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The Origins and Application of GAAR in India and the UK

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Abstract

This paper explores the origins and application of General Anti Avoidance Rules in India and the UK, examining their motivations, scope, and its adherence to the rule of law. The UK GAAR (distinct from the Welsh and Scottish GAARs) targets abusive arrangements, applying broadly to various taxes, and curbing overreliance on the judiciary. In India, GAAR emerged in response to challenges posed by evolving economic structures and conflicting opinions between the government and courts. The Indian GAAR applies only to income tax but offers a broad scope to address impermissible avoidance arrangements. The paper also contends that the broad and generic nature of GAARs could potentially violate the rule of law. However, the UK provides guidelines regarding applicability, while India relies on quasi-judicial/judicial processes for redressal. Both GAARs serve their intended purpose. The effectiveness of these GAARs will likely become clearer as they undergo further scrutiny in court decisions and continue to adapt to evolving tax landscapes.

I. Introduction

General Anti Avoidance Rules (GAAR) act as a shield against aggressive tax planning. While tax evasion is illegal in most jurisdictions, tax planning is not. However, individuals and corporations are able to get tax benefits through twisted forms of tax planning that involve arrangements or transactions with no real commercial or business purpose. The main objective of such transactions is to gain tax benefits. Though such transactions are not illegal in themselves, the object of these transactions is to avoid tax. This led to the creation of a grey area where extreme tax planning with no commercial purpose was statutorily considered legal. GAAR was introduced to remedy this. It serves as a balancing act between legitimate tax planning and illegal tax evasion by examining the business purpose and the actual substance of the transactions. As it is impossible to determine the exact manner in which tax avoidance occurs, GAAR lays down some broad guidelines that help evaluate the true nature of the transaction. In this sense, it can be termed a plenary provision aimed at preventing what Lord Templeman calls a "circular game in which the taxpayer and a few hired performers act out a play; nothing happens save that the Houdini taxpayer appears to escape from the manacles of tax."[1]

GAARs have been introduced in India and the United Kingdom fairly recently – they came into effect in the assessment year 2018 – 19 and 2013, respectively. These two jurisdictions are being compared as they are both common law countries whose tryst with tax avoidance and planning began or relied significantly on the *Duke of Westminster* decision. India and the UK are significant economies, both domestically and globally. Their tax policies and regulatory frameworks have implications beyond their borders, affecting international trade, investment, and taxation. However, the countries' tax systems are not replicate and cater to dissimilar requirements due to their disparate economic positions. The UK is a developed nation with a long-established tax infrastructure. India's tax system is newer and suited to a rapidly emerging economy with its own set of fiscal challenges and priorities. Juxtaposing these two jurisdictions' approaches to tax avoidance will show how the GAARs diverge despite initial similar responses to tax avoidance to accommodate the unique needs and circumstances of diverse economies. Thus, the motivations for creating the respective GAARs are quite different. Initially, the UK followed a judicial approach

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[1] *Ramsay v IRC*, [1982] AC 300 (HL).

to determine whether there was abuse of schemes with the sole aim of tax avoidance. This approach was quite prudent in that the courts were able to lay down certain cardinal principles based on which cases would be decided, giving due credence to the facts. This allowed a wide ambit of circumstances that the legislature might not have envisaged to be deemed evasion. However, when the UK finally legislated on GAARs, the scope of its applicability was significantly narrowed. In India, like many other amendments to the Income Tax Act, GAAR was a response that opposed the courts' view on the matter, especially in the *Vodafone* case. The first part of this paper will examine the requirement and motivation for GAAR in both countries and the second part will analyse their scope in the Finance Act, 2013 and Income Tax Act, 1961.

It is also important to examine the relationship between the rule of law and measures to prevent tax avoidance, both judicial and legislative. Taxpayers require clarity and predictability in the law to conduct their affairs compliantly. Before enacting GAARs, there were frequent changes in the courts' positions on what constituted avoidance. However, even after their enactment, GAARs, with their broad and sometimes ambiguous provisions, can still create some uncertainty about the legality of certain tax planning strategies. When these provisions are compliant with the rule of law, taxpayers will find them trustworthy and are more likely to comply with tax obligations. The final part of this paper will examine the UK and Indian GAARs' compliance with the rule of law.

II. Origins and Necessity

A. UK

The judicial history of tax planning in the UK is varied. The Parliament's legislative supremacy means that the court seldom strays from the words of the statute. As Lord Wilberforce stated, a "subject is only to be taxed on clear words, not on the 'intendment' or the 'equity' of an act".[2] It is thus hardly surprising that they chose to interpret statutes quite textually. In *IRC v Duke of Westminster*,[3] a duke had escaped taxation by paying his gardener annuities instead of wages as the former was deductible from his taxable income. The main argument of the Revenue was that the court should consider not the form of the contract with the gardener but its substance. There was no reason to make such a contract, save for avoiding tax. The House of Lords did not accept this argument. They held that if an individual, through their ingenuity and as per statutory provisions, ensured they did not have to pay tax, then they could not be compelled to do so by the Revenue. It is important to note that this was a 1936 decision about an individual paying his employee. When such a decision is transplanted into the modern capitalistic and corporate world where MNCs could get into such contracts with its few million employees, this decision would not bode well for governments. Fortunately, this stance was curtailed in *Ramsay v IRC*.[4] While maintaining the integrity of the *Duke of Westminster* principle, it introduced some fetters to it. As per this decision, if the taxpayer's financial status was unchanged after the scheme, they intended to go through with the scheme, through its various steps, until the end, and the whole and only purpose of the scheme was to avoid tax, then the taxpayer was liable to pay tax. However, the legislature's ability to formulate laws in this regard was undermined. The House of Lords held that it was not feasible for it to come up with a concrete rule that decides whether the transaction is avoidance or not as the possibilities were too varied, thus the courts were better suited to examine the legality of these transactions.

[2] Graham Aaronson, 'GAAR Study' (HM Treasury, 11 November 2011) <https://webarchive.nationalarchives.gov.uk/ukgwa/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf> accessed 20 October 2023.
[3] *IRC v Duke of Westminster* [1936] AC 1 (HL).
[4] *Ramsay* (n 1).

Despite these judicial fetters, there was no room to consider taxpayers' intentions. This is evident in *Barclays Mercantile Business Finance Limited v Mawson*.[5] Here, the House of Lords ruled in favour of a taxpayer who claimed depreciation deductions on amounts paid to a seller. The seller had returned it to the taxpayer as security for a lease on the taxpayer's capital assets. This decision was based on the fact that the purpose of the statute had been fulfilled as a capital investment had occurred. Although the judiciary's stance evolves and wavers, the intention of the taxpayers in entering such schemes is not always examined, and adherence to statutory provisions is prioritised.

Further, the *Duke of Westminster* judgement makes it clear that the substance of the arrangement does not trump its form. Therefore, if left in the hands of the judiciary, the Revenue would lose out on significant tax payments, creating the need for GAAR. This concern was highlighted in the Aaronson Report. It was felt that in a judicial anti-avoidance system where judges would apply normal principles of statutory interpretation to taxation provisions, they would be tempted to stretch the provisions to arrive at a sensible result, a move that would undermine the integrity of the legislation.[6] This fear seems justified as judges could widen or narrow the scope of the *Duke of Westminster* or *Ramsay* principles, creating uncertainty that could shake the taxpayers' confidence in the revenue system. The motivation for GAAR in the UK seems mostly to stem from the need to ensure certainty and predictability for taxpayers.

B. India

Historically, Indian courts have also adopted the position of overlooking the form over substance argument and focus on whether the transactions were compliant with the statute. In *Bank of Chettinad Ltd. v. CIT*,[7] the court held that if parties chose to hide their legal relation through a scheme, then the Revenue authorities could dispute it and find out the true nature of that relationship. However, they were not allowed to displace the legal effect of the transaction by examining its substance. The *Duke of Westminster* principle has also been affirmed in India in numerous cases.[8] The courts have held that the effectiveness of the device that has been used to divert income is not dependent on morality but on lawfully circumventing statutes by exploiting loopholes. This might have sufficed in a newly independent India with developing industries when the aforementioned cases were decided, but it is difficult to advocate for this stance post-1991. The liberalisation, privatisation and globalisation policies meant that the Indian economy became more robust and complex. This created opportunities for aggressive tax planning. The involvement of other countries in the Indian economy, the creation of DTAAs and the entry of MNCs perhaps necessitated more comprehensive rules to curb tax avoidance. Although the courts had been attempting to deal with these unique situations, the government was not satisfied with the judiciary's methods.

This is evident in *Vodafone International Holdings v Union of India*[9] where the court recognised tax planning, but the government amended the Income Tax Act (IT Act) to negate the precedent set by the court. Vodafone, which was incorporated in the Netherlands, bought CGP Investments, a holding company of Hutchinson Telecommunications International Limited, both of which were incorporated in the Cayman Islands. This transaction led to the transfer of the 67% shareholding CGP investments had in Hutchison Essar Limited, an Indian company. While the entire transaction occurred abroad, it led to the transfer of an Indian asset for which the companies

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[5] *Barclays Mercantile Business Finance Limited v Mawson* [2005] 1 AC 684

[6] Aaronson (n 2).

[7] *Bank of Chettinad Ltd. v. CIT* [1940] 8 ITR 522 (PC).

[8] *McDowell & Company Limited vs CIT* [1985] 154 ITR 148 (SC); *CIT vs A. Raman & Company* 1969 SCR (1) 10; *CIT v M/S. B.M. Kharwar* 1969 SCR (1) 651.

[9] *Vodafone International Holdings v Union of India* (2012) 6 SCC 613.

incurred no tax liability. The government argued that CGP Investments was a colourable device that was inserted into the transaction to escape payment of capital gains tax in India. Here, like the UK, the Supreme Court preferred a textualist reading of Section 9(1)(i) of the IT Act and held that the provision created a legal fiction only to ensure the tax cannot be escaped by merely executing a contract outside India. To trigger this section, there needed to be (1) a capital asset, (2) located in India, (3) that was transferred. The third condition was not fulfilled as the Court held that the use of the words 'direct' and 'indirect' in this section referred not to the transfer of capital assets but to the accrual of income. The *McDowell* case was reaffirmed, resulting in a decision in favour of Vodafone.

The deal between the companies was legitimate in that it did not violate the law. It only found loopholes to exploit. However, their positions as massive MNCs which have huge turnovers and are giants in their fields should perhaps have also been considered. MNCs like these often operate in developing and underdeveloped countries while relying on them as an important source of labour. While the MNCs flourish, the lack of tax paid in these countries can seriously hinder their development.[10]

An example of this is seen in Cairn India's offshore indirect transfers that the Revenue investigated and later decided to tax. This is particularly interesting in the development of GAAR as the tax on these transactions was imposed retroactively after the *Vodafone* decision and subsequent amendments to the Finance Act in 2013 but before the implementation of GAAR. Here, Cairn undertook some corporate restructuring schemes to indirectly transfer assets situated in India by routing the transaction through a wholly owned subsidiary of Cairn that was incorporated in Jersey, an enabler of corporate tax avoidance.[11] When this case was referred to arbitration, the tribunal had to analyse anti-avoidance rules through case law as no statute existed then. The tribunal agreed with India's definition of tax avoidance as a transaction with the "dominant purpose of reducing or avoiding liability to pay tax in ways that are inconsistent with the intent of the law."[12] However, they chose to focus on the first part of this definition to determine the existence of evasion rather than the second condition of inconsistency as the focus of Indian courts had also been the same.[13] The inclusion of a GAAR as a statute could have backed up what the intent of the law was, providing greater clarity on the kind of transactions that the law expected to tax and those that were exempt. The tribunal, upon analysing a slew of anti-avoidance cases, found that the courts' approach had swung from strict interpretation[14] to a step transaction,[15] with the *Vodafone* decision culminating in the recognition of the colourable device used solely or dominantly to avoid tax. Eventually, the tribunal held in Cairns' favour, as it also did in the *Vodafone* award. In both cases, it is undisputed that the law was silent, and the foreign companies saved significant amounts of money by not paying taxes in India. It could be argued that the international economic order, and more specifically investor arbitration is a neo-colonial instrument that

[10] Sam Jones, 'Tax Dodging by Big Firms "Robs Poor Countries of Billions of Dollars a Year"' *The Guardian* (2 June 2015) <https://www.theguardian.com/global-development/2015/jun/02/tax-dodging-big-companies-costs-poor-countries-billions-dollars> accessed 8 December 2023.

[11] Phillip Inman, 'UK Overseas Territories Top List of World's Leading Tax Havens' *The Guardian* (9 March 2021) <https://www.theguardian.com/business/2021/mar/09/uk-overseas-territories-top-list-of-worlds-leading-tax-havens> accessed 17 February 2024.

[12] *Cairn Energy Plc Cairn UK Holdings Limited v Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award (21 December 2020) (Laurent Lévy, President; Stanimir A. Alexandrov; J. Christopher Thomas).

[13] Błażej Kuźniacki and Stef van Weeghel, 'Cairn Energy1: When Retroactive Taxation Not Justified by Prevention of Tax Avoidance Is Unfair and Inequitable' (2023) 39 Arbitration International 125.

[14] *A. Raman* (n 8).

[15] *McDowell* (n 8).

developed countries use to control the developing ones.[16] Thus, clarity in the Indian law in the form of a comprehensive GAAR might reduce the need for or better inform arbitration proceedings while also ensuring a stable monetary base to support a developing welfare state.

III. GAAR in the Finance Act and Income Tax Act

A. Scope and Applicability

Unlike the Indian GAAR, the UK decided to make it applicable to all schemes from the date of enactment (17th July 2013). It intends to specifically target "abusive arrangements," rather than being a generic, broad provision that would cover a spectrum of schemes. As per the Aaronson Report, this is to ensure that the ability of individuals and businesses to engage in sensible and responsible tax planning is not undermined.[17] While the intention behind this secures investor confidence, it does allow for certain transactions to be excluded from its purview. In this sense, the UK's GAAR is about anti-abuse rather than anti-avoidance. Although its scope is limited, its applicability in terms of the taxes it covers is quite broad. Enumerated in the Finance Act, 2013, this includes various taxes, including income tax, capital gains tax, inheritance tax, and corporation tax, among many others.[18] A 'tax arrangement' is defined as any agreement where, considering all circumstances, it would be reasonable to conclude that the main purpose or one of the main purposes was to secure a tax advantage through the arrangement.[19] Such an arrangement must also be abusive in that it should involve a course of action that is not reasonable in relation to tax provisions after considering all circumstances.[20] This definition of a tax arrangement is rather dissimilar to India's. The UK provisions have a non-exhaustive list of tax arrangements that might indicate abuse.[21] These provisions make it clear that the rationale behind the GAAR is to have a more streamlined approach to catch instances of tax evasion. Though the statute covers a range of transactions, the scope for judicial interpretation has not been negated. The statute provides a degree of certainty for the taxpayers and helps channel judicial decisions in a particular direction. For instance, the GAAR provisions repeatedly make use of the term "reasonable" and ultimately, it lies with the court to apply the test of double reasonableness. Here, the court would not decide whether the arrangement was reasonable but whether it could be reasonably considered a reasonable course of action.[22] Another safeguard the taxpayers have is the GAAR Advisory Panel which is made up of independent advisors who are experts in the field. The Revenue is guided by the opinion of the Advisory Panel. Though it is not binding, the HMRC must mandatorily get the Panel's opinion before applying GAAR provisions.

In India, Chapter X-A of the Income Tax Act contains the GAAR provisions. Section 95 of this Act begins with a non-obstante clause which causes this Chapter to take precedence over other parts of the Act. Departing from the UK's provision, the Indian GAAR includes only income tax. Additionally, while the initial iteration of GAAR and the Direct Tax Code of 2009 and 2010 included arrangements whose main purpose or one of its main purposes was tax evasion, it was scrapped when it was finally included in the IT Act to align with the recommendations of the

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[16] Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 European Journal of International Law 1147.
[17] Aaronson (n 2) 3.
[18] Finance Act 2013, s 206(3).
[19] ibid; s 207(1).
[20] ibid; s 207(2).
[21] ibid; s 207(4).
[22] HMRC, 'HMRC'S GAAR GUIDANCE' <https://assets.publishing.service.gov.uk/media/5a7e0954ed915d74e6223b11/gaar-part-abc.pdf> accessed 20 October 2023.

Expert Committee.[23] This was because the committee believed that GAAR could be invoked in tax arrangements where obtaining tax benefits was a purpose but was not the main, sole, or predominant one. However, this will not allow taxpayers to escape liability as the main purpose of the step is to determine whether there has been a breach of GAAR. This is perhaps a better approach as the taxation base is still quite broad and would still cover the arrangements that the Revenue had hoped to tax in the *Vodafone* case. Despite its limited applicability, the types of arrangement it covers are rather vast as it intends to tax all impermissible avoidance arrangements (IAA). The onus is on taxpayers to use their sensibilities. They must rely on other provisions of this chapter to determine whether their scheme would amount to prudent tax planning or impermissible tax evasion as per the rules mentioned in the Chapter. Once the Revenue establishes there was an IAA as defined under Section 96(1), the burden of proof shifts onto the taxpayer[24] to prove there was a commercial substance to the arrangement as per Section 97. Thus, evidence of the genuine commercial purposes behind the arrangements must be provided to show that obtaining tax benefits was not the primary intent of these transactions. There is not a great deal of uncertainty in the provisions as specific transactions like round trip financing,[25] and elements that have the effect of offsetting or cancelling each other,[26] among others in this inclusive and non-exhaustive list are enumerated as lacking genuine commercial substance. The Indian GAAR, like the UK's, is also not limited to cross-border transactions – it includes domestic arrangements as well. Another interesting feature of the Indian GAAR is that it can override or be applied in addition to any other basis for the determination of tax liability as per Section 100. This implies that Bilateral Investment Treaties and Double Tax Avoidance Agreements cannot be used by taxpayers as shields to escape tax liability.

B. Counteraction

In the UK, when a tax arrangement is found to be abusive, the tax benefits it provides will be offset through just and reasonable adjustments. These adjustments may take the form of assessments, reassessments, amending claims, or disallowing them, depending on the situation.[27] The requirement for the adjustment to be just and reasonable ensures fairness towards the taxpayer is explained in the GAAR Guidance. When there are several non-abusive alternatives, the one which the taxpayer would most likely have chosen having regard to the circumstances would be used to calculate the tax payable and not the alternative which would allow the Revenue to impose the highest tax.[28] A penalty worth 60% of the value of the counteracted advantage is also levied.[29]

On the other hand, the Indian GAAR has much harsher repercussions for IAAs. While some consequences are enumerated in an inclusive and non-exhaustive list, the Revenue is free to decide any consequence that is appropriate in the circumstances of the case[30] as long as the consequence is restricted to the part of the agreement which has been declared impermissible.[31] Some consequences include the denial of tax benefits or benefits derived from tax treaties. It is clear that the assessing officer wields a great deal of power in determining the consequences. This is starkly different to the HMRC's ability to make just and reasonable adjustments as the Revenue is given untrammelled power in deciding the penalty. In the UK, the penalty imposed by the

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[23] Parthasarathi Shome, 'Final Report on General Anti Avoidance Rules (GAAR) in Income Tax Act, 1961' (2012).
[24] (n 18) s 96(2).
[25] (n 18) s 97(b)(i).
[26] (n 18) s 97(b)(iii).
[27] (n 18) s 209.
[28] GAAR Guidance (n 22).
[29] (n 18) s 212A(2).
[30] Income Tax Act 1961, s 98 (1).
[31] Income Tax Rules 1962, Rule 10UA.

HMRC must be just and reasonable. This is not merely a nominal guideline as the application of GAAR will be scrutinised by an independent GAAR Advisory Panel which can give its opinion on the penalty imposed. India has no such provision. The procedure for declaring an arrangement as an impermissible avoidance arrangement is skewed in favour of the Revenue officers. The Principal Commissioner or the Commissioner decide whether it is necessary to apply GAAR and the consequences.[32] The matter is referred to an Approving Panel (comprising a High Court judge, a Revenue officer, and a scholar/academic) only when they are not satisfied with the assessee's objections to the application of GAAR.[33] Only a Principal Commissioner or Commissioner can invite the Approving Panel to scrutinise the imposition of GAAR and not every arrangement on which GAAR is sought to be imposed is examined by the Panel. Thus, the role of the courts in this regard becomes extremely important lest Revenue officers' powers should be abused. The possibility of judicial review will ensure that there is no deviance from the principles of fairness and justice, but the process is likely to be expensive, time-consuming and cumbersome. This is because of India's multi-tier income tax dispute resolution system. It begins with an appeal of the assessing officer's order before the Commissioner of Income Tax, then the Income Tax Appellate Tribunal, a High Court and finally the Supreme Court. The UK's legislation seems to be more practical in this regard as the HMRC GAAR Guidelines have detailed descriptions and also include examples of when and what kinds of consequences are acceptable, and also because all proposed applications of GAAR are examined by the Advisory Panel.

IV. Rule of Law Considerations

According to Raz, the rule of law has two basic aspects – that people should be ruled by and obey it, and that they should be guided by it.[34] GAARs may fall short of fulfilling the second criterion. This is because the taxpayer may not be informed about the exact types of transactions the statute intends to tax, which would hinder their ability to form their expectations and model their actions based on the law. GAARs may not entirely meet the standards outlined by Fuller or align with certain basic principles proposed by Raz that are crucial for preserving the rule of law. This could pose certain problems for the application of GAARs as they tend to be inherently general. If there is only ex-post facto knowledge about what the law requires, the rule of law could be violated. It could be argued that laws regarding tax avoidance are not prospective, open and clear,[35] that there are frequent changes in the law,[36] and that there is no complete congruence between official action and declared rule.[37] A realistic consequence of these statutes lacking the rule of law is the deterrence of investments.

A. Pre-GAAR Compliance with the Rule of Law

By enacting GAAR provisions, the UK and Indian Parliaments have essentially curtailed the taxpayer's ability to "order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be"[38] by imposing statutory limits. The textualist interpretation in *Duke of Westminster*, which marked the origin of anti-avoidance rules in both jurisdictions, meant

[32] (n 30) s 144BA(2).
[33] (n 30) s 144BA(4).
[34] Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 214 <https://doi.org/10.1093/acprof:oso/9780198253457.003.0011> accessed 30 October 2023.
[35] ibid; 215.
[36] Lon Luvois Fuller, *The Morality of Law* (Yale University Press 1964) 79.
[37] ibid; 81.
[38] Duke of Westminster (n 3).

the opportunities for tax avoidance and aggressive tax planning – whether abusive or not – were wide. However, this approach later proved to be economically unviable, causing the judiciary to evolve this concept through a number of cases over the years. Such frequent changes would have caused confusion about the permissibility of certain arrangements. The taxpayers' awareness of the legality of such transactions is complete only when the court decides ex post facto. Relying on existing laws and previous decisions regarding tax evasion would not have been sufficient to prevent penalisation as the legality of the matter is adjudicated after the transaction is complete. This was contrary to the rule of law as one of its tenets requires the law to be prospective, open, and clear, and not mislead or confuse those who wish to be guided by it.[39] A taxpayer could also not have made themselves aware of the rules they were expected to follow as they were not made available to them through statutes and were changed frequently (albeit out of necessity) by the courts.[40]

B. GAARs' Compliance with the Rule of Law

To remedy the uncertainty created by judicial intervention, the legislatures ideally should have clarified which acts constitute tax avoidance to prevent judicial speculation and expansion of the rule. However, GAAR, which is meant to restrict this broadness is equally wide, generic, and ambiguous as it is catered to apply to a variety of situations. One ambiguous system seems to have replaced another. It could be argued that such broad provisions that give considerable discretion to the Revenue are not backed by the rule of law. It is generally accepted that tax should be collected with the authority of law. This law is formulated by the Parliament. The generic and vague wording in the statute could suggest that there might be certain arrangements that the Parliament did not intend to tax but they are nonetheless within the ambit of GAAR. Thus, without the Parliament intending to tax certain arrangements, one could contend that there was no authority of law to tax such transactions, because of which GAAR could be considered to lack the rule of law. The lack of congruence between the application of GAAR by the Revenue and the legislation relating to GAAR because of mistaken interpretations or inaccessibility of the provisions[41] due to their ambiguous articulation undermines the rule of law.

This analysis is refuted by the then HMRC counsel, Anthony Inglese. He argues that the court's rule of interpretation as laid down in *Pepper v Hart*[42] (which has also been cited in Indian judgements), would negate any concerns about ambiguity as extra-legal materials like parliamentary debates could be used to inform the HMRC's assessments or the court's decisions.[43] He further argues that the government produces various materials like explanatory notes and memoranda that aid interpretation.[44] Raz also concedes that it is impossible to completely conform to the rule of law and that extreme conformity is not desirable.[45] Inglese's arguments quite adequately address the question of ambiguity. Yet, one needs to be wary of over-reliance on government reports which may be susceptible to political influences. However, the courts will likely see past such attempts to attach tax liability. Further, the narrow applicability of the UK GAAR ensures that it remains attractive as a place of business and gives certainty to taxpayers.

[39] Raz (n 34) 215.
[40] Fuller (n 36) 39.
[41] ibid; 81.
[42] *Pepper v Hart* [1992] UKHL 3.
[43] J N Stefanelli & L Moxham (Eds), 'Do Our Tax Systems Meet Rule of Law Standards? Conference Papers 20 November 2013' (Bingham Centre Working Paper 2014/06), Bingham Centre for the Rule of Law, BIICL, London, September 2014.
[44] ibid.
[45] Raz (n 34) 223.

Unfortunately, the applicability of the rule of law was not considered by the expert committee in India, nor was it debated when the amendment was introduced.[46] This is particularly concerning as assessing officers are given a wide range of powers as the GAAR aims to target anti-avoidance and not anti-abuse arrangements under Section 144 of the IT Act, unlike the UK. The wide scope of the Indian GAAR coupled with the powers of the Revenue officers do not bode well for its compliance with the rule of law. Provisions governing counteractions are particularly problematic as they can be confusing. As mentioned earlier, the administration of GAARs, particularly decisions regarding the consequences of entering into IAAs lie in the hands of the Revenue, with no certainty over what these consequences may be. The penalty may be one of those enumerated in Section 98 of the IT Act or may be anything else the Revenue decides. Such a provision can hardly be termed prospective, clear and open. It is not capable of adequately guiding a taxpayer's behaviour. This is further problematic as remedying abuse of GAAR depends on the taxpayer's willingness and financial ability to litigate the case.[47] The costs can be considerable as the taxpayer might have to argue their case before the Approving Panel if the Revenue refers to matter to them, later the tribunal, and finally, the courts.

Resorting to this multi-step process could be eliminated if there was greater clarity over the application of GAARs in India. There is a dearth of literature regarding GAAR from the Indian Department of Revenue, while the UK has a detailed 4-part document[48] from the HMRC which includes the scope, applicability, and examples of situations where GAAR can be applied. This raises questions about GAAR proceedings in India being arbitrary, unjust, and unfair. While they are most definitely subject to judicial review, the taxpayer nonetheless must go through the rigamarole of participating in the IT tribunals and court proceedings. Relying on the court as a barrier against the arbitrary application of the law has its drawbacks. The generality and broadness of Indian GAAR provisions leave gaps that the Revenue and courts may not always be able to fill. As Fuller argues, not all areas of law will benefit from such flexible standards where rules are derived on a case-by-case basis by relying on abstract standards.[49] More information on GAAR and its applicability from the government would create greater transparency. Certainty brought by the clarity of GAAR provisions would reduce the need to approach the courts.

While it would not be correct to deem the Indian GAAR provisions as being bereft of the rule of law, it would not be a stretch to state that it is not fully compliant with it. Its provisions are sufficiently clear. They allow taxpayers to form general expectations about the impact of their tax planning schemes as most of the provisions are articulated by the Parliament in Chapter XA of the IT Act, except perhaps for the provisions regarding counteraction. However, in the ever-evolving field of taxation, some situations might not be unexpected, going beyond the legislature's intentions. In such situations, the courts are capable of stepping in to ensure the outcome is fair, just, and reasonable. In future, the courts will likely find stable footing in the GAAR provisions, paving the way for a more comprehensive and consistent body of rulings that will empower taxpayers with greater clarity about the nuances of GAAR and enhance their decision-making capabilities.

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[46] Tarun Jain, '"GAAR" and "Rule of Law": Mutually Incompatible?' (2013) 43 Chartered Accountant Practice Journal 424.
[47] Fuller (n 36) 81.
[48] HMRC, 'HMRC'S GAAR GUIDANCE, Approved by the Advisory Panel with effect from 15 April 2013' <https://assets.publishing.service.gov.uk/media/5a7e0954ed915d74e6223b11/gaar-part-abc.pdf> accessed 20 October 2023.
[49] Fuller (n 36) 64.

V. Conclusion

It is obvious that GAAR provisions in both countries are not the perfect piece of legislation. Yet they both succeeded in addressing the concerns the two countries had regarding the gaps in the law that allowed tax evasion. If, indeed, it was possible to have the perfect laws of taxation, there would have been no need for GAAR. The continuous changes in the way people and corporations run their businesses mean there are always new methods of evading taxes. This highlights the necessity for GAARs as important tools for tax authorities that help curb aggressive tax avoidance. These fairly new legislations have not been widely examined in courts to conclusively determine their success or failure. Based on the provisions, the UK's GAAR seems to have balanced the need to tax and to ensure fairness and certainty for taxpayers while providing a wealth of information to streamline GAAR interpretation. Though the Indian GAAR could be more transparent and clearer, it fulfils the purpose of widening India's tax base while providing redressal to aggrieved taxpayers through quasi-judicial and judicial proceedings. Thus, presently, both GAARs are fit for purpose.