its extraterritorial operations. Thus a question mark may be put on the practicability of the extra-territorial operation law but not on its existence. The Indian Parliament can enact laws for territories outside of India that have an impact on or a nexus with India. The laws can be enacted for only such extra territorial operations that have a real connection or an expected real connection with India and nothing illusionary or fanciful. Thus, on account of their having some nexus with India, the Indian Parliament can enact such laws for the benefit of the people of India.

#### IV Legislative Development on Extra-territorial Operation of Law

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33. *Id.* at para 31-55.

14. *Id.* at para 24.

15. *Supra* note 27 at para 9.

16. *Supra* note 12 at para 61-64.

17. *Id.* at para 76.

The Constitution of India provides the legislative scheme which envisages that all laws made by the parliament are primarily applicable within the territory of India or its part. But the constitutional scheme has also allowed the parliament of India to frame extra-territorial operation of laws. In the legislative sphere of India, some specific laws made by Parliament of India which have extraterritorial operation of law enumerated in chronological order of their enactment are given below.

### **Indian Penal Code (section 3 and 4) and Code of Criminal Procedure (section 188)**

The Indian Penal Code (IPC) is an existing colonial law that deals with the punishment of offences committed within India and extension of Code to extra-territorial offences. It is a general penal code for India which is applicable to every person who committed offences within the territory of India except the State of Jammu and Kashmir. The section 3 of the IPC deals with the punishment of offences committed beyond the territory of India but which legally may be tried within India. Section 4 states that the Act also applies on any Indian citizen who has committed offences beyond the territorial boundary of India. The section 3 and 4 of the Code signify that the attribute of extra-territorial operation of law is an exception of section 1 which provides general rule of territorial jurisdiction of the Code. The section 188<sup>38</sup> of the Code of Criminal Procedure (CrPC) also deals with the offence committed outside India by citizen or non citizen of India. It is the procedural counterpart of section 4 of the IPC which only deals with the procedure and does not make it a substantive offence. The proviso to section 188 of CrPC opens with non-obstante clause and imposes condition that such offences could be inquired into or tried only after having obtained the previous sanction of the Central Government.

In the case of *Ajay Agrawal v. Union of India*<sup>39</sup>, a question arose whether the prosecution of the appellant under section 120(B) read with section 420 and 471 of the Indian Penal Code was bad in the absence of sanction under section 188 of the Criminal Procedure?. The Supreme Court held that

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38. Section 188. Offence committed outside India

When an offence is committed outside India-

(a) by a citizen of India, whether on the high seas or elsewhere; or

(b) by a person, not being such citizen, on any ship or aircraft registered in India,

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.

39. MANU/SC/0265/1993

sanction under section 188, CrPC was not a condition standardized to take cognizance of the offence. If need be, it could be obtained before trial begins.

In this case before the Apex Court, it was alleged that the offence of conspiracy initially appeared at Chandigarh. Though the conspiracy in itself is completed offence, but it being a continuing offence, part of the conspiracy and overt act in furtherance thereof took place at Dubai and partly at Chandigarh. In consequence, other offences were committed including the offence of cheating of the Punjab National Bank at Chandigarh. The Supreme Court<sup>40</sup> held that since the offences were committed during the continuing course of transaction, the need to obtain sanction for various offences, under proviso to section 188, CrPC is obviated.

The Supreme Court in this judgment did not disturb the ratio of cases of *T. Fakhrulla Khan and others v. Emperor*<sup>41</sup> and *In Re: M.L. Verghese*<sup>42</sup>. In case of Fakhrulla Khan and Varghese, the offences were committed outside India. The offences were completed in themselves without conspiracy and so, it was held that prior sanction under section 188, CrPC was necessary before cognizance could be taken. In this judgment the Supreme Court also held that since the proviso to section 188, CrPC begins with non-obstante clause its observance is mandatory but it would only come into play if the principal clause is applicable on the basis that the offence has been committed and it is committed outside the country.<sup>43</sup>

The Supreme Court of India in *Om Hemarajani v. State of U.P.*<sup>44</sup> upheld the decision of Allahabad High Court that the word 'inquiry' used in proviso to section 188 CrPC is confined to proceedings before the Magistrate prior to trial alone but cannot be extended to investigation by the police. The Apex Court relied on the law laid down in *Sahebrao Bajirao v. Suryabhan Ziblati*<sup>45</sup> and *Emperor v. Vinayak Damodar Savarkar*<sup>46</sup> further observed: 47

The scheme underlying section 188 is to dispel any objection or plea of want of jurisdiction at the behest of a fugitive who has committed an offence in any other

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40 . *Id.* at para 26.

41. AIR 1935 Mad 326.

5. MANU/TN/0217/1947.

43 . *Supra* note 39 at para 29.

44. MANU/SC/1002/2004.

6. MANU/NA/0114/1947.

7. MANU/MH/0149/1910.

8. *Supra* note 44 at para 15.

country. If such a person is found anywhere in India, the offence can be inquired into and tried by any court that may be approached by the victim. The victim who has suffered at the hands of the accused on a foreign land can complain about the offence to a court, otherwise competent, which he may find convenient. The convenience is of the victim and not that of the accused. It is not the requirement of section 188 that the victim shall state in the complaint as to which place the accused may be found. It is enough to allege that the accused may be found in India.

In *Thota Venkatesh Warlu v. State of A.P.*<sup>48</sup> the question which had been called upon to consider in this case was whether offences arising out of the same transaction could be tried together, some of which were committed within India and some outside India, without the previous sanction of the Central Government, as envisaged in the proviso to section 188 CrPC? The court relied on *Ajay Aggarwal case*<sup>49</sup> and held that the offences committed in Botswana by an Indian citizen would also be amenable to the provisions of the IPC section-4, subject to the limitation imposed under the proviso to section 188 CrPC. The Magistrate is free to proceed against the accused in respect of offences having been committed in India and to complete the trial and pass judgment therein, without being inhibited by the other alleged offences committed outside of India for which sanction would be required.

By virtue of 2009 amendment in section 4 of IPC a new sub section (3) has been added which provides ‘...Any person in any place without and beyond India committing offence targeting a computer resource located in India’. However, section 188 of CrPC does not incorporate the corresponding changes introduced in IPC. In view of added new sub section (3) of section 4, a person who commits an offence from outside of India targeting a computer resource located in India, the related provisions of IPC will apply to him. Therefore, the prior sanction of Central Government under section 188 of CrPC for inquiry or trial in such case will not be applied to him. The term ‘Computer resources’<sup>50</sup> are defined in section 2(1)k of Information Technology Act, 2000 and its section 75 also provides for extra-territorial operation of the statute. The division bench of the

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48. (2011) 9 SCC 527.

18. *Supra* note 39.

19. s. 4: Explanation (b) the expression “computer resource” shall have the meaning assigned to it in clause (k) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000).

Bombay High Court in *Razia Khatoon Rizvi v. The State Of Maharashtra*<sup>51</sup>, A. S. Oka J. for bench opined: 52

a person who is not a citizen of India commits an offence in a foreign country while he is not on any ship or aircraft registered in India, the provisions of IPC will not apply to him unless he has committed an offence targeting a computer resource in India.

The aforesaid decisions clearly cull out that sanction under section 188 CrPC is only necessary before the commencement of inquiry or trial and it is not a condition precedent for registering the offence by police or investigation by police. The conjoint reading of section 3 and section 4(3) of IPC, section 2(1)(k) and 75 of Information Technology Act and section 188 of CrPC articulate an inference that a person residing in foreign country targeting a computer resource in India, the prior sanction of Central Government under section 188 CrPC will not be applied to him.

### **Hindu Marriage Act 1955 section 1(2) and 19**

The section 1(2)<sup>53</sup> of the Hindu Marriage Act, 1955 (hereinafter H.M. Act) pertains to the extent of jurisdiction where the Act applies. The first part of section 1(2) of the act applies to intra-territorial jurisdiction, and second part extends the jurisdiction as extra-territorial operation. The combined reading of section 1 with clause (a) and (b) of section 2(1)<sup>54</sup> makes its intra-territorial operation of the Act apply to all Hindus, Buddhists, Jains and Sikhs whether they are domiciled in India or not. The provision of clause (c) of section 2(1)<sup>55</sup> contemplates extra-territorial operation only in the sense that persons domiciled in other territories to which the Act may extend are governed by Hindu law even though they reside outside the territories and would come within the purview of this Act.

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51. MANU/MH/0446/2017.

52 . *Id.* at para 9.

53. s.1(2) : It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

20. s.2(1): This Act applies,- (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj; (b) to any person who is a Buddhist, Jaina or Sikh by religion, and (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

55 . Hindu Marriage Act, 1955 (Act 25 of 1955)



Citizenship is not a necessary or imperative qualification for application of this Act<sup>56</sup>. The section 19<sup>57</sup> of the H. M. Act refers to the jurisdiction of the District Court and empowers the court to hear the petition where the marriage was solemnised. The scope of section 19(iv) extends beyond the consideration of domicile by providing that petition under the Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the petitioner is residing at the time of the presentation of the petition in a case where the respondent is, at that time, residing outside the territories to which the Act extends.

In the case of *Nitaben v. Dhirendra Chandrakant Shukla*<sup>58</sup> by virtue of a conjoint reading of the provisions of the sections 1(2), 2(1), 19(i) and 19(iv) of the Hindu Marriage Act 1955 the Gujrat High Court settled that if the marriage might have taken place somewhere else or the respondent might be residing somewhere else or at a place outside the territories to which the H. M. Act extends, then also the District Court where the petitioner resides at the time of the presentation of the petition would get jurisdiction. Though the word used in section 19(iv) is not 'domicile' but 'residing', the fact would show that extra-territorial jurisdiction was given in a case where other party was residing outside the territories to which the Act applies. The Court observed: 59

Sub-section (2) of section 1 of the Act gives extra territorial application of the Act to Hindus domiciled in the territories to which the Act extends but who are outside those territories, meaning thereby, the Act applies to those who are regarded as Hindus even if they reside outside the territories to which the Act applies or even if they leave such territories,...but it would appear from the provisions of section 1 read with section 2(1) of the Act that the Act would nevertheless apply to a Hindu residing in India, for the duration of his residence, whether he is domiciled in India or not. In fact, reading of these provisions makes it clear that by making the Act applicable to all Hindus, etc. under section 2(1)(a) and (b) and making the Act

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56. Satyajeet A Desai(ed.), *Mulla Hindu Law* 838 (Lexis Nexis, Gurgaon, 2010).

9. s.19: Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction  
 (i) the marriage was solemnised, or  
 (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends,..."

10. MANU/GJ/0317/1983.

11. *Id.* at para 43.

applicable to all such persons within the territory of India irrespective of their domicile the Legislature has omitted the nexus of domicile.

The observations of *Nitaben case* of the Gujarat high Court created confusion regarding condition of domicile for seeking the relief under Hindu Marriage Act 1955. The necessity of domicile and extra-territorial operation of Hindu Marriage Act was settled by Apex Court of India in *Sondur Gopal v. Sondur Rajini*<sup>60</sup>. In this case, the wife filed petition seeking decree of judicial separation under section 10 of the H.M. Act and also prayed for permanent custody of the minor child. The husband raised a plea that as he was not domiciled in India, hence, the petition was hit by provisions of section 1(2) of the H. M. Act, 1955. In short, his case was that they were citizens of Sweden and presently the husband is domiciled in Australia, therefore, the petition under H. M. Act in India was not maintainable. The husband had abandoned his domicile of his origin i.e. India and acquired domicile of Sweden and along with citizenship in 1997, he had abandoned the domicile of Sweden when he shifted to Sydney, Australia. After the family Court this matter came up before the Bombay High Court. The High Court held that the husband has miserably failed to establish that he ever abandoned Indian domicile and/or intended to acquire domicile of his choice. The husband appealed against this order of Bombay High Court in the Supreme Court with the leave of the court.

The division bench of Supreme Court of India referred the observation of Bombay High Court regarding condition of domicile.<sup>61</sup>

It is, thus, clear that a condition of a domicile in India, as contemplated in section 1(2) of H.M. Act, is necessary ingredient to maintain a petition seeking reliefs under the H.M. Act. In other words, a wife, who is domiciled and residing in India when she presents a petition, seeking reliefs under H.M. Act, her petition would be maintainable in the territories of India and in the Court within the local limits of whose ordinary civil jurisdiction she resides.

In this case Supreme Court dissented and found erroneous the decision of *Prem Singh v. Sm Dulari Bai*<sup>62</sup> and *Varindra Singh v. State of Rajasthan*<sup>63</sup> in respect of domicile. The Court further observed: 64

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60. MANU/SC/0694/2013.

21. *Id.* at para 15.

22. AIR 1973 Cal. 425.

Domicile are of three kinds, viz. domicile of origin, the domicile by operation of law and the domicile of choice. The present case is concerned only with the domicile of origin and domicile of choice... In domicile of choice one is abandoned and another domicile is acquired but for that, the acquisition of another domicile is not sufficient. Domicile of origin prevails until not only another domicile is acquired but it must manifest intention of abandoning the domicile of origin.

Thus, in this case, it was clear that domicile of India got revived immediately on his abandoning the Swedish domicile. In view of the settled principle of International Law that if domicile of origin is displaced as a result of acquisition of domicile of choice, domicile of origin remains in the background ready to revive the moment he abandons his domicile of choice. The Court relied on the *Electronics Corporation of India Ltd. v. Commissioner of Income Tax*<sup>65</sup>, C.K. Prasad J. clarified that the H.M. Act will apply to Hindus domiciled in India even if they reside outside India. If the requirement of domicile in India is omitted altogether, the Act shall have no nexus with India which shall render the Act vulnerable on the ground that extra-territorial operation has no nexus with India. The extra-territorial operation of law is saved not because of nexus with Hindus but Hindus domiciled in India. By all these reason, both husband and wife were domiciled in India and the H. M. Act applied to them.<sup>66</sup>

Therefore, the extra-territorial operation of law must have nexus with India as decided in *ECIL case* was included in *Sondur Gopal* case. It is now settled that H. M. Act has extra-territorial operation but the same is subject to the requirement of domicile. And in the context of H.M. Act, 1955, requirement of domicile provides nexus to extra-territorial legislation with India.

### **Section 9 (1) of the Income Tax Act, 1961**

The territorial jurisdiction of Income tax Act 1961 extends to the whole of India but section 9(1) of the Act invoked its extra-territorial nature as it said that the Act is applicable to non-resident assesses, although it seeks to tax only that part of their income which has a nexus in India. The act apply to all income accruing or arising, whether directly or indirectly, through or from any business connection in

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63. RLW 2005 (3) Raj. 1791.

12. *Supra* note 60 at para 26.

13. *Supra* note 27.

14. *Supra* note 60 at para 14.

India, any property in India, any asset or source of income in India, or through the transfer of a capital asset situate in India.

In the case of *Electronics Corporation of India Ltd. v. CIT*<sup>67</sup>, a Norwegian company entered into an agreement with Electronics Corporation of India Ltd. (ECIL), Hyderabad to provide technical know-how and services including facility for training of personnel for which it was paid in Norwegian currency. Norwegian company did not have any office or any business activity in India. It appears that the services were all rendered in Norway. The question was whether the appellant was liable to deduct tax at source in respect of fees for technical services falling under section 9(1)(vii). The High Court repelled the contention that section 9(1)(vii) of Income Tax Act 1961 was beyond the legislative competence of Parliament as it had the potential of extra-territorial operation. On appeal to the Supreme Court, for the three judge's bench, R.S. Pathak, C.J. observed that a Parliamentary statute having extra-territorial operation cannot be ruled out from contemplation. The court held that the Parliament's power to legislate, incorporate only competence to enact laws with respect to aspects or causes, that occur, arise or exist, or may be expected to do so, solely within India. The operation of the law can extend to person, things and acts outside the territory of India. Parliament will have no competence to make the law unless a nexus with something in India exists. In view of the substantial importance of the question, the bench referred the case for determination by a Constitution bench.

In *GVK Industries Limited & another v. Income Tax Officer*<sup>68</sup> the five judges constitutional bench of the Supreme Court considering the arguments of the Attorney General that the Parliament has inherent power to legislate for any territory including territories, beyond India and that no Court in India may question or invalidate such laws on the ground that they have extra-territorial laws, which in other words views that Parliament may enact legislation even to extra-territorial expects or cause that have no impact, effect in or consequence for India. The considering the scope of article 245(1) and 245(2) of the Constitution of India, the apex court bolstered on the cases decided by the Privy Council<sup>69</sup> with the cases on the concept of sovereignty related to International Law<sup>70</sup> and also taking into account the scientific and technological development, which have the magnitude of cross-border

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67. *Supra* note 27 at para 8 and 9.

23. *Supra* note 12.

24. *Wallace Brothers and Co. v. Commissioner of Income Tax, Bombay*, (1948) 16 ITR 240. also see *A.H. Wadia v. Commissioner of Income Tax, Bombay*, (1949) 17 ITR 63.

25. *Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation*, (1933) 49 CLR 220 at 239, Also see *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138.

travel and transactions including the aspects of crime having global criminal and terror networks. B. Sudershan Reddy, J. for the Constitution bench<sup>71</sup> held that the Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India.

### **SEBI Act, 1992 (section 11, 11B, 11C, 12 and 12A)**

SEBI Act, 1992 established a body corporate in the name of the Securities and Exchange Board of India (SEBI) to protect the interests of investors in securities and to regulate the securities market. Its territorial jurisdiction extends to the whole of India. The services in connection with instruments that are defined as securities Under section 2(h) of the Securities Contracts (Regulation) Act, 1956 (in short 'SCR Act, 1956'). The conjoint reading of section 11, 11B, 11C, 12 and 12A of SEBI Act, 1992 along with SEBI (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003<sup>72</sup> entitled SEBI to invoke its extra-territorial operation to protect the interests of investors.

The Hon'ble Supreme Court in the case of *SEBI v. Pan Asia Advisors Ltd.*<sup>73</sup>, wherein, the Apex Court was examining the principles of 'effects doctrine' in cases involving exercise of extra-territorial jurisdiction and held that to protect the interests of investors, 'effects doctrine' could be applied. The SEBI Act, 1992 read along with the definition of 'Stock Exchange' in section 2(j) of SCR Act, 1956 as well as Regulation 2(1)(c) of the 2003 Regulations provides for proceeding against any person in order to protect the interests of investors and the stock market in India with reference to any fraud played against such interest of the investors in India. The duty of SEBI to protect the interests of investors would automatically come into play as stipulated under sections 11-B, 11-C, 12 and 12-A of the SEBI Act, 1992.

### **The Arbitration and Conciliation Act, 1996 section 2(1)(f), 28(1), 44 and 53**

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71. *Supra* note 12 at para 76.

26. Regulation 2, Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003.

27. (2015) 14 SCC 71.

The provision of the Arbitration and Conciliation Act, 1996 Section 2(2) is read with section 28(1) explicitly envisages that where the place of arbitration is situated in India, the procedure of Part I of the Act would apply. The international commercial arbitration defined under section 2(1)(f), where condition precedent is at least one of the parties belong to outside of India. If the scope of arbitration comes within the purview of section 2(1)(f)<sup>74</sup> which tacitly provides an extra-territorial operation to Part I of the Act. The chapter I of part II of the Arbitration Act explicitly deals the enforcement of New York Convention related to foreign awards. The 'foreign award' is defined in section 44 to mean an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960. The chapter II of part II of Arbitration and Conciliation Act, 1996 deals with the Geneva Convention Awards. The section 53 an interpretation clause comprises the meaning of foreign award. The 'foreign award' under Geneva Convention means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924.

In *Bhatia International v. Bulk Trading S.A.*<sup>75</sup>, the three judge's bench of Supreme Court of India held that the provisions of the Arbitration and Conciliation Act, 1996 part I would compulsorily apply to all arbitrations and to all proceedings where such arbitration is held in India. The parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held outside of India, the provisions of Part I would also apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or Rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or Rules will not apply.

In the case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*<sup>76</sup> the Constitution Bench of Supreme Court overruled the ratio of Bhatia International case as 'where the arbitrations which take place outside the India the provisions of Part I would also apply'. The S.S. Nijjar, J. for

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74. s. 2(1)(f) "international commercial arbitration" means "an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is— (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) 2 \*\*\* an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country.

28. (2002) 4 SCC 105.

29. (2012) 9 SCC 552.

bench held that a plain reading of section 2(2) reflects that Part I is limited in its application to arbitration which takes place in India. The Part I and Part II of the Arbitration and Conciliation Act, 1996 are exclusive of each other as is evident from the definition section of both the Parts. The definition of international commercial arbitration contained in section 2(1)(f) is limited to Part I and section 44 gives the definition of 'foreign award' for the purpose of Part II. The Court further held that Part I only applies where the seat of arbitration is in India, irrespective of the kind of arbitration. It is held that section 2(7) does not indicate that Part I is applicable to arbitration held outside India. The section 28 makes a clear distinction between purely domestic arbitration and international arbitration with a seat in India.

Further Apex Court finally concluded that the Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. The provision contained in section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India.

One other important thing that happened in *Bharat Aluminium* case was that such a declaration of law was directed to operate only prospectively, to all the arbitration agreements executed hereinafter. In *Sasan Power Limited v. North American Coal Corporation India Private Limited*<sup>77</sup> the Agreement-I and Agreement-II are anterior to *Bharat Aluminium* judgment dated 6 September 2012. The apex court held that this case would be governed by the law laid down in the case of *Bhatia International*.

### **Section 1(2) and 75 of the Information Technology Act, 2000**

Information Technology Act, 2000 provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication. The territorial jurisdiction of the Act is extended to the whole of India, its provision also applies to any offence or contravention

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77. MANU/MP/1269/2015.

committed outside of India by any person<sup>78</sup>. The section 75 of the Act invoked the mode of extra-territorial operation of Act, applying to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India. The conjoint reading of section 1(2) and section 75 provides extra-territorial operation to the Act, having a nexus with offence or contravention committed outside India.

### **Section 32 of the Competitions Act, 2002**

The Monopolistic and Restrictive Trade Practices (MRTP) Act, 1969 was repealed by the Competition Act, 2002 due to the economic development of the country and to promote and sustain competition in markets. The Competition Commission of India (CCI), established under the section 7 of the Competition Act, looks into the violations of the Act by *suo moto* or complaints by individuals and references made by State or Central government or statutory authorities. It shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.<sup>79</sup> Territorial jurisdiction of the Act extends to the whole of India except the State of Jammu and Kashmir like most of the other prevailing laws in India. However, section 32 of the Act gives CCI extra-territorial powers to inquire and pass adequate orders regarding anti-competitive agreements having an adverse effect on competition in India.

In *Haridas Exports*<sup>80</sup> case arose under the MRTP Act, 1969, the Appellant was aggrieved by the orders passed by the MRTP Commission, whereby Indonesian manufacturers of float glass had been restrained from exporting the same to India at allegedly predatory prices. While considering the correctness of the order impugned in that case, the question relating to extra-territorial jurisdiction came up for consideration. The question arose as to whether MRTP Act, 1969 has extra-territorial jurisdiction and as to whether it can pass orders against parties who are not in India and who do not carry business here and where agreements were entered into outside India with no Indian being a party to it. The Court enunciated that while applying sections 1, 2, 2(a) and 14 of the MRTP Act, 1969, for the Commission to exercise any jurisdiction, goods should be imported into India and so

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78. The Information Technology Act, 2000 (Act 21 of 2000), s.1(2).

15. The Competition Act, 2002 (Act 12 of 2003), s.18.

16. (2002) 6 SCC 600.



long as the import had not taken place and the goods were merely intended for exports to India, the same would not fall within the definition of the word 'goods' in section 2(e). Finally the Haridas Exports case enshrines the 'effects doctrine', which recognizes the effect of preventing, distorting or restricting competition or gives rise to a restrictive trade practice even if the 'practice' took place outside India but the resultant adverse effect was experienced in India, then the MRTP Commission had the jurisdiction to entertain the complaint.

In case of *Sh. Dhanraj Pillay and Others v. M/s. Hockey India*<sup>81</sup> the aspect of extra- territorial jurisdiction of the Competition Act was underlined over International Hockey Federation (FIH) being an international federation founded under Swiss law. The Director General (DG) under Competition Act, 2002 envisaged on the basis of the definition of person section 2(l) and scope of section 32, concluding that Hockey India (HI) and FIH both falls well within the ambit of Competition Act. The CCI concurs with the finding of the Director General (DG) and held that the activities carried out by HI as well as FIH in respect of grant of franchise rights, media rights, TV rights, sponsorship rights and various other rights yielded revenue which are different from a charitable non-profit activity because the revenues were in the commercial field. Thus the economic activities carried out by HI and FIH bring it within the ambit of the definition of enterprise as defined under section 2(h) in the Act. Finally the CCI enunciated that if the activity of an enterprise located outside India has effect on competition in India, it falls within the jurisdiction of the Commission and the Commission has full authority to take action against an enterprise located outside India. Thus the Commission had the authority under the Act to examine the conduct of FIH, if it had an effect in India.

The competition act 2002 contains explicit provision of extra-territorial operation and also efficient to counter cross border economic terrorism. If an agreement may enter into outside the territorial jurisdiction of the Commission but if it results in a restrictive trade practice in India then the CCI will have jurisdiction to pass appropriate orders in respect of such restrictive trade practice.

**Finance Act, 1994 as amended in 2006 (section 64 and 66 –A) and Goods and Services Tax Act, 2017**

The Service Tax was introduced in India in the year 1994 under Chapter-V of the Finance Act, 1994. The section 64 of the Act defines the territorial jurisdiction of the Act and specifically provides that

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81. MANU/CO/0033/2013.

the Act will extend to whole of India except State of Jammu & Kashmir. The section 66A was inserted by the Finance Act, 2006 which provides an extra-territorial operation of service tax. The section 66A providing charge of service tax on services received from outside India provided, or to be provided by a person, who has established a business or has a fixed establishment from which services are provided and are received by a person, who has his place of business, fixed establishment, permanent address or usual place of residence in India to be taxable services.

In the case of *Glyph International Ltd v. Union of India*<sup>82</sup> the petitioners challenged the validity of section 66A as inserted by Finance Act, 2006 on its extra-territorial operation and levy service tax on the taxable event outside India. It has been challenged that no service tax can be levied on the services provided outside India by a foreign company irrespective of the fact that the petitioner has taken the subject services, the extra-territorial operation of the act requires to be struck down. The Allahabad high court (Sunil Ambwani, J. and Kashi Nath Pandey, JJ.) held that service tax will be charged on services received from outside India provided, or to be provided by a person who has established a business or has a fixed establishment from which the services are provided and are received by a person (recipient), who has his place of business, fixed establishment, permanent address or usual place of residence in India. The Taxation of Services (Provided from Outside India) Rules, 2006 made in exercise of powers conferred by sections 93 and 94 read with section 66A of the Finance Act, 1994 does not suffer from the vice of unconstitutionality, either on the ground of lack of legislative competence, or on the ground of extra- territorial operation of laws.

Chapter V of the Finance Act, 1994 has been omitted by the provision of section 173 and 174 of Central Good and Services Tax Act, 2017. The service tax was merged in an integrated indirect tax system- Goods and Services Tax (GST), enforced in India from 1 July 2017. The Central GST and Integrated GST make a provision for levy and collection of tax on intra-state and inter-state supply of goods or services or both within the territory of India. GST is a consumption based tax and if the place of consumption is outside India there is no GST on exported goods and services. But the imported goods and services from outside the India may be levied. The section 2(84) of CGST Act 2017 defines an association of persons or a body of individuals, whether incorporated or not, in India or outside India. The GST registration is mandatory irrespective of turnover for Person supplying

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82. MANU/UP/3302/2011.

online information and database access or retrieval services from a place outside India to a person in India, other than a registered taxable person.

### **Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016**

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 was enacted with the objective of assigning unique identity numbers to individuals residing in India for the purpose of good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India and for the matters connected therewith or incidental thereto. The Aadhaar Act shall extend to the whole of India except the state of Jammu and Kashmir like most of the other prevailing laws in India. The sub clause 2 of section 1 of the Act gives it to extra-territorial operation and provides that Act will apply to any offence or contravention committed outside India by any person. The section 44 explicitly envisages that the Act applies for offence or contravention committed outside India by any person, irrespective of his nationality, if the act or conduct of a person constituting the offence or contravention involves any data in the Central Identities Data Repository.

### **V Conclusion**

The Parliament of India is a democratic institution having Constitutional sanctity. The Constitution of India under article 245(2) provides the competence to Indian Parliament to legislate on extraterritorial aspects or causes to have any direct or indirect, tangible or intangible impact or the effect or consequence for the territory of India, or any part of India or the interests of the welfare of the well being of or security of inhabitants of India and Indians. Thus, the extra-territorial operation of law must have nexus with or impact on India. The law made by the Parliament related to extra territorial operations is within judicial scrutiny but can never be deemed as invalid on grounds of its extra territorial nature.

The sections 3 and 4 of the IPC signify that the attribute of extra-territorial operation of law and permission under section 188 CrPC is only necessary before the commencement of trial or inquiry and it is not a condition precedent for investigation or registering the offence by police. The section 3 and 4(3) of IPC clarify that a person residing in foreign country and targeting computer resources in

India will not require the prior sanction of Central Government under section 188 CrPC. The second part of section 1(2) read with section-19(i) and 19(iv) of the Hindu Marriage Act, 1955 extends the jurisdiction as extra-territorial operation but the same is subject to the requirement of domicile in India. The extra-territorial operation of Hindu Marriage Act is saved not because of nexus with Hindus but Hindus domiciled in India.

The section 9(1) of the Income Tax Act 1961 provides the Act an extra-territorial nature as it extends to people, things and acts outside the territory of India. The Income Tax Act applies to all income accruing or arising, whether directly or indirectly, through or from any business connection in India, any property in India, any asset or source of income in India, or through the transfer of a capital asset situated in India. The Income Tax Act is restricted to apply to only that part of income which has a nexus with India. The reading of section 11, 11B, 11C, 12 and 12A of SEBI Act, 1992 along with its 2003 Regulations entitled SEBI to invoke its extra-territorial operation to protect the interests of investors and the stock market in India with reference to any fraud played against such interest of the investors in India. The conjoint reading of section 2(1)(f), 28(1) and 44 of Arbitration and Conciliation Act, 1996 tacitly provides an extra-territorial operation to the Act.

The Information Technology Act 2000 sections 1(2) and 75 give jurisdiction outside the territorial border of India and apply to any offence or contravention committed outside of India by any person. Competition Commission of India (CCI) established under the section 7 of the Competition Act, 2002 has the duty of eliminating practices having adverse effect on competition and ensure freedom of trade in markets in India. The section 32 of Competition Act gives CCI extra-territorial powers to inquire and pass adequate orders regarding anti-competitive agreements having an adverse effect on competition in India. The service tax was merged in an integrated indirect tax system- GST in 2017 that also has extra-territorial operation. The under section 2(84) of CGST Act, 2017 for imported goods and services from outside the India under, GST registration is mandatory irrespective of turnover for person supplying online information and database access or retrieval services from a place outside India to a person in India, other than a registered taxable person. The section 1(2) and 44 of Aadhaar Act, 2016 gives it to extra-territorial operation and provides that Act will apply to any offence or contravention committed outside India by any person irrespective of his nationality.

The meteoric progress in the field science, technology, communication, trade, commerce and Hi-tech offence including cross boarder terrorism has created new kinds of socio-economic and political challenges. This study clearly shows the rise in the number of enactments related to extra- territorial operations owing to the growing sense of interdependence and cross-border activities among nations and since science and technology are touching new horizons with each passing day, the researchers hope that there are more such legislations ahead of us.