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EDITORIAL

Research is very important for the development of our society. It is a phenomenon which helps the society and humanity to move forward. With the present state of the art development, there has been constant rework and modification of our ways of doing research. Nonetheless, the basic objective of research is to analyse and have a look into anonymous and unperceived things and bring out new opportunities.

Research articles are a very important method to disseminate new ideas and findings in a consolidated manner. Writing a research article is a phenomenon and it has to be executed in an appropriate manner so that the basic idea of research is justified. They are a medium to showcase one's ability and expertise in a particular or various fields of knowledge and achievements and how it can be communicated to the whole world.

The NLUALPR is a peer reviewed journal with ISSN: 2455-8672. It is a compilation of selected articles contributed by eminent scholars and academicians in various fields of law and recent developments in the same. This journal is a platform to bring out discussions and to analyse various aspects of law and other multidisciplinary areas. This issue has been able to garner positive response in the path of research and development through its articles which reflects on the importance of research and its contribution to the development of the society.

In this issue of NLUALR,

Dr. V.K. Ahuja, in the article titled 'Law of Patents: Balancing between Monopoly and Techno-economic Development and Public Interest' has discussed on patents as an important tool for the technological and economic

development of any society in reference to three important aspects of patent system, i.e. the technological and economic development of the society, monopoly enjoyed by the patentee, and public interest, in addition to the co-ordination among all the three aspects as it is extremely important for progressive society.

Dr. Arun Kumar Singh, in the article titled 'Reproductive Rights of Women with Mental Disabilities and the Judicial Activism: An Analysis in Human Rights Perspectives' discusses on the importance of the protection of the rights of Women with disabilities especially mentally disabled women and how the Indian Courts have a taken a remarkable step towards protecting the rights of the disabled women by calling on for respect for women's rights to autonomy and decision-making concerning pregnancy.

Dr. Manju Chellani, in the article titled 'Restitution of Cultural Objects Displaced during Colonization: Urgent need for International Regime' discusses on the importance of culture for a sense of social and personal continuity in terms of Cultural objects (CO) by demonstrating the ethical and legal dimensions of the restitution of CO removed during colonization and reiterating the urgency for a comprehensive, strong and consistent international regime for effecting such a restitution.

Dr. Neha Aneja, in the article titled 'Status of Live-in Relationship in India: A Judicial Approach' discusses on importance of union of man and woman as the architect of social structure with special focus on live in relationship and how the Indian judiciary has stepped in to fill the gap created when there were no specific statutes governing live-in relationships in or country.

Dr. Daniel Mathew, in the article titled 'Accommodating Human Rights Claims in Investor State Dispute Settlement framework: mixing of oil and water?

discusses on investor state dispute settlement (ISDS) framework which has given rise to the possibility of inclusion of human rights claims in investment arbitration proceedings and the conditions required for raising human rights-based claims in ISDS proceedings , specially, the possibility of raising human rights-based claims on Indian investment arbitration.

Dr. Chiradeep Basak, in the article titled 'Legislating Net Zero: The Dues Ex Machina For a Resilient Decarbonised Future' discusses on the relationship of human activities and the present rate of climate change in relation to emission of carbon-dioxide and how a regulation of Net Zero stage of carbon-dioxide can be an assurance to a de-carbonized free future of the human civilization.

Mr. Himangshu Ranjan Nath, in the article titled, 'Transparency in the Election Process in India: The Need of the Hour', discusses on the importance of transparency in the election process in India for the maintenance of a healthy democracy by focusing on the contours of bringing transparency in the electoral system, so that free and fair elections can be hold with an analysis of the relevant steps taken by the Election Commission, legislature and the judiciary.

Mr. Saheb Chowdhury, in the article titled 'An Analysis of Socioeconomic Rights Enforcement in South Africa' discusses on the important of Socio- Economic rights as an important aspect of human rights along with civil political rights in reference to The Constitution of the Republic of South Africa, 1996 and how it involves involve approbation and disapprobation of the role of the court in realizing or failure in adequately realizing the constitutionalized socio-economic rights.

Mr. Akshay Verma, in the article titled 'The Non-Binding Nature of the Binding Mediation' discusses about

the suitability of Alternative Dispute Resolution Processes especially mediation in resolution of disputes in Indian and other Asian countries by drawing comparison in terms of applicability, finality and binding nature of the Mediation and its various hybrid processes.

Dr. Seema Singh, in the article titled 'Fundamental Rights & Dynamics of the State', discusses on the dilution of the role of the state as defined under Article 12 of the Constitution of India in the era of globalization and neo-liberalization and exploration of the possible solution of this problem of inevitable privatization where most of the public functions are going to performed by the private players and how the role of the state is shrinking to limit it as a regulator.

Ms. Vidushi Puri, in the article titled, 'Mandatory versus Voluntary Corporate Social Responsibility: A Comparative Study of CSR Regime in India and Singapore' discusses on regulations in relation to voluntary and mandatory corporate social responsibility regime in India and how it contributes to corporate sustainability along with a comparative analysis of CSR regimes in India and Singapore.

Ms. Chintu Jain, in the article titled, 'Data Protection and Right to Privacy', discusses on the interface between data protection and right to privacy by drawing out certain issues such as unsolicited and unregulated data collection, storage, usage, sharing, and processing of data personal data, especially that which is sensitive in nature which has the potential of compromising our privacy, and what are the regulatory framework in this context.

Dr. Mayengbam Nandakishwor Singh, in the review of the book titled, 'The Destruction of Hyderabad' by A. G. Noorani, London, Hurst & Company, 2014, pp. 384, ISBN 978-1-84904-439-4 discusses on a different historical narrative about how Hyderabad state became part of Indian

state by focusing on different factors which to led to the accession of the state to Indian Union in 1948.

Thus, the various aspects have been covered in this issue of the Journal, which will contribute enough energy for further study and understanding of the contemporary problems faced in the society.

LAW OF PATENTS: BALANCING MONOPOLY AND PUBLIC INTEREST TOWARDS TECHNO-ECONOMIC DEVELOPMENT

V. K. Ahuja[*]

ABSTRACT

Patent is a significant tool for the technological and economic development of any society. Being monopoly rights for a period of 20 years, patent also restricts competition as it is an incentive to the patentee. Though on the expiry of 20 years, patent falls into public domain and becomes freely available to all, the legislature has also provided some inbuilt mechanism in the Patents Act, 1970 to serve public interest during the subsistence of patent. The present article discusses the three important aspects of patent system, i.e. the technological and economic development of the society, monopoly enjoyed by the patentee, and public interest. The article also discusses the co-ordination among all the three aspects as it is extremely important for progressive society.

I. INTRODUCTION

The grant of patent by patent office to an inventor with respect to his invention means conferring certain exclusive rights on him for a period of 20 years. The period is not renewable and has to expire after 20 years, meaning thereby that patent has to necessarily fall in public domain on its expiry. The patent in practical terms confers monopoly on the patentee for the

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aforesaid period.[1] During the subsistence of patent, the patentee is entitled to commercially exploit the invention, licence it to others to exploit, or assign it completely to a third party for a mutually agreed compensation. In *Telemecanique & Controls (I) Limited* v. *Schneider Electric Industries SA*,[2] the Division Bench of Delhi High Court stated that "a monopoly of the patent is the reward of the inventor."[3] The patent right is called as statutory right as it stems from the statute, i.e. Patents Act, 1970.[4]

In *F. Hoffmann-la Roche Ltd.* v. *Cipla Limited*[5], the Delhi High Court has succinctly stated the meaning of patent in the following manner:

> The expression "patent" connotes a right granted to anyone who invents or discovers a new and useful process, product, article or machine of manufacture, or composition of matter, or any new and useful improvement of any of those. It is not an affirmative right to practice or use the invention; it is a right to exclude others from making, using, importing, or selling patented invention, during its term. It is a property right, which the state grants to inventors in exchange with their covenant to share its details with the public.

The grant of patent not only recognizes and rewards the inventor but also encourages him to go for more inventions. This ultimately results in the technological and economic development of the society.

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[1] *Bajaj Auto Ltd*. v. *TVS Motor Company Ltd*., 2008 (36) PTC 417 (Mad.) at p. 439. In *Telemecanique & Controls (I) Limited* v. *Schneider Electric Industries SA*, 2002 (24) PTC 632 (Del) (DB), the Division Bench of Delhi High Court observed that "patent created a statutory monopoly protecting the patentee against any unlicensed user of the patented device".

[2] *Telemecanique & Controls (I) Limited* v. *Schneider Electric Industries SA*, 2002 (24) PTC 632 (Del) (DB) (India).

[3] *Id*., at p. 644.

[4] *Novartis AG* v. *Cipla Ltd*., 2015 (61) PTC 363 (Del), p. 397.

[5] 2008 (37) PTC 71 (Del.) (India).

The monopoly by way of patent is not absolute and subject to certain provisions of the Patents Act, 1970 which seek to protect public interest. The Act, therefore maintains a balance between the monopoly granted to the patentee and the public interest at large.

In *Bishwanath Prasad Radhey Shyam* v. *Hindustan Metal Industries*[6], Justice Sarkaria observed that "the object of Patent Law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period of the monopoly, passes into the public domain".

Reiterating the aforesaid observation, the Bombay High Court in *Bayer Corporation* v. *Union of India*[7] further stated that "an inherent objective in the grant of patent was the obligation of the patent holder to utilize the invention to meet the needs of the society. The invented product was not to be kept in the attic but was to be made available to society for use and also to form the basis for further research and development. All of which would lead to the betterment of human existence on planet earth, while contributing to the improvement of technological advancement".

It is interesting to note that a patent does not come with a presumption. The Parliament has reflected some public policy concerns, which allows patent/invention to be challenged at various stages, e.g. before grant[8], after grant[9]; revocation of

[6] *Bishwanath Prasad Radhey Shyam* v. *Hindustan Metal Industries*, (1979) 2 SCC 511 (India) at p. 517.
[7] *Bayer Corporation* v. *Union of India*, Writ Petition No.1323 of 2013 decided on 15 July 2014 (India).
[8] Section 25(1), Patents Act, 1970 (India).
[9] *Id*., section 25(2).

patent[10], and in the event of a suit for infringement, the defendant in addition to contending non-infringement, may also "counter claim and seek revocation under section 107".[11]

The enactment of Patents Act, 1970 was a serious exercise. Justice Rajagopala Ayyanagar before submitting a comprehensive report on Patents Law Revision in September 1959, pointed out that the same patent law would operate differently in industrial countries and under-developed countries because of their different technological and economic development. Justice Ayyanagar agreed with the views of the "Patents Enquiry Committee" that "the Indian Patent system has failed in its main purpose, namely, to stimulate invention among Indians and to encourage the development and exploitation of new inventions for industrial purposes in the country so as to secure the benefits thereof to the largest section of the public".[12] Justice Ayyanagar submitted a comprehensive report on Patents Law Revision in September 1959. The recommendations of Justice Ayyanagar found place in the Patents Act, 1970.

II. MONOPOLY AND PUBLIC INTEREST

When a patent application becomes successful, the patentee gets certain exclusive right with respect to his invention. These rights are not absolute, but are subject to other provisions of the Patents Act. In case of a product patent, the exclusive rights are "to prevent third parties ... from the act of making, using, offering for sale, selling or importing for those purposes that product in India." In case of process patent, the patentee has the aforesaid rights *mutatis mutandis*.[13]

These exclusive rights are in fact monopoly for a period of 20 years, which is not absolute as aforesaid. The Indian Patents

[10] *Id*., section 64.
[11] *Dr. Aloys Wobben* v. *Yogesh Mehra*, 2011 (45) PTC 200 (Del) (India) at pp. 206-07.
[12] Interim Report, p. 165.
[13] Section 48, Patents Act, 1970 (India).

Act originally provided this term for a period ranging between 5-7 years for drugs and pharmaceuticals and 14 years for other products. The TRIPs Agreement made it 20 years for all products. Under original Patents Act, 1970 only process patent could be granted for drugs and pharmaceuticals. This position has now been changed in line with TRIPs Agreement and product patents are to be granted for drugs and pharmaceuticals. During the period of 20 years, the patentee may exploits his patent by self-working, licensing or assigning. The price of the patented products are ordinarily higher as there is no law to regulate their prices and the patentees fix the prices arbitrarily.

The patent law, however protects public interest and provides monopoly to the patentee only when his invention is "new or novel", "involves an inventive step", and is "capable of industrial application". Patent granted remains subject to certain conditions as stipulated in section 47 of the Patents Act. According to these conditions, the government is free to use, make or import the patented products for its own use, and in case of drugs and pharmaceuticals, also to distribute them in hospitals and dispensaries. The patent system has been designed in such a manner that government may take actions with respect to patent in certain circumstances and the public and competitors of patentee can also make use of patent for certain purposes. The discussion has been made later in the article to show how patent system takes care of public interest and also adds to the technological and economic development of the country.

III. DISCOVERY, IDEA AND INVENTION

Discoveries are not patentable. The practical application of discovery may lead to patentability.[14] "Discovery is the unearthing of causes, properties or phenomena already existing in nature; whereas invention is the application of such knowledge

[14] *Gale's Application,* (1991) RPC 305 (CA) at p. 323.

to the satisfaction of social needs".[15] Buckley L.J. in *Reynolds* v. *Smith*,[16] observed:

"Discovery adds to the amount of human knowledge, but it does so only by lifting the veil and disclosing something which before had been unseen or dimly seen. Invention also adds to human knowledge, but not merely by disclosing something. Invention necessarily involves also the suggestion of an act to be done, and it must be an act which results in a new product, or a new result, or a new process, or a new combination for producing an old product or an old result."[17]

Ideas, like discoveries are also not patentable. It is therefore, *sine qua non* to convert an idea or a discovery into an invention to make it patentable. Fletcher Moulton L.J. stated in *Hickton's Patent Syndicate* v. *Patents & Machine Improvements*,[18] "[I]nvention may lie in the idea, and it may lie in the way in which it is carried out, and it may lie in the combination of the two; but if there is invention in the idea plus the way of carrying it out, then it is good subject-matter for Letters Patent".

IV. PREVENTION OF PATENTING OF TRADITIONAL KNOWLEDGE

Traditional knowledge is of extreme importance as the country is very rich in bio-diversity and the people in India have generated traditional knowledge for many centuries. There have been many cases where patents have been granted in some jurisdictions which were based on traditional knowledge. The Patents Act prevents patenting of traditional knowledge in India. According to section 3 (p), "an invention which, in effect, is traditional knowledge or which is an aggregation or duplication

[15] Kolle quoted in W.R. Cornish, *Intellectual Property* (Delhi, 2001) (India), p. 177.
[16] (1903) 20 RPC 123.
[17] *Id.*, p. 126.
[18] *Hickton's Patent Syndicate* v. *Patents & Machine Improvements*, (1909) 26 RPC 339 at 348.

of known properties of traditionally known component or components", is not patentable.[19] Traditional knowledge includes "traditional based creations, innovations, literary, artistic or scientific works, performances and designs".[20] Traditional knowledge is transmitted from generation to generation and is ordinarily associated with a particular community. Inventions based on traditional knowledge cannot be patented as such knowledge already exists.

It is noteworthy that if an application for patent has been filed for an invention which is traditional knowledge based, pre-grant opposition may be filed.[21] Even if an inventor is successful in getting a patent for his invention which is based on traditional knowledge, post-grant opposition may be filed.[22] The ground for filing pre-grant/post-grant opposition is the same i.e. "the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere". Interestingly, if no post-grant opposition is filed within one year from the grant of patent, the aforesaid ground may also be invoked for the revocation of patent.[23] The protection provided to traditional knowledge by the aforesaid provisions is defensive protection.

The Government of India has prepared huge database, known as Traditional Knowledge Digital Library (TKDL) in which traditional knowledge has been documented to a very great extent. The TKDL is a very useful database for the patent office to find out whether a particular invention is based on traditional knowledge. The TKDL helps in the prevention of privatization

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[19] *Dhanpat Seth* v. *Nil Kamal Plastic Crates Ltd*., 2008 (36) PTC 123 (HP) (DB) (India).
[20] V.K. Ahuja, "Human Rights Approach to Intellectual Property Rights" in V.K. Ahuja, *Human Rights: Contemporary Issues (Festschrift in the Honour of Professor Upendra Baxi)* (2019), pp. 51-75 at p. 73.
[21] Section 25(1)(k), Patents Act, 1970 (India).
[22] *Id*., section 25(2)(k).
[23] *Id*., section 64.

of traditional knowledge. It therefore serves the public interest by retaining the traditional knowledge in public domain.

In addition to above, section 3 also makes certain inventions not patentable.[24] The Delhi High Court in *F. Hoffmann-La Roche Ltd.* v. *Cipla Ltd*.,[25] stated that these inventions are not granted patents as a matter of policy. Section 3 serves public interest by denying monopoly in terms of patent with respect to so called inventions as enumerated in it. It is also noteworthy that section 3(d) rules out the possibility of evergreening of patents. Evergreening is a concept where a patentee before the expiry of patent makes some cosmetic or incremental changes in the existing invention and tries to get a new patent.

V. LOCAL WORKING OF PATENT

The general philosophy of Patents Act, 1970 emphasizes on working of patented inventions in India.[26] The patents are to be granted to "encourage inventions and to secure that the inventions are worked in India on a commercial scale"[27] without

[24] Some of the inventions which are non-patentable under section 3 of the Patents Act, 1970 include inventions which are "contrary to public order or morality" or which may cause "serious prejudice to human, animal or plant life or health or to the environment"; "discovery of any living thing or non-living substance occurring in nature"; "mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance ..."; methods of agriculture/horticulture; processes for "the medicinal, surgical, curative, prophylactic (diagnostic, therapeutic) or other treatment of human beings" or a process for treatment of animals; plants, seeds and animals; business methods; method of performing mental act/playing game..

[25] *F. Hoffmann-La Roche Ltd.* v. *Cipla Ltd*., 2016 (65) PTC 1 (Del) (DB)(India), p. 16.

[26] Section 83, Patents Act, 1970 (India).

[27] In *Glaverbal S.A.* v. *Dave Rose*, 2010 (43) PTC 630 (Del.) (India) at p. 665, the court observed that the test of commercial working would mean that the product or invention must be put to commerce, and "it must have sales arising

undue delay and to the fullest extent.[28] Apart from that, the patents are not to be granted "merely to enable patentee to enjoy a monopoly for the importation of the patented article".[29] The original philosophy of the Patents Act was to discourage patentee to meet the local requirements through importation of patented products. The Act required patentees to work the invention locally. In other words, patentees could not enjoy monopoly by getting a patent and start importing the patents products from other countries to India. The intention of the legislature behind this provision was that if a patent is granted for an invention, it should locally work in India so that there could be transfer of technology. Working of an invention in India will not only ensure transfer of technology, but also provide more employment, and a strong market including an export market in the country. In place of outflow of foreign exchange, there will be more inflow of it in India. There will be an overall technological as well as economic development of the country.

The TRIPs Agreement, however does not make any difference between the products locally made or imported.[30] This simply means, it is not mandatory for the patentee to work the invention locally. The patentee may get patents in different countries but work in some selected countries and fulfil the local requirements of other countries through importation. After India became party to TRIPs Agreement in 1995, it is no more required for patentees to work the inventions locally in India.

It is noteworthy to refer the "Make in India" initiative started by the Prime Minister Sh. Narendra Modi. Under "Make

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out of the exploitation of the same. The commercial working might not be present in vacuum".

[28] Section 83(a), Patents Act, 1970 (India). In *Novartis AG* v. *Cipla Ltd*., 2015 (61) PTC 363 (Del) (India), p. 397, the court stated that "an obligation is imposed on a patentee to work the patent in India on a commercial scale and to the fullest extent. The patent may be worked by the patentee himself or through licensees. Failure to fulfill this obligation will entail in the granting of compulsory licences or the revocation of the patent itself".

[29] Section 83(b), Patents Act, 1970 (India).

[30] Article 27(1), TRIPs Agreement.

in India" initiative, the Government encouraged corporates from all parts of the world to manufacture in India. The purpose was that by manufacturing in India, not only that there will be transfer of technology, but also a market will be created of new products and reliance on import will decrease. At the same time, export from India will increase resulting in lot of foreign exchange inflow in the country. Further, there will be lot of foreign investment in the country and employment opportunities will increase substantially. A signal will go to the entire world that India is an industry and business friendly destination. The "Make in India" initiative encourages the local manufacturing as was intended by original Patents Act, 1970. Thus, by providing industry/business friendly environment by making all round reforms, patentees may be encouraged to start manufacturing in India rather than going to China.

Section 83 also states that the protection as well as enforcement of patents should not only contribute to the "promotion of technological innovation" but also to the "transfer and dissemination of technology". This has to be done in such a manner which is mutually advantageous to producers as well as users of technological knowledge. Further, it is to be done in such a manner which is conducive to social and economic welfare of the country. Further, it should be done in such a manner as to maintain a balance of rights and obligations.[31] This language has been borrowed from Article 7 of the TRIPs Agreement which lays down its objectives. In the practical reality, however, transfer and dissemination of technology does not take place if the patentee after getting patent in India, manufactures patented products in other countries and import them into India.

In addition to above, section 83 also states that the grant of patents should not be an impediment for the protection of "public health and nutrition" which is very important subject-matter for the State. The patents should act "as instrument to promote public interest" particularly in those sectors which are

[31] Section 83(c), Patents Act, 1970 (India).

of vital importance for the country's "socio-economic and technological development".[32] The power of Central Government to take measures for the protection of public health is not to be impeded by patents.[33] The right holders are not to misuse patent rights, restrain trade or adversely affect the "international transfer of technology".[34] The language of aforesaid provisions have been borrowed from Article 8 of the TRIPs Agreement which lays down its principles. Special emphasis has been laid down on the protection of public health and public interest in the principles of TRIPs Agreement. The patented products should be available to the public at "reasonably affordable prices".[35]

The aforesaid general philosophy of Patents Act, 1970 as enumerated in section 83 of the Patents Act takes care of public interest at large. However, the ground reality is something different. The grant of patent in India may only ensure the availability of patented products in India. There is no price regulatory mechanism in place which ensures the availability of patented products at reasonably affordable prices. This, however, is a ground for compulsory licence, which is not used frequently, as in the history of 50 years of Patents Act, only one compulsory licence has been granted. Further, importation is considered equivalent to local manufacturing, which may not add to transfer of technology in real sense and may not add to technological development of the country. A conducive environment, therefore must be created by the government as discussed above and the patentees should be encouraged to work locally.

VI. COMPULSORY LICENSES

Compulsory licence is a powerful tool in the hands of Central Government to address the issues relating to public health, prevent misuse of power by patentee, and serve public

[32] *Id*., section 83(d).
[33] *Id*., section 83(e).
[34] *Id*., section 83(f).
[35] *Id*., section 83(g).

interest. It is however, noteworthy that compulsory licence is used as an exception, not as a general rule. As already stated, only one compulsory licence has been issued in the history of 50 years of Patents Act. The TRIPs Agreement makes very stringent provisions for the grant of compulsory licences.

Under Indian Patents Act, compulsory licence may be issued under three circumstances under Chapter XVI of the Patents Act, 1970.

A. Compulsory licence under general circumstances

Section 84 enables any interested person to apply for the grant of compulsory licence after the expiry of 3 years from the grant of patent[36] on the following conditions which are alternative, not cumulative:

(i) the "reasonable requirements of the public"[37] not being satisfied regarding the patented inventions, or
(ii) the non-availability of patented invention at a "reasonably affordable price", or
(iii) the non-working of patented invention in the Indian territory.

[36] In *F. Hoffmann-La Roche Ltd.* v. *Cipla Limited*, 2009 (40) PTC 125 (Del.) (DB) (India) at p. 152, the court observed that the "legislative intent was to grant a monopoly to the patent holder for at least the first three years after the grant of patent to enable it to recover the enormous costs incurred in research and development of the product". In *Telefonaktiebolaget LM Ericsson (Publ)* v. *Competition Commission of India*, 2016 (66) PTC 58 (Del) (India), p. 107, the court stated that the "Parliament in its wisdom thought it fit to grant this minimum period for a patentee, to reasonably ensure that its patent is worked in India and the patented invention is available at reasonable and affordable prices".

[37] When "reasonable requirements of the public is deemed not to have been satisfied", is defined very comprehensively under section 84(7), Patents Act, 1970.

The first compulsory licence in India under section 84 was granted by Controller of Patents to Natco against Bayer Corporation on March 9, 2012. The compulsory licence was granted against a patent for the drug "Sorafenib Tosylate (brand name Nexavar)". The drug is used for treating Kidney cancer i.e. "Renal Cell Carcinoma (RCC)" and liver cancer i.e. "Hepatocellular Carcinoma (HCC)". As per the terms and conditions of the compulsory licence, Natco was directed to provide the same drug for Rs. 8800/- for 120 tablets which was being sold by patentee for Rs. 2,80,428/-. The 120 tablets were prescribed for consumption by the patient in one month. Natco was also directed to pay 6% royalty to patentee. The patentee went in appeal to Intellectual Property Appellate Board (IPAB) against the order of Controller.

The IPAB while upholding the order of Controller, increased the royalty by 1% to 7%. The petitioner approached the Bombay High Court by filing a writ of certiorari to quash the IPAB order.

The Bombay High Court in *Bayer Corporation* v. *Union of India*,[38] stated that the "reasonable requirement of the public" was to be considered in the context of number of patients who required that drug. With respect to the term "adequate extent", the Court stated that it would vary depending upon the nature of the article. The requirement of meeting adequate extent with respect to a luxury product will be different from the requirement of medicinal products. In case of medicinal products, 100% availability is the test, meaning thereby that medicines should be available to every patient. The Court also stated that it was in accordance with the Doha Declaration on TRIPs Agreement and Public Health of 2001 which talks of flexibility to member States to ensure "access to medicines for all". Disagreeing with the arguments of patentee, the Court stated that in the case in hand

[38] *Bayer Corporation* v. *Union of India*, Writ Petition No. 1323 of 2013 decided by Bombay High Court on 15 July 2014 (India).

the requirement of all the patients of patented drug was not being met.[39]

On the issue of drug being available at reasonably affordable price, the Court stated that it had to be "arrived at on the basis of the evidence led by the parties ... of their respective prices". The petitioner was selling the patented drug for Rs. 2,80,428/- per month whereas the applicant offered the same for Rs. 8,800/-. In such a scenario, the "reasonably affordable price has to be necessarily the price of the applicant as it by itself establishes that the price of the petitioner is not a reasonably affordable price".[40]

Regarding "working of patent in the territory of India", the Court stated that manufacturing might not be required in every case to establish that patent has worked in India. Nevertheless, the patentee had to show the reasons for not manufacturing the patented invention in India in view of provision laid down in section 83. Once the patentee had satisfied the authorities by giving reasons for non-manufacturing the patent in India, then the importation could be considered equivalent to working of patent in India. This was required particularly when the patentee had "manufacturing facilities in India".[41]

Regarding the rate of royalty, the Court stated that UNDP recommended rate of royalty to be 4% whereas the Controller fixed it at 6% which was further increased to 7% by IPAB. As the patentee did not provide any evidence regarding the cost incurred in developing the patented drug, there was no reason to increase it.[42]

The Court made significant observations while concluding:

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[39] *Id*. at pp. 38-39.
[40] *Id*. at pp. 40-41.
[41] *Id*. at pp. 47-49.
[42] *Id*. at p. 51.

> "[T]he law of patent was a compromise between interest of the inventor and the public. In this case, patented drug was meant to heal patients suffering from cancer. Public interest is and should always be fundamental in deciding a *lis* between the parties while granting a compulsory licence for medicines/drugs".[43]

The aforesaid observations of the Court show that "public interest" is to remain fundamental at all the times while granting a compulsory licence for medicinal products. The public interest with respect to right to health must always get priority over the rights of the patentees in their patented pharmaceutical inventions.

B. Compulsory licence under special circumstances

Realizing the fact that developing and the least-developed countries were facing problems to fulfill their human rights obligations with respect to right to health of people in their territories due to their obligations under the TRIPs Agreement, the "Doha Declaration on the TRIPs Agreement and Public Health" was adopted on 14 November, 2001.

The Doha Declaration recognized the fact that least-developed and developing countries were facing acute problems of public health, the major of which were "HIV/AIDS, tuberculosis, malaria and other epidemics". Further, it was a matter of concern that IPR protection was resulting in price rise of medicines. It was agreed that Members could take measures to "protect public health". Further, "access to medicines for all" should be promoted. The term "other epidemics" may include acute respiratory infections, diarrhoeal diseases, measles, etc.[44]

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[43] *Id*. at p. 52.

[44] V. K. Ahuja, "Addressing Public Health Problems in the Light of Doha Declaration", 43(1) *Indian Journal of International Law*, 2003, pp. 108-16 at 114.

The Doha Declaration recognized certain flexibilities in TRIPs Agreement. It also recognized the right of members "to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted".[45] The Legislature adopted the aforesaid flexibilities in the Patents Act, 1970 by the by way of amendment in 2002.

Section 92, which has its genesis in Doha Declaration, provides that in case of "national emergency" or in "circumstances of extreme urgency" or in case of "public non-commercial use" the Government on its satisfaction, may make a declaration that compulsory licence should be granted after the sealing of patent at any point of time. The Controller, thereafter has discretion to grant compulsory licence to the applicant. The Controller while granting compulsory licence has to ensure that the public gets the patented product at the "lowest prices" and at the same time the patentee also gets a "reasonable advantage". Since section 92 is a special provision dealing with health emergency, the provisions of section 87 will not be applicable in such cases.

As far as the question of "what constitutes a national emergency or other circumstances of extreme urgency" is concerned, it is for every Member country to decide at their own. Further, the "public health crises", which include "HIV/AIDS, tuberculosis, malaria and other epidemics", may also represent either a "national emergency" or other "circumstances of extreme urgency".

C. Compulsory Licence for the purpose of Exporting Patented Pharmaceutical Products

Section 92A makes special provision for the grant of compulsory licence in exceptional circumstances. Patented pharmaceutical products may be manufactured in India under

[45] Clause 5(b), Doha Declaration on the TRIPs Agreement and Public Health, 2001.

compulsory licence and exported to any such country which does not have manufacturing capacity or which has manufacturing capacity, but such capacity is insufficient. Such compulsory licence shall be issued to address public health problems of importing country. This is however essential that importing country must have granted compulsory licence or otherwise permitted importation of such patented pharmaceutical products from India. In absence of any authorization from importing country, manufacturing of such product in India will result in infringement of patent. Patented product is defined to mean any patented product including the one made by patented process which is required to address the issues of public health. This also includes ingredients which are necessary for the manufacture of such products and diagnostic kits.

Section 92A was inserted in the Patents Act, 1970 by the Patents (Amendment) Act, 2005 to help those countries which may be facing public health problems and are not in a position to manufacture the required pharmaceutical products to address such problems. India, being pharmacy of the world has strong infrastructure to manufacture sufficient pharmaceutical products for other countries. It is noteworthy that the products so manufactured under compulsory licence for any country is to be exported to such country only and no part of it is to be used for local consumption.

The genesis of section 92A may be found in the "Doha Declaration on the TRIPS Agreement and Public Health**"**.[46] Paragraph 6 of the Declaration recognized the fact that difficulties may be faced by those member countries which have "insufficient or no manufacturing capacities" in the area of pharmaceutical sector to make effective use of the provisions of compulsory licence as provided by the TRIPS Agreement. Thereafter in 2003, a waiver decision was taken in this regard. On the basis of 2003 decision, India incorporated section 92A in the Patents Act, 1970 by way of amendment in 2005.

[46] WT/MIN(01)/DEC/2, 20 November 2001.

On 6 December 2005, it was agreed that the aforesaid waiver decision of 2003 should be made an integral part of the TRIPs Agreement by way on an amendment. Finally, after acquiring acceptance of two third members of WTO on January 23, 2017, the amendment to TRIPs Agreement became effective in this regard.

VII. REVOCATION OF PATENT FOR NON-WORKING

Non-working of patent by patentee two years after the grant of first compulsory licence is a ground for revocation of patent. Either the Central Government or any other interested person may approach the Controller of Patents for the revocation of patent on any of the three grounds, viz. the "reasonable requirements of the public" not being satisfied regarding the patented inventions, or (ii) the non-availability of patented invention at a "reasonably affordable price", or (iii) the non-working of patented invention in India. These grounds are the same as provided for the grant of compulsory licence as listed in section 84 of the Patents Act, 1970. The Controller, on his satisfaction that anyone of such grounds exists, may pass an order for the revocation of patent. The normal time frame for deciding application for revocation is one year from the time when it was made to the Controller of Patent.[47]

This provision addresses the issue of non-working on the part of patentee who in spite of the fact that first compulsory licence has been issued against him, does not work his patent. This amounts to misuse of monopoly by patentee, which is remedied by Controller of Patent by issuing revocation order. Again, this provision is an exception and not a general rule and hardly used in practice.

In addition to above, a patent can also be revoked in public interest under section 66 if in the opinion of Central

[47] Section 85 of the Patents Act, 1970 (India).

Government, it is being exercised in a mischievous mode to the country or is otherwise prejudicial to the public.

VIII. INVENTION MAY BE USED FOR GOVERNMENT PURPOSES

The Central Government has wide powers under Chapter XVII of the Patents Act, 1970 regarding use and acquisition of inventions for government purposes. After filing of patent application or grant of patent, the invention may be used by Central Government/authorized person for government purposes. The goods made by using such invention may also be sold on "non-commercial basis". The goods so purchased by the purchaser are to be deemed as if the same have been purchased from the patentee.[48]

Section 100(4) of the Patents Act is of significant importance. It also protects public interest in a situation in which only application for patent has been filed but the patent has not been granted. It gives powers to Central Government for the purpose of authorizing a person in those situations where only "an application for patent has been made" but the patent has not been granted or where the patent has been granted on such application, "to make, use, exercise or vend the invention or import the machine, apparatus or other article or medicine or drug covered by such patent". Prior permission of inventor/patentee is not required in such a case. In case of any health emergency, section 100(4) may be a saviour. Many a times, a medicinal product based on a new invention may be required on urgent basis to protect public health. The inventor might have applied for patent for such invention and the application may be pending. The Government cannot issue compulsory licence unless a patent has been granted. In such a scenario, section 100(4) can be invoked to address public health issues.

[48] *Id*., section 100.

Section 102 is another very important provision. It empowers the Central Government to acquire the patent/invention for a "public purpose". In case the Government decides to acquire the patent/invention, all rights with respect to patent/invention, stand transferred to as well as vest in it. A "notice of acquisition", however is to be given by the Government to the applicant/patentee/interested person and compensation is to be paid. The amount of compensation may be such which is agreed upon between the Government and the inventor/patentee or which is determined by the High Court as "just" after considering relevant factors.[49] Thus, by giving the power of acquisition of patent/invention to Central Government, section 102 serves public purpose.

IX. PRINCIPLE OF EXHAUSTION AND PARALLEL IMPORTATION

According to "the principle of exhaustion", the rights of IPR owner get exhausted on the first sale of the product. This means that once the IPR owner has sold his products in the market, he does not have any further control over the movement of the goods sold lawfully. Any person can buy or import those goods and sell them anywhere he likes provided if he exports those goods to a country, that country should also have adopted the principle of exhaustion. The TRIPs Agreement also lays down the provision with respect to exhaustion. It provides that "[N]othing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights" for the purpose of dispute settlement.[50] The TRIPs Agreement leaves it to Member Countries to adopt or not to adopt a law regarding exhaustion of rights. There can be three types of exhaustion: (i) "national exhaustion"; (ii) "regional exhaustion"; and (iii) "international exhaustion".

[49] *Id.*, section 102.
[50] Article 6, TRIPs Agreement.

Section 107A(b) of the Patents Act provides that it "shall not constitute an infringement" of patents, if any person imports patented products from "a person who is duly authorized under the law to produce and sell or distribute the product".[51] Ordinarily, the right to importation lies with the patentee.[52] It is clear from the aforesaid provision that India follows the principle of international exhaustion.

The concept of parallel importation is extremely important in the field of drugs and pharmaceuticals. As the prices of patented drugs and pharmaceuticals are very expensive, the provision relating to parallel importation enables a person to import the patented drugs from a country where it is cheaper than India. It is therefore, not an infringement to legally import products from other countries where the same are available at a cheaper price and sell them in India. This provision may be helpful in providing patented products in Indian market at a reasonable price.

X. USE OF PATENT FOR EXPERIMENT, TEACHING OR RESEARCH

A patent granted under Patents Act, 1970 may be made or used by any person for the purpose of "experiment or research including the imparting of instructions to pupils".[53] All patents are granted subject to the aforesaid condition. This means no authorization is required from patentee or government for these purposes. The reason is that research, experiment and instructions are extremely important for the progress of any society. These free activities result in enhancement over existing knowledge and lead to further technical advancement. The legislature has maintained a fine balance between the rights of patentee and public interest, by making grant of every patent subject to the aforesaid conditions.

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[51] *Id*., section 107A(b), Patents Act, 1970 (India).
[52] *Id*., section 48(a).
[53] *Id*., section 47(3).

XI. BOLAR EXEMPTION

The provision regarding Bolar exemption in Patents Act is extremely useful as it enables the producers of generic drugs to get ready to bring bio-equivalent of the patented drugs in the market immediately after the expiry of patent. The generic drug producers may have to conduct certain trials with respect to patented drugs and seek regulatory approval during the subsistence of patent.

Section 107A allows "making, constructing, using, selling or importing a patented invention" for the purposes of developing and submitting information in ***India or abroad*** which is required under law for regulatory purposes. This provision has been drafted in a liberal manner. It exempts all the aforesaid acts for "the purpose of development and submission of information required under any law in India or abroad".[54] This provision, apart from Bolar exemption, is also known as research exemption, safe harbour exemption or early working exception[55] in different jurisdictions.

It will be appropriate to refer to the EC-Canada dispute in this regard which was referred to WTO. The exception for getting regulatory approval was allowed in this case, whereas stockpiling of the patented product was disallowed.[56] The position is well settled now. The patented invention can be made use of during the patent term for the purpose of getting regulatory approval, but manufacturing of products for stockpiling with the intention that the same will be launched in the market immediately after the expiry of patent will not be allowed and be deemed to be infringement of patent.

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[54] V.K. Ahuja, "Human Rights Approach to Intellectual Property Rights" in V.K. Ahuja, *Human Rights: Contemporary Issues (Festschrift in the Honour of Professor Upendra Baxi)* (2019), pp. 51-75 at p. 73.

[55] Report of the WHO Commission on Intellectual Property Rights, Innovation and Public Health, "Public Health: Innovation and Intellectual Property Rights", April 2006, p. 147.

[56] WT/DS II 4/R dated March 17, 2000.

XII. CONCLUSION

Patents deal with three most important aspects, namely economic and technological development of the society; enjoyment of monopoly by patentee, and serving of public interest. There is not even an iota of doubt that patents are essential tools for the economic and technological development of a country. Patents give opportunities to patentees to recoup their investments along with making of reasonable profits. This incentive encourages inventors to do more research and innovations and introduce new technologies in the market for the betterment of people. New products are made available to the society due to patent protection. Patent protection may result in generating new export market for new products on regular basis which may bring more revenue in form of taxes and otherwise for the State; transfer of technology; creation of more employment; and the overall economic and technological development of the society.

It is however, also true that monopoly granted to patentees in terms of exclusive rights may be abused by them to the detriment of public at large. The patent prohibits competition for 20 years from the date of application. The monopoly enjoyed by patentees are misused by them by not working the patented invention in the country, and pricing the products very high, most particularly in case of drugs and pharmaceuticals. Many a times, the invention is not locally worked in the country and the patented products are imported from other countries to meet the public demand. This practice, though allowed under TRIPs Agreement which considers importation equivalent to local working, is not good for the economic and technological development of the country. Further, there is no price control regulation mechanism to control the prices of patented products particularly the drugs and medicines. This is the biggest drawback of the patent system.

The third aspect of patent protection is public interest. The term of patent has been confined to 20 years from the date

of application, after which the patent falls into public domain. After the expiry of patent, any member of the public can make use of that invention for which patent was granted and compete with the inventor who was earlier patentee. On the expiry of patent, the prices of patented products, particularly drugs and pharmaceuticals come down substantially. Further, as already discussed, there are many inbuilt safeguards in the Patents Act, 1970 which takes care of the situation that unnecessary monopoly is not granted and the monopoly once granted is not misused by the patentee.

The patent system, thus deals with three aspects and takes care of the interest of patentee, public interest and the society by contributing to its growth. What is most important is that there should be a proper co-ordination among all the three aspects. A fine balancing between monopoly and public interest is a *sine qua non* for progressive society.

REPRODUCTIVE RIGHTS OF WOMEN WITH MENTAL DISABILITIES AND THE JUDICIAL ACTIVISM: AN ANALYSIS IN HUMAN RIGHTS PERSPECTIVES

Arun Kumar Singh[*]

ABSTRACT

Women with disabilities always had to fight for basic human rights. Despite various welfare legislation, women with disabilities especially mentally disabled women suffer the most. Their right to privacy and autonomy are hardly protected. The reproductive rights of women of this category are infringed by sterilizing them without their consent. Judiciary in various pronouncements tried to protect the reproductive rights of disabled women. Indian courts have issued several notable decisions recognizing women's reproductive rights as part of the "inalienable survival rights" implicitly protected under the fundamental right to life. And also, the courts have called for respect for women's rights to autonomy and decision-making concerning pregnancy. Despite the judicial pronouncements still the social attitude towards the mentally disabled particularly women are not changed.

I. INTRODUCTION

Human rights are the rights that are available to everyone because of being human. It is the basic human rights jurisprudence that the reproductive autonomy of any woman must be maintained and the obligation is on the States to ensure

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it. They are having the same rights as par with a normal human being. The international community is moving towards a more robust recognition of the human rights of disabled persons including reproductive rights. Women, particularly the woman suffering from mental disabilities are vulnerable to sexual and reproductive health violations. A woman just because of being mentally disabled cannot be deprived of her sexual autonomy. However, a double standard exists for disabled women especially for the mentally disabled. They are seen as asexual or `defective' and undesirable as sexual partners or mothers. Both disabled and non-disabled women's sexuality and reproductive capacities have been regulated by a patriarchal society, but the expectations of women's traditional reproductive roles are reversed. A non-disabled woman is expected, encouraged to have reproductive rights whereas disabled women are compelled not to have reproductive rights, and are also discouraged for that. Patriarchal society does not think that she may be mentally disabled but not sexually disabled. It is a common perception of society that a mentally disabled person has no right to autonomy. Although, there are various international as well as national laws to protect the autonomy of mentally disabled people particularly reproductive autonomy but the issue is regarding the enforcement of the provisions. This paper covers both mental illness and mental retardation in the realm of mental disability. The objective of the paper is to articulate the human rights norms, considering the reproductive rights of women with mental disabilities, against which the laws and policies of nations are required to be measured. Laws and policies affecting mentally disabled women's reproductive rights have been discussed here. How the Judiciary has tried a lot to protect and preserve the reproductive rights of mentally disabled women has also been highlighted in the paper. The methodology that has been adopted in the present discussion is, doctrinal which is based on the primary and secondary sources.

II. MEANING AND CONCEPT OF MENTAL DISABILITY AND REPRODUCTIVE RIGHTS

A person who lacks comprehension appropriate to his/her age will be considered as mentally disabled. This would not mean that if a person is not able to comprehend his/her studies appropriate to his /her age and is failing to qualify examination is mentally disabled.

[1]Disability is a physical or mental condition that limits a person's movements, senses, or activities. Mental illness and mental retardation are two different forms of disability. Mental illness can be described as inappropriate, irrational, or unrealistic behaviour. In mental illness, the behaviour of the person is not normal. There are many kinds and degrees of mental illness. They may be mild or severe. When the condition becomes serious enough to affect the person's behaviour or ability to think rationally, it is termed "mental illness".[2] The Mental Healthcare Act, 2017 defines "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, especially characterized by sub normality of intelligence". Mental illness is inappropriate, irrational, or unrealistic behaviour.[3] As in most physical illnesses, there is something wrong with parts of the body, likewise, in mental illness, it is the behaviour of a person that is not normal. Mental

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[1] *Persons with Disabilities (Divyangjan) in India - A Statistical Profile: 2021*, p.17, Government of India Ministry of Statistics and Programme Implementation National Statistical Office Social Statistics Division, http://mospi.nic.in/sites/default/files/publication_reports/Persons_Disabilities_31mar21.pdf

[2] *'Facts and Fictions about Mental Illness'* p.5, https://mn.gov/mnddc/past/pdf/60s/68/68-FFM- DPW.pdf.

[3] Section 2(1)(s) of the Mental Healthcare Act, 2017 (India).

illness may be caused by physical, psychological, or environmental factors or a combination of all three.[4] The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Herein after referred as PWD Act, 1995 also makes distinction between mental illness and mental retardation. It excluded mental retardation from the purview of mental illness.[5] Mental illness is different from mental retardation as both are two distinct conditions. Mental illness is a disease where the mental development of the patient is normal and is curable like other diseases. It can occur at any time. A mentally disabled person can be emotionally different. He may be antisocial or have strange behaviour. Sometimes suicidal tendencies can also occur in the mind of a mentally ill person.

As for as "mental retardation" is concerned it is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, as expressed in conceptual, social, and practical adaptive skills. which is a condition of arrested or incomplete development of the mind of a person, especially characterized by sub-normality of intelligence.[6] It is a cognitive imitation.[7] In mental retardation generally delayed development takes place. Mental retardation is incurable because it is not a disease rather a condition and only through proper training, such a condition can be improved. Mentally retarded person may have some special characteristics like big heads, thick tongues, squint, etc. Mental retardation takes place during the developmental period generally before eighteen years of age. Under mental retardation, a person lacks understanding or comprehension as compared to her/his age

[4] *Supra* note1.

[5] PWD Act, 1995 2(q) "Mental illness" means any mental disorder other than mental retardation; (r) "Mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterized by sub normality of intelligence.

[6] Clause (3) of the Schedule of RPWD Act, 2016 (India).

[7] Susan L. Hyman MD, *Pediatric Clinical Advisor, 2007*, https://www.sciencedirect.com/topics/medicine-and-dentistry/mental-deficiency.

group. Sometimes she/he is unable to communicate her/ his needs when compared to other persons of her/his age group.[8] She/he may have difficulty in doing daily activities, understanding routine instructions; or having extreme difficulty in making decisions, remembering things, or solving problems.[9]

According to PWD Act, 1995 "mental retardation" means a condition of arrested or incomplete development of mind of a person which is especially characterized by sub normality of intelligence; it is an incomplete mental development."[10] The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act, 1999 provided; "Mental Retardation" means a condition of arrested or incomplete development of mind of a person which is especially characterized by sub-normality of intelligence.[11] A mentally retarded person is one whose normal intellectual growth was arrested at some time before birth, during the birth process, or in the early years of development.[12] It may be possible in the case of a person who is mentally ill also. The degree of retardation varies from person to person, it may be very mild to very severe. The PWD Act,1995 included not only mental illness as well as mental retardation in the definition of mental disability.[13] As for the meaning of 'person with a disability is concerned' the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act, 1999,

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[8] *Persons with Disabilities (Divyangjan) in India - A Statistical Profile : 2021*, p.17, Government of India Ministry of Statistics and Programme Implementation National Statistical Office Social Statistics Division, http://mospi.nic.in/sites/default/files/publication_reports/Persons_Disabilities_31mar21.pdf

[9] *Id.*

[10] Section 2(r) of the PWD Act, 1995 (India).

[11] Section 2(g) of the The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (India).

[12] *Supra* note 1.

[13] Section 2(i) of the PWD Act,1995 says; "(i) "Disability" means- (I) Blindness; (ii) Low vision; (iii) Leprosy-cured; (iv) Hearing impairment; (v) Loco motor disability; (vi) Mental retardation; (vii) Mental illness.

provides that "the persons with a disability mean a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disabilities."[14]

Apart from the above, the Rights of the Person with Disabilities Act, 2016 hereinafter referred to as RPWD Act, 2016 gives a very significant definition of 'person with a disability it includes physical, mental, intellectual, or sensory impairment in its purview. The RPWD Act 2016 prescribes that mental illness is covered under mental behavior, that also excludes mental retardation from its purview, the Act says, "person with a disability a means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others."[15] The Act includes both mental illness and mental retardation in its purview. Although, the word 'mental retardation' as such is not mentioned there, for mental retardation word intellectual disability has been used. The Schedule of RPWD Act,2016 differentiates between mental illness and mental retardation but it does not say that only mental illness will be part of disability rather it gives an inclusive definition and includes intellectual disability also, in its realm.[16]

As far as reproductive rights are concerned, these rights include the right to equality and non-discrimination, the right to marry and found a family the right to comprehensive reproductive health care including family planning and maternal health services, education, and information; the right to give

[14] Section 2(j) The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act,1999 (India).

[15] Section 2(s) of the Rights of Persons with Disabilities Act, 2016 (India).

[16] The Schedule provides; "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, but does not include retardation.

informed consent to all medical procedures including sterilization and abortion; and the right to be free from sexual abuse and exploitation. These are the rights that are covered under the right to privacy.[17] True reproductive autonomy also requires that a woman who faces an unwanted pregnancy has the option to abort it if so chooses, and she should be provided with sufficient information and support to make this decision for herself.[18] Although these rights are equally available to both non-disabled and disabled women. However, eugenics theory propogates supporting forcible sterilizations and abortions on mentally retarded persons. But in the modern time, these measures are considered as anti-democratic and violative of the guarantee of 'right to equality as laid down in Article 14 of our Constitution. Sometimes it is argued that the mentally retarded woman has low I.Q. (Intelligent Quotient) level and can't judge the best interest of the child. It may be true but there is the possibility that a woman with low I.Q. may possess the social and emotional capacities that will enable her to be a good mother.

III. LEGAL PROTECTION OF REPRODUCTIVE RIGHTS OF WOMEN WITH MENTALLY DISABLED WOMEN

Having sexual relationships, family relationships, bearing and rearing children and making home are important human and civil rights. In a joint statement, the United Nations Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Committee on the Rights of Persons with Disabilities (CRPD) said that access to safe and legal abortion, as well as related services and information, are essential aspects of women's reproductive health.[19] The CEDAW

[17] *Reproductive Rights and Women with Disabilities: A Human Rights Framework, Centre for Reproductive Rights*, https://www.reproductiverights.org/sites/default/files/documents/pub_bp_disabilities.pdf

[18] *Id.*

[19] '*Stop Regression on Sexual and Reproductive Rights of Women and Girls, UN Experts Urge'*,

Committee, highlighting the women with disabilities, including mental disabilities, stated that States must ensure that health services are accessible, sensitive to their needs, and respectful of their dignity and rights to autonomy, privacy, confidentiality, informed consent, and choice.[20] And also, outlined that States should remove all barriers and restrictions to women's access to health services, including abortion as well as prenatal, perinatal, and postnatal care.[21] But the question here is; what exactly the reproductive rights mean? Do disabled women especially the mentally disabled have the same rights at par with non-disabled women?

Marriage and motherhood are part of the right to privacy. Here the term has been used to refer to women's right to avoid unwanted pregnancy by way of contraception or through safe, legal abortion. As well as the right to bear and raise children.[22] As for as the reproductive rights of disabled persons particularly mentally disabled women are concerned, many times they face obstacles to sexual and reproductive freedom from the medical and legal communities, the public, and their families. Many disabled women have experienced denial of their desire to become mothers through sterilization, contraception, or abortion. Although, these reproductive rights are protected under several widely ratified international human rights treaties that create binding legal obligations upon the States who are parties to the treaties.

The Universal Declaration of Human Rights,1948 provides that the right to a standard of living is adequate for the

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https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23503&LangID=E.

[20] CEDAW Committee General Recommendation No. 24 on article 12 of the Convention (women and health), U.N. Doc. A/54/38/Rev.1 (1999), paras. 6, 12, 14, 25–27, 31.

[21] *Id.*

[22] Virginia Kallianes & Phyllis Rubenfeld, *'Disabled Women and Reproductive Rights' Disability & Society*, https://www.tandfonline.com/doi/pdf/10.1080/09687599727335.

health and well-being of an individual.[23] Although, it does not provide direct protection to the reproductive rights of women but protects other rights that support reproductive rights such as privacy, equal rights in marriage, no discrimination, etc. Apart from the above, the right to make free and informed decisions about health care and medical treatment, including decisions about one's fertility and sexuality, is enshrined in Articles 12[24] and 16[25] of the Convention on the Elimination of all Forms of Discrimination Against Women,1978 hereinafter referred to as CEDAW. And also, the United Nations Convention on the Rights of Persons with Disabilities,2007 (UNCRPD) imposes obligations on the state parties to eliminate all forms of discrimination and family planning education to the person with

[23] Article 25 of the UDHR,1948 provides, ". Everyone has the right to a standard of living adequate for the health and well-being of 74 himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, 75 whether born in or out of wedlock, shall enjoy the same social protection."

[24] Article12(1) of the CEDAW provides; "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."
Article12 (2) says; "Notwithstanding the provisions of paragraph I of this Article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

[25] Article16 of the CEDAW says; "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women."

disabilities.[26] And also, it ensures the right to access reproductive rights on an equal basis with others.[27]

As far as the Indian scenario is concerned, Section 10(1) of the Rights of Persons with Disability Act, 2016 (RPWD) obligates appropriate government to make necessary information regarding reproductive and family planning accessible to persons with disabilities.[28] The Act also says that no procedure of sterilization would be adopted without the consent of such a woman with a disability.[29] Under Section 25(2)(k) of the Act, the obligation has been imposed on the appropriate government to ensure that the measures, schemes, and programs, to promote healthcare and prevent disabilities must also include sexual and reproductive healthcare for women.[30] Sections 24(2), 24(3)(d), 25(3)(k), and 37of RPWD Act provide rights of women with disabilities to equality and non-discrimination, protection from violence, and reproductive rights. The above provisions are equally available to all women with disabilities and nowhere it

[26] Article23(1)(a) of UNCRPD provides; "States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized."

[27] Article23(1)(c) of UNCRPD provides, "States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that Persons with disabilities, including children, retain their fertility on an equal basis with others."

[28] Section 10(1) provides; "The appropriate Government shall ensure that persons with disabilities have access to appropriate information regarding reproductive and family planning."

[29] Section 10(2) provides, "No person with disability shall be subject to any medical procedure which leads to infertility without his or her free and informed consent."

[30] Section 25(2) (k) says; "The appropriate Government and the local authorities shall take measures and make schemes or programmes to promote healthcare and prevent the occurrence of disabilities for sexual and reproductive healthcare especially for women with disability."

has been said that these rights are not available to women with mental disabilities. But under the Medical Termination of Pregnancy Act, 1971 (MTP Act), the difference has been made between physical disability and mental disability (mentally ill woman) regarding termination of pregnancy. Medical Termination of Pregnancy Act, 1971 indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any `mental illness. A physically disabled woman's consent is having value but a mentally disabled woman's consent regarding termination of her pregnancy has no meaning, rather his guardian's consent is taken into consideration for termination of her pregnancy.[31] As for as the 'guardian' under MTP Act is concerned, "guardian" means a person having the care of the person of a 'minor' or a 'mentally ill person'.[32] The issue of 'mental retardation' and 'mentally ill' have been considered on a different footing. The Act focuses on mentally ill people. It says that a mentally ill person" means a person who requires treatment because of any mental disorder other than mental retardation. The Act reflects that a guardian can make decisions only on behalf of a 'mentally ill person' but the same cannot be done in the case of a person who is 'mentally retarded'. The mentally retarded woman herself is responsible to consent for pregnancy. It will be her choice to abort her child or not under the MTP Act.

IV. REPRODUCTIVE RIGHTS AND JUDICIAL PRONOUNCEMENTS

Betty Friedan has said; "there is no freedom, no equality, no full human dignity, and personhood possible for women until they assert and demand control over their bodies and the

[31] Section 3 (4) of the MTP Act1971 says; (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.
(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.
[32] Section 2(a) of the MTP Act, 1971 (India).

reproductive process. The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned."[33]

In India, a disabled woman, particularly, a mentally disabled woman is usually at the receiving end of a lot of contempt and neglect. A mentally disabled woman has been consistently denied her rights. In *Suchita Srivastava* v. *Chandigarh Administration*[34] the Supreme Court has given a remarkable judgment. This case is related not only to abortion per se, rather is about whether the law of this country recognizes and protects the rights of a woman to make decisions for her life and body, especially when the woman is a person with mental retardation (MR) or any other disability. In this case, a nineteen-year-old mentally challenged orphaned girl living in a government-run welfare institution (Nari Niketan) in Chandigarh, was raped, and subsequently became pregnant while she was living in that institution. In May 2009 her pregnancy was detected. Upon this discovery, the respondent, the Chandigarh Administration, filed a criminal case under Sections 376 and 120B of the Indian Penal Code, 1860, and constituted a medical board to evaluate the mental status of the woman. The Multi-Disciplinary Medical Board which included a psychiatrist recommended that a woman had the adequate physical capacity to bear and raise the child but her mental health could be further affected by the stress of bearing and raising her child. The medical board opined that the woman had an intellectual disability and was suffering from mild mental retardation. It recommended that the woman's pregnancy should be terminated. The Respondent then filed a petition to the High Court of Punjab and Haryana requesting permission to terminate the pregnancy. Based on these recommendations, the Punjab and Haryana High Court ordered medical termination of her pregnancy. Against the High court's order, an appeal was preferred to the Supreme Court

[33] Bhavish Gupta, Meenu Gupta, *The Socio-Cultural Aspect of Abortion in India: Law, Ethics and Practise*, ILI Law Review, https://ili.ac.in/pdf/p10_bhavish.pdf.
[34] (2009) 9 SCC 1 (India).

of India, by an NGO. The Supreme Court, in this case, has delivered a landmark judgment and said that such a mentally retarded woman can deliver the child as she was mild mental retarded. The Court held;

> "The substantive questions posed before we were whether the victim's pregnancy could be terminated even though she had expressed her willingness to bear a child and whether her `best interests would be served by such termination. As explained in the fore- mentioned discussion, we conclude that the victim's pregnancy cannot be terminated without her consent, and proceeding with the same would not have served her `best interests. In our considered opinion, the language of the MTP Act respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. Lastly, we have urged the need to look beyond social prejudices to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities."

In another case, *Ms. Z* v. *State of Bihar*[35] a woman suffering from moderate mental retardation was destitute. She was living on the footpath in *Phulwarsharif,* Patna. Later on 25th January 2017, she was brought to 'Shanti Kutir, an NGO. The medical test done by Shanti Kutir showed she was pregnant. This pregnancy was the result of rape committed against her. Although, she wanted to terminate her pregnancy it was not performed by the medical authority owing to lack of consent. So, a petition was filed before Patna High Court, but the Court did not permit the termination of pregnancy. An appeal was preferred to Supreme Court against the verdict of the Patna High Court. The Supreme Court in the instant appeal stressed the right of

[35] *Ms. Z* v. *State of Bihar*, (2018) 11 SCC 572 (India).

bodily integrity, personal autonomy, and sovereignty of a woman and said that the concept of a guardian for the termination of pregnancy should not be over-emphasized. And also, requisite respect should be given to the bodily integrity and autonomy of such women. The Supreme Court stressing the fact said that the victim was not a minor, her pregnancy was a result of rape and she did not want her pregnancy. And also, her medical reports indicated that there would be no threat to her life due to the termination of her pregnancy. When she consented to terminate the pregnancy her consent must be considered. The dilution of the right to consent to women suffering from mental retardation would be a gross violation of their reproductive rights. The Court allowed her to terminate the pregnancy.

V. CONCLUSION

From the above discussion, it appears that India is one of the countries which developed a legal framework and policy to protect the reproductive rights of women. The United Nations Convention on Rights of Person with Disability, 2006 (UNCRPD2006) has imposed obligations on the countries to implement the mandates in their respective nations. The RPWD Act 2016 tried to address the issues relating to disabled persons but it has to be strengthened a great deal to bring it in line with international legislation. So, for as mentally disabled persons are concerned mostly, they are denied their sexual rights as well as other reproductive rights. In this context, we will have to understand that persons with disabilities are also having the same biological needs as others. They need counseling because they do not know where and how to engage. The Courts also emphasized the 'consent' of a woman who is bearing the pregnancy whether she wants to terminate or not, even mentally retarded women are also allowed to terminate the pregnancy subject to the provision of the MTP Act,1971. So, the time has come to implement the legal provisions regarding the protection properly so that the reproductive rights of women with disabilities especially the mentally disabled can be protected.

RESTITUTION OF CULTURAL OBJECTS DISPLACED DURING COLONIZATION: URGENT NEED FOR INTERNATIONAL REGIME

Manju Chellani[*]

ABSTRACT

The importance of culture for the continued well-being of humans is indubitable. However, cultural heritage gets destroyed, displaced and abused due to many factors. This article has focused exclusively on one of these: cultural objects displaced during the colonial era from their place of origin. Restitution of such cultural objects is generally acknowledged as being imperative for restoration of balance, part-reparation of past wrongs, and building of national identity on part of the erstwhile colonized nations. As of now, the available recourses for such restitution are soft international law; domestic legislation; bilateral arrangements; political will; ethical scruples etc. But their relatively small number and the special features characterizing them make them unique. The huge number of significant cultural objects still left unrestituted make it both clear and urgent that a comprehensive, strong and consistent international regime is required. In this article, the ethical and legal dimensions underpinning this and other issues relating to cultural heritage, have been analyzed, including juxtaposing them around the debates surrounding the famous non-restitution of Parthenon Marbles from United Kingdom to Greece. The article has concluded that the moral validation of the restitution under question makes it imperative that its international regulation should be urgently transmuted into reality. This protection should be systematically framed on the

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liberal lines of the existing conventions dealing with other aspects of cultural heritage. It should also reinforce the value of international cooperation and diplomacy; nexus between cultural heritage and cultural identity of nations and peoples; obligation of reparation of past wrongs; intergenerational justice; difference between possession and response towards preserving cultural heritage.

I. INTRODUCTION

The importance of culture for a sense of social and personal continuity cannot be underscored enough. However, it's very significance makes it vulnerable. It gets destroyed, displaced and abused by way of plunder during war; appropriation and wilful damage during foreign rule; theft during peace-time; poverty; migration; natural disasters; trade and so on. This affects the balance of culture in the human life at different points of time and place. And restoration of cultural heritage [1](CH) is imperative for the eventual re-achievement of this balance. This article will focus exclusively on restoration of one type of CH namely cultural objects (CO) which were displaced during the colonial era from their place of origin (PO).

Generally speaking, the terms "restitution", "repatriation" and "return" are used for this restoration. However, they have different connotations[2]. For the purpose of this article, the term "restitution" will be used throughout, unless required otherwise by the context.

[1] Of course, natural heritage which is partly composed of man-made elements is also a part of cultural heritage. See especially Article 1 of the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, 1972, https://en.unesco.org/.However, for the purpose of the present article, only tangible cultural heritage and intangible cultural heritage are included in a discussion of the cultural heritage.

[2] In the context of cultural heritage, "return" connotes its usual meaning in English language. "Repatriation" connotes return to one's native country. "Restitution" connotes returning to lawful (previous) owner.

The World War II marked the decline of colonization all over the world and the following few decades were characterized by the emergence of new nation-states which started building up their identity and other resources. The presence of CH of their past could play a very important role in the crystallizing of self-identity but an enormous amount had been displaced to the territories of their erstwhile rulers. It was generally acknowledged that restitution of the same would go some way towards reparation for past wrongs and for helping towards carving out of a national identity. However, such restitution has witnessed more enthusiasm than action, due to a variety of reasons. One of the major of such reasons is the absence of a strong regime of international law (IL) dealing with it. Hence the restitutions which have taken place have been the subject of case-by-case method; with a combination of principles of general international law; soft dedicated international law; domestic legislation; bilateral arrangements; political will; and ethical scruples. As a contrast to this, far more protection is available to the displacements of CO done after the colonial period; and especially after 1970. This has been possible because of the relevant developments in IL related to protection of CH. Perhaps as a corollary, this latter protection is also buttressed by stronger domestic legislations and bilateral arrangements. Obviously, the restitution of CO removed during colonial period should be fortified equally.

The objectives of this article are to:

1. Demonstrate the ethical and legal dimensions of the restitution of CO removed during colonization.
2. Reiterate the urgency for a comprehensive, strong and consistent international regime for effecting such a restitution. This protection will also serve to standardize the claims for restitution from anywhere in the world, even if they are not related to colonialism directly; but only in the similarity of circumstances surrounding the removal. They will then not be so dependent on variable factors such as domestic legislation, diplomatic negotiations, political will etc.

Section I of the article will briefly trace the historical context of an enormous amount of CO taken away during the colonial times from their PO, during a relatively short span of time, which has led to the need for their restitution. Section II will take up the evolution of the jurisprudence related to the restitution of CO, taken away during colonial times, in the post-World War II scenario[3]. Discussions of some selected CO which have been restored; and developments in international CH law generally will serve to highlight the trend of relevant legal and ethical thought. Section III will juxtapose this around the debates surrounding the non-restitution of a famous CO, namely the Parthenon Marbles. They had been taken away to United Kingdom by a British subject from Greece while it was occupied and ruled by Turkey, a foreign power. Such an analysis will demonstrate the need for a strong international regime of restitution. Section IV will use the analyses throughout the article to draw some conclusions and to comment on the future trends of IL in this area.

II. BRIEF HISTORICAL CONTEXT OF DISLOCATION OF CULTURAL OBJECTS DURING COLONIAL TIMES

Culture, both tangible and intangible, is fundamental for the human psyche. So much so that the human mind may not even

[3] However, a notable category of restitution – Nazi-looted cultural property – will not be taken up in this article. The period during which the atrocities and lootings by the Nazi regime against Jewish people were committed was concurrent with the last phase of colonization. But the circumstances surroundings the displacement/seizure were quite different. The "looters" dispossessed their own nationals (though the Nuremberg Laws stripped Jews of their nationality in Germany in 1933). Secondly, the loot remained in the country. Those dispossessed of it became either refugees in other countries or victims of concentration camps or other forms of persecution. This is why many of the cases in this category are within the purview of domestic legislation (of the claimants); as also specific and exclusive international rules. Due to such differences, this category of cases is not being put in the same subject-matter as that of the present article.

register its importance until it is irrevocably taken away[4]. It is part of one's history since time immemorial. Through it, the present gets sanctified by the people who have lived their lives with it, thought about it, worshipped it, constructed it. It tells the history of a people or place even when there the written records are not available for some reason. Succeeding generations of humans feel connected to their ancestors with the presence of their CH around them. However, this beautiful and reassuring continuity of culture does get disturbed due to many reasons: both natural and man-made. These include plunder during war, appropriation and wilful during foreign rule, theft during peace-time, poverty, migration, natural disasters, and so on. The destruction of much of any CH and its context(s) is irrevocable. CO, especially, have always been the cynosure of illegal or (questionable) legal relocation or invasion. This is generally for reasons of their material value, context, importance, beauty; and also because of their movability. More specifically in the case of CO, there are other factors for their displacement during colonization (and at other times too). They are being discussed below in some detail.

Parties to any small or big human conflicts have always recognized the fact that the erosion of culture is erosion of people. Hence taking away of CO has often been used as a psychological weapon. CO are also displayed in the museums of the conquering/colonizing country for boasting about the number of colonies under them; or may be stored in research institutions as tools for archaeological and historical scholarship[5]. Even when the CO had been obtained "legally" in the colonial environment,

[4] The fundamental importance of culture for human life, happiness and development has been discussed in numerous academic work including a fairly recent article by the present author. See Manju Chellani, *Why It is so Important to Give Importance to Culture?* 10 (I) Delhi Journal of Contemporary Law (2018), lc2.du.ac.in/DJCL.html.

[5] These manifold factors are enumerated and discussed at length in Jessica Kumari Gosling, *How significant is the UNESCO 1970 agreement towards current and historic approaches to repatriation Thesis*, University of London 10-18 (2012), https://www.academia.edu. Gosling's thesis has provided an understanding for which the present author owes gratitude.

it should be remembered that the laws there were made by a foreign occupying power. Naturally they were more advantageous to them. The relationship between the local colonized people and the government would not be on the same footing as that in a non-occupied country. At all of these times, an individual, society or country would be helpless against this ravaging of an integral part of their being. Any protest would have had to be paid for their lives or liberty. Paradoxically it is during these very difficult times that the need to cling to any surviving signs of the past and their CH is paramount for anchoring of life[6]. It is well-recorded that the quantum of forcible removal of CH from colonized countries had increased unprecedentedly during the relatively short span of colonial period when compared to any other time in history.

The decolonization process started across the world post World War II. The political equations and territorial boundaries across the planet changed dramatically and irrevocably. Many new nation-states were carved out of the former colonies. These new nation-states had to bring order out of chaos. As they attempted to build up their resources and identity, it was realized that there were many significant roadblocks. One of them was the paucity of symbols around which the national-cultural identity could be entwined. Many objects which depicted their continued history, religion, traditions, beliefs etc were known theoretically but were missing physically. Though not much could have been done at the time of removal because of the subjugated status of the people of the former colonies; now it was imperative to take a call. This was especially relevant for the CO which were the

[6] See a very heart-touching description in the well-known novel: *The Librarian of Auschwitz*; authored by Antonio Iturbe and translated into English by Lilit Zekulin Thwaites. It is based on the true story of Dita Kraus, a former inmate at the infamous Auschwitz concentration-camp in Germany during the World War II which was meant for housing and eventually killing its Jewish and other inmates. This poignant story focuses on the efforts made by a few older inmates to preserve some historical books in order to teach and pass on the cultural and religious heritage to the children growing up in the camp which expressed contempt for this heritage at every moment.

most representative of their ruptured identity which they hoped to re-build in the coming years[7]. In fact, the presence of such significant CO could even inspire re-unification of former nations now split into multiple territories. This was appreciated by some of the hitherto colonizing nations. For this and other varying reasons, they returned the dislocated CO to their former colonies/PO[8], over different points of time. However, restitution of a large number has remained unattained. They had found a place in museums and private collections and become their invaluable hallmarks after the dislocation. This was one factor. Another major factor was that the IL enforcing restitution has been very limited and primarily persuasive in nature. If any country was not self-motivated to do so, they did not feel bound to restore. Furthermore, the available mechanisms, apart from being "soft" in nature, have also been procedurally very complex, time-consuming, taking a tortuous route. Undoubtedly the situation has improved with time due to increasing number and broadmindedness of domestic legislation, diplomatic negotiations and bilateral treaties. But it is far from adequate. The following section will illustrate the evolution of the jurisprudence – legal and ethical – relating to such restitution and some other connected issues of CH, in different sub-sections.

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[7] Ana Filipa Vrdoljak, History and Evolution of International Cultural Heritage Law: Through the question of the removal and return of cultural objects Proceedings of the Expert Meeting and First Extraordinary Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, Seoul, 25 to 28 November 2008 7 (28 November 2008), https://www.academia.edu.

[8] Gosling, *Supra* note 5, at 15-17 for a penetrating discussion. Also, according to Brent, the removals of cultural objects also dropped significantly; apart from some regions of the world where during and after the decolonization process, high prices were offered for antiquities which could be excavated by the local people who were suffering from poverty. *See* M. Brent, A View inside the Illicit Trade in African Antiquities *in* Plundering Africa's Past 63-78(P. R. Schmidt, R. J. McIntosh, 1996) *cited in* Afolasade A. Adewumi, The Achievement of Return and Restitution of Cultural Property in Africa: The Roles of International Bodies 5 University of Ibadan Journal of Public and International Law 63, 67 (2015), https://www.academia.edu.

III. EVOLUTION OF CULTURAL HERITAGE JURISPRUDENCE FOR THE RESTITUTION OF CULTURAL OBJECTS POST DECOLONIZATION

In tandem with all branches of IL, the jurisprudence of CH has also developed strikingly after the World War II. However, these developments are not uniform for all the issues related to protection of CH. In the case of protection of intangible cultural heritage (ICH), there is remarkable development, incorporating culture-sensitive and progressive elements. In the case of tangible cultural heritage (TCH) too, protection has developed over the last few decades. However, when it comes to the issue of restitution, far more protection is available to the CO displaced after the colonization period as compared to that during the colonization. And the former is not with retroactive effect. So it does not affect the restitution being discussed in this article, except indirectly sometimes. Nevertheless, it may serve as an inspiration for future law-making in terms of scope and direction. At present, the difference of treatment does appear to be unfair and incoherent. It is true that restitutions of CO displaced in colonial times have taken place, over decades and by different countries; even under the most unpredictable conditions. They are laudable; but unfortunately, relatively few. Moreover, they have followed a case-by-case method. Consequently, each potential restitution coming after that is left to chance and political-legal vagaries. This is the reason that this important process requires an articulate and consistent regime of its own.

The following first sub-section will discuss the legal recourses available for restitution under question. The discussion of the ethical dimensions in the following sub-section will reflect the burgeoning thought on many aspects of CH including its restitution. This is important as the broad-based ethical developments in the IL relating to CH as a whole will definitely have an impact on the current limitations of the legal recourses for restitution. Already creative interpretations of general IL and the multi-pronged CH jurisprudence have pushed the cause of

restitution beyond the legal protection factually available to it. It is hoped that the flow of the ethical thought will carry it further.

A. Legal position

The following includes international (soft) law, agreements, negotiations, mediation and other methods. Selected instances of actual restitution have also been included to illustrate their potential, limitations and working.

1. Resolution 3391 (XXX) of 19 November 1975 of the United Nations General Assembly[9].

It says that "*Recognizes* in this connexion the special obligations incumbent upon those countries which had access to such valuable objects, either through particular claims or on other pretexts, as a result of their rule over or their occupation of a foreign territory"[10].

2. A Plea for the Return of an Irreplaceable Cultural Heritage to those who created it, of 1978[11].

In 1978, the Director-General of United Nations Educational, Scientific and Cultural Organization (UNESCO) launched this Plea. "These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish . . . I also call on institutions possessing several similar objects or records to part with at least one and return it to its country of origin, so that the young will not grow up without

[9] United Nations Educational, Scientific and Cultural Organization, *Culture*, www.unesco.org/new/en/culture/themes/.
[10] *Id*. in para 2.
[11] Amadou-Mahtar M'Bow, *A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created it*, [Hereinafter 1978 UNESCO Plea], www.unesco.org/culture/laws/pdf/PealforReturn_DG_1978.pdf.

ever having the chance to see, at close quarters, a work of art or a well-made item of handicraft fashioned by their ancestors."[12].

3. United Nations General Assembly Resolution on Return or Restitution of Cultural Property to the Countries of Origin, of 29 November 1979[13].

It says "reaffirming that the return or restitution to a country of its *objets d'art*, monuments, museum-pieces, manuscripts, documents and any other cultural or artistic treasures constitute a step forward in the strengthening of international co-operation and the preservation and further development of cultural values" and also "invites Member States to take all necessary steps for the return or restitution of cultural property through, inter alia, bilateral arrangements"[14].

4. UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Restitution in Case of Illicit Appropriation; created in 1978[15].

It was created for resolving the disputes regarding the restitutions as a result of colonial or other foreign occupation. It has no jurisdictional power but acts only in advisory capacity, through discussion and negotiation. The cases are brought before it by the UNESCO member states only if the bilateral negotiations are not working[16]. Even then, the States are not compelled to bring cases before it; nor to obey the recommendations. The role is one of cooperation only. In 2005,

[12] *Id*. in paras 8-16.
[13] United Nations Educational, Scientific and Cultural Organization, *Culture*, www.unesco.org/new/en/culture/themes/.
[14] *Id*, para 3.
[15] Adopted by 20 C/Resolution 4/7 .6/5 of the 20th session of the General Conference of UNESCO, Paris, 24 October-28 November 1978 [hereinafter ICPRCP], Restitution of Cultural Property, *Intergovernmental Committee (ICPRCP)*, www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/.
[16] *Id*. in Article 3.

it was amended[17] to empower it to propose for mediation or conciliation for the member-states or associate members of UNESCO, unless the entity holding the contested object is an individual[18]. The mediation and conciliation is voluntary and is binding only when the state parties reach a binding agreement on it. Its authority is persuasive only and the procedure for filing is complex. It may be with regard to a public or private institution.

A case of restitution which includes almost all the "classical" elements was resolved by the ICPRCP not so long back[19]. The eventual solution, it is hoped, will also prove to be classical and a model to be emulated. Bogazkoy is an archaeological site in Turkey. Scientists from both Archaeological Institute of Germany and of Archaeological Museum of Turkey had undertaken excavations there from 1906 to 1912. From 1915 to 1917, in accordance with the agreement between the two museums, two statues of Sphinx were taken from there to the state museums in Berlin for restoration, cataloguing etc. The first sphinx and the wing of the second one were restored to Turkey by 1943. However, the second sphinx was not returned. The facts surrounding the initial displacement were very important but they could not be ascertained. If the Sphinx had left Turkey with the permission of the authorities, then the displacement was not illegal. The Democratic Republic of Germany (RDA) said that the statue had left Turkey legally as an imperial decree of Sultan Abdul Hamid III in 1899 had authorized Germany to take part of the excavated material in which it was going to participate. This decree could even supersede the later Ottoman law of 1906 prohibiting taking any cultural asset outside Turkey. The Sultan had died in 1909; and there was no evidence that the successor had prolonged the decree or signed one of the same kind which could make the

[17] *Vide* Resolution of 2003 (33 / C Resolution 44). https://en.unesco.org/fighttrafficking/icprcp.

[18] *Supra* note 15 in Article 4.

[19] Arthemis, *Bogazkoy Sphinx – Turkey and Germany*, https://plone.unige.ch/art-adr/cases-affaires/bogazkoy-sphinx-2013-turkey-and-germany.

displacement of 1915 to be illegal vis-a-vis the law prevailing at that time. RDA said that it could not produce the required paper which, in reality, may have been lost during the two intervening World Wars. At the same time, the Sphinx formed part of the collection in Berlin's museum – so it was assumed to belong to Germany. At the instance of Turkey, bilateral negotiations started from 1975 but failed. Then the case was initially presented to ICPRCP in 1986. It invited both the countries to hold negotiations to reach a mutually acceptable solution[20] and encouraged them not to break off the negotiations. The ICPRCP also issued 8 recommendations from 1989 to 2011. Following this, there was an agreement on the part of Germany and Turkey. A memorandum of understanding was signed which included no conditions for restitution. The Sphinx was returned in 2011 to Istanbul and then to the Bogazkoy Museum. It was described as "voluntary act of friendship" and is an example of the successful bilateral negotiations under the aegis of the ICPRCP. They were undoubtedly tough, complex and prolonged. The persistent efforts of the ICPRCP should be lauded and the ethical stands and patience of both the parties to the dispute are also highly appreciable.

5. United Nations General Assembly Resolution on the Return or Restitution of Cultural Property to the Countries of Origin of 2010[21].

It says that it "welcomes the most recent efforts made by the United Nations Educational, Scientific and Cultural Organization for the protection of the cultural heritage of countries in conflict, including the safe return to those countries of cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance that have been

[20] United Nations Educational, Scientific and Cultural Organization, Restitution of Cultural Property, *Return of Restitution Cases*, www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/return-or-restitution-cases/.

[21] United Nations Digital Library, UN Doc A/RES/64/78, 11 February 2010, https://digitallibrary.un.org.

illegally removed, and calls upon the international community to contribute to these efforts."[22].

6. United Nations General Assembly Resolution on the Return or Restitution of Cultural Property to the Countries of Origin of 2015[23] .

This Resolution was spearheaded by Greece and supported by numerous other Member States as co-sponsors[24], for seeking support for the return of PM[25]. It says, "...and a recognition that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development, as well as targets related to the protection and restitution of cultural property".

7. United Nations General Assembly Resolution on the Return or Restitution of Cultural Property to the Countries of Origin of 2018[26].

Its Para 7 says that, "Recalling that the 2030 Agenda for Sustainable Development includes, inter alia, a pledge to foster inter-cultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility . . . all

[22] *Id*, para 9.

[23] United Nations Educational, Scientific and Cultural Organization, Restitution of Cultural Property, *Resolution adopted by the United Nations General Assembly about Return and Restitution of Cultural Property*, UN Doc A/RES/70/76, 9 December 2015, www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/resolutions-adopted-by-the-united-nations-general-assembly-about-return-and-restitution-of-cultural-property/.

[24] United Nations Educational, Scientific and Cultural Organization, *Adoption of the resolution: "Return or restitution of cultural property to the countries of origin,* www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/emergency-actions/general-assembly/.

[25] See Section III of the present article.

[26] United Nations Digital Library, UN Doc A/RES/73/130, 13 December 2018, https://digitallibrary.un.org.

cultures and civilizations can contribute to, and are crucial enablers of, sustainable development, as well as targets related to the protection and return or restitution of cultural property". After the passing of this Resolution, the Foreign Ministry of Greece issued a statement saying: "The said resolution, that also encompasses the return of the Parthenon marbles, was widely endorsed by all regional groups of member states, 105 of which jointly introduced the draft Resolution"[27].

8. Restitution from museums and other institutions.

International Council of Museums (ICOM) is non-profit and non-governmental organization. Established in 1946, it represents the international community of museums and museum professionals. One of its tools is the Code of Ethics for Museums[28]. It reflects the minimum standards which are approved of by the museum professionals all over the world. They prefer mediation and informal negotiation, as compared to litigation, for resolution of restitution claims. The mediation process is consensual in nature. Its code of ethics says "when a country or people of origin seek the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to cooperate in its return."[29]. It also maintains a relationship with UNESCO. In May 2011, it also launched the ICOM-WIPO (World Intellectual Property Organization) Art and Cultural Heritage Mediation Programme. It provides procedural advice and support to the parties. Among

[27] GTP Editing Team, *UN Supports Greek Resolution on Return of Cultural Property to Countries of Origin*, December 24, 2018, https://news.gtp.gr/2018/12/24/un-supports-greek-resolution-return-cultural-property-countries-origin/.
[28] International Council of Museums, *ICOM Code of ETHICS for Museums*, https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf.
[29] *Id* in Principle 6.3.

other issues, it deals with restitution. States, museums, indigenous communities, private individuals and any other ICOM or non-ICOM members can avail of their services. The mediation binds the parties only if they agree to it. The parties also have the option to submit to the mediation only in certain and not all respects of the dispute[30].

Though a number of museums have returned CO to their PO[31], many more still remain with them. A lot of effort will have to be made especially in cases of those CO which have become associated with their image. Undoubtedly, they follow the existing framework of IL and rules. But that framework is weak and lacking in clarity, as has been discussed throughout this article. However, an example of restitution follows here which illustrates the best practices of the museums. It is very heartening to note; and it involves a totem-pole.

In 1872, a nine-meter pole was commissioned by an Indian clan G'psgologx (Haisla First Nation[32]) in British Columbia, Canada, while it was a colony of the United Kingdom. It depicted scenes of small-pox epidemic which had spread in the area surrounding the clan. But the commissioning clan had been spared and it was believed by them that this happened because of

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[30] Alessandro Chechi, *New Rules and Procedures for the Prevention and Settlement of Cultural Heritage Disputes: A Critical Appraisal of Problems and Prospects in International Law for Common Goods. Normative Perspectives on Human Rights, Culture and Nature* 249, 258-9, Federico Lenzerini, Ana Filipa Vrdoljak, 2014 https://www.academia.edu.

[31] Euphronios Krater from Metropolitan Museum of Art in 2006; Weary Herakles from Museum of Fine Arts, Boston to Turkey in 2011; Orpheus Mosaic from Dallas Museum of Art to Turkey in 2012; Dancing Shiva statue from National Gallery of Australia to India in 2014 — are just a few well-known instances.

[32] In Canada, the First Nations are indigenous peoples. They are spread across the country but half of them are in Ontario and British Columbia alone, https://en.wikipedia.org/wiki/First_Nations.The facts of this case have been presented in a concise form from Derek Fincham, *Justice and the cultural heritage movement: using environmental justice to appraise art and antiquities dispute 20* (1) Va. J. Soc. Pol'y & L. 43, 88-90 (2015), https://www.academia.edu.

the depiction on the totem-pole. In 1929, the Swedish consul posted there took permission from the Federal Department of Indian Affairs to take it to Sweden where it was placed in the Museum of Ethnography in Stockholm. After they got to know the location of the totem-pole in 1991, a Haisla delegation visited Sweden to discuss about the repatriation of the totem-pole which finally took place in 2006. Initially the Swedish people were concerned that the pole may be left to the elements and disintegrated once taken back to the British Columbia. However, once they discovered that this was the very purpose of the pole, this was no longer a matter of concern. The Haisla delegation also acknowledged the care that the Swedish people had taken of their totem pole. As a mark of this, carvers from the tribe travelled to Sweden and made a replica of the totem pole and kept it in the museum. The original one was returned to the Haisla Nation in 2006. In this way, the feelings of both the parties were valued. This is an instance of very amicable restitution in which the very different sentiments of both the parties were respected.

9. WIPO Alternative Dispute Resolution (ADR) for Art and Cultural Heritage[33].

Since May 2011, there is a mediation programme, jointly conducted by the WIPO and ICOM. It is part of the WIPO ADR Services for Specific Sectors and provides dispute resolution advice and case administration services, to reduce the need for court litigation. It provides a neutral forum in which a dispute of this nature can be resolved in a single procedure. The nature of the disputes may be purely legal or sensitive non-legal involving ethical, commercial, spiritual, cultural issues etc. The ADR Services understands that parties in such disputes may be from different jurisdictions and cultural backgrounds. It can involve public and private stakeholders and for all aspects of CH disputes. It sets up a list of mediators who are experts in the area

[33] World Intellectual Property Organization, *WIPO Alternative Dispute Resolution for Art and Cultural Heritage*, https://www.wipo.int/amc/en/center/specific-sectors/art/.

of art; specialize in understanding CH and cultural backgrounds; alongwith expertise in dispute resolution. The emphasis is on sustainable, interest-based solutions which are not limited to monetary relief. The mediation process is consensual in nature[34].

10. Diplomatic negotiations/Bilateral agreements/Voluntary return from state to state.

Over the years, many nations have signed inter-state agreements and Memorandums of Cooperation. The terms of these instruments may refer to the offices of UNESCO, ICOM and others too. Of course, the subject-matter of these is not restricted to restitution only; they involve other ramifications of TCH and ICH too. Comprehensive diplomatic negotiations and bilateral (or multilateral) agreements would explicitly or implicitly include customary and articulated principles of IL.

One of the most famous and beloved examples of restitution has been possible only through such ethical and amicable negotiations, agreement and political will. It is the return of the Icelandic Manuscripts from Denmark to Iceland[35]. During the time that Iceland was a colony of Denmark, Arne Magnussen was a Danish official there between 1702 and 1712 and also collected manuscripts representing Iceland's heritage which he bequeathed to the University of Copenhagen. To conserve them, the Arne Magnussen Foundation was set up in the University. After Iceland started asking for these invaluable evidences of their cultural heritage back, a treaty was negotiated in 1961. In 1965, Danish parliament passed a legislation to endorse that treaty. The Magnussen Foundation challenged it but the Supreme Court of Denmark upheld the legislation on the grounds that they are symbols of Iceland's nationhood and

[34] Chechi, *Supra* note 30, at 256-7.
[35] The facts of this case have been presented in a very concise form from the detailed discussion of the history and restitution of the Icelandic Manuscripts in Jeanette Greenfield, *The Return of Cultural Treasures* 10-46 (1989).

cultural identity[36]. Restitution was affected after that. It is a laudable example of the cooperation between two countries. In the interest of what was ethical, the political good-will prevailed over substantial opposition.

11. Domestic legislation/Decision of the national courts.

Generally speaking, the direction and strength of the domestic legislation would be affected by the general principles of international law including human rights law; maxims of law and ethics; accession to related international and regional instruments; and so on. This is why the restitution of Nazi-looted cultural property occupies a special place in the domestic legislation of many countries and IL, especially in Europe[37]. Many domestic legislations and courts are also sympathetic towards the restitution of CO displaced during colonial times. Following is an instance of this:

In 1911, Italy took over control of Morocco to establish a colony in North Africa; and also declared annexation of Libya on 5 November 1911. Eventually, the Ottoman Empire capitulated and signed a peace Treaty in 1912. It was under these circumstances that the Italian soldiers found a headless marble sculpture representing Goddess Venus in Cyrene, which was in the eastern part of Libya. It was shipped off to Italy in 1915 for safe-keeping. In 1989, the Libyan authorities requested the return of this CO which became to be known as Venus of Cyrene. After this, negotiations were conducted concerning the restitution of all cultural assets removed by Italy from Libya, a former colony. A Joint Declaration was made by the two countries in 1998, in

[36] *Arne Magnussen Institute* v. *The Ministry of Education*, UfR (Law Reports) (1966) 22; 1 UfR (1972) 99.

[37] For a list of international agreements on the Nazi-looted cultural property, see Alessandro Chechi, *Multi-Level Cooperation to Safeguard the Human Dimension of Cultural Heritage and to Secure the Return of Wrongfully Removed Cultural Objects in Cultural Heritage, Cultural Rights, Cultural Diversity, New Developments in International Law* 347, 354 (Silvia Borelli, Federico Lenzerini, 2012), https://www.academia.edu.

accordance with the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970[38]. In 2000, an agreement was formulated. In 2002, the Italian Ministry of Cultural Heritage and Activities passed a decree to implement the proposed restitution. In the same year, Italia Nostra, an Italian non-governmental organization filed a lawsuit against the Ministry seeking the annulment of this decree[39]. Its claim said that the Venus of Cyrene was part of Italian cultural heritage since it was found on a territory under the Italian sovereignty. Hence the return would mean giving it up to a foreign sovereign. This could be done only by an enactment of a specific law and not a decree. After studying the facts, it was decided by the *Tribunale Adeministrativo Regionale* that Italy had obtained control over the region of Cyrene only in 1923 with the Treaty of Lausanne and hence the statue was not found in Italian sovereign territory. Also, the obligation of restitution was also because of the Joint Declaration of 1998 and 2000; and also of customary IL of rebuilding the CH of erstwhile colonies or occupied States. This international obligation was sanctified by the Italian Constitution and thus would prevail upon any conflicting domestic legislation. Upon appeal in 2008, the Council of State upheld the tribunal's decision[40] whilst adding the grounds of two other principles of customary IL, namely: the principle of self-determination of peoples and that of prohibition of use of force. Finally, Venus of Cyrene was returned to Libya in 2008.

12. International Court of Justice[41].

[38] *Infra* note 46.

[39] Tribunal Amministritavo Regionale del Lazio (Sez. II-quarter), 28 February 2007, No. 3518. For a scintillating and informative discussion of this case, see Alessandro Chechi, *The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene* XVIII (1) The Italian Yearbook of International Law Online 159, 160-4, January 1 2008, https://www.academia.edu.

[40] Associazone nazionale Italia Nostra Onlus C. Ministero per i beni e attivita culturali et al., Consiglio di Stato, No. 3154, 23 June 2008, para. 44.

[41] International Court of Justice, icj-cij.org/en/court.

The Temple of Preah Vihear case (*Cambodia* v. *Thailand*)[42] was decided by the International Court of Justice in 1961. This case actually dealt with delimitation between Cambodia and Thailand. The Court decided that the land under contention, surrounding the ancient Temple of Preah Vihear, was situated in the territory of Cambodia. Hence Thailand should withdraw any forces situated there since its occupation by them in 1954. They should also restore any cultural or religious object removed by them during this occupation from the temple or temple area. However, the issue of restitution was only incidental in this case as it was mainly about delimitation of national boundaries and hence territorial sovereignty. Though International Court of Justice is a potential mechanism for restitution of CO, no case has been decided by it for the same.

It is clear from the above that the legal recourses in IL for the restitution of the CO displaced during the colonial times are very limited. The United Nations General Assembly Resolutions do have a topical effect; but are generally more effective if the resolutions relate to an individual case. Many instances of possible restitution still remain status-quo. In fact, in many cases, domestic legislation and bilateral arrangements have proved to be more effective. This is laudable but also has the side-effect of arbitrariness in the entire gamut of restitution. Chance plays a large role here that whether or not the CO of a country was taken away by a now "liberal" country with domestic legislation and courts to match[43]. Same is the case of bilateral agreements and political orientation. It goes without saying that restitution should be rooted in a consistent and comprehensive regime which governs all nations equally.

Some of the ethical principles already inherent in the IL; especially those relating to other issues of CH may propel the

[42] *Cambodia* v. *Thailand*, ICJ, 1962.opil.ouplaw.com>160icj62.case.1>law-icgj-160icj62
[43] *Supra* note 40, for instance.

formulation of this kind of regime; and also shape its direction. They are being critiqued in the following sub-section.

B. Ethical position

The various concerns of CH include restitution; importance of diversity; impact on sustainable development; recognition of significance of ICH and other related issues. However, these concerns are not always viewed by all the stakeholders similarly or unequivocally. There may be shortfalls between theoretical enthusiasm and hard-core implementation because of some polarities in interests and perceptions. Notwithstanding this, the evolution in the perception of importance and consequent treatment, bodes well for the eventual development of rules for restitution too. Following is a brief discussion of some of the most relevant polarities here:

1. "Heritage" vs. "Property"

When we trace the development of the CH jurisprudence, it is clear that the tenor is one of changing perception of CH from "property" to "heritage". Just after the World War II, the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954[44] said in its Article 4 (3) that the contracting states shall refrain from requisitioning moveable cultural property situated in the territory of another contracting party. Article I (3) of its First Protocol (1954)[45] says that each contracting state shall prevent the exportation of cultural property of the territory occupied by it during an armed conflict. In case it is exported, then it should be returned at the end of the hostilities and never kept as war reparations. Though utmost respect was accorded to culture, it was still regarded as "property". Over the decades, several inclusive paradigms of IL such as common heritage of humankind and common concern emerged. They

[44] [Hereinafter 1954 UNESCO Convention], portal.unesco.org/en/ev.php-URL_ID
[45] UNESCO, portal.unesco.org/en/ev.php-URL_ID

were reflected in the later UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970[46]. This convention considered culture to be both "property" (to be protected) to "heritage" (to be respected)[47]. This has the laudable objectives of recognizing the unique and inalienable nature of CH for the country of origin and also that it should not be made the subject of illegal trafficking. The language in which its Preamble is framed displays these inspirations indubitably. It says that cultural property constitutes one of the basic elements of civilization and national culture. Its true value can be appreciated only in relation to its origin, history and traditional setting. In order to avert the dangers of theft, clandestine excavation and illicit export, it is essential for every State to become increasingly alive to the moral obligation to respect its own CH and that of all nations. Only two years later, UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, 1972[48] also referred to CH as "property"[49]; but it was also viewed as the responsibility of the international community as a whole. This was done to encourage participation in the protection of cultural (and natural) heritage of outstanding universal value which will serve as an effective complement thereto to the action of the State which is taking action[50]. Its Preamble says that "[E]xisting international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong." By the time the Second Protocol of the 1954 UNESCO Convention was formulated in 1999[51], much had changed and its language mirrored these changes. It deals with armed conflicts

[46] [Hereinafter 1970 UNESCO Convention], portal.unesco.org/en/ev.php-URL_ID.
[47] Preamble.
[48] [Hereinafter 1972 UNESCO Convention], portal.unesco.org/en/ev.php-URL_ID.
[49] *Id.* in Preamble.
[50] *Id.*
[51] [Hereinafter 1999 Second Protocol], portal.unesco.org/en/ev.php-URL_ID.

which are not international in nature. Its provisions are to follow the developments in IL in the event of any excavation, damage, destruction and so on to the cultural property. Among other provisions, enhanced protection is provided to cultural property which can be considered to be CH of the greatest importance to humanity[52]. Sometime later, the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Faro (2005)[53] enshrined the importance of CH so far as to say, "[T]he value and potential of cultural heritage wisely used as a resource for sustainable development and quality of life in a constantly evolving society"[54]. Apart from legalities, common sense tells us that the destruction or damage to the CH of one country is a great loss to all humanity. Such CH cannot be replicated ever. It is only logical then that The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 2003[55] talks about the destruction of the Bamiyan Buddhas and says that, "Mindful that cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights"[56].

This thought may be carried further to say that it is also natural that a CO may be the common responsibility of all humankind; but "belongs" to its PO only (but not in the sense of "property"). This change in terminology is very important because "property" is associated with rights only and the physical/material connotation is related to the CO's location. "Heritage", on the other hand, is associated with responsibility and a sense of belongingness. Its connotation is related to the mind and heart and tells us that this where the heritage ought to be. In terms of its location, it emphasizes on what should be,

[52] *Id.* in Article 10 (a).
[53] [Hereinafter 2005 Faro Convention], https//www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000160083746.
[54] *Id*. in Preamble.
[55] UNESCO, portal.unesco.org/en/ev.php-URL_ID.
[56] *Id*. in Preamble.

rather than what is. It remains another matter, however, that some nations may give more importance to the "property" present in their territory as compared to the "heritage" present anywhere in the world. This brings us squarely to the following polarity.

2. Nationalist approach vs. Internationalist approach

Post-decolonization, the question naturally arose about the restitution of all the significant, beautiful and valuable CO which had been removed by the erstwhile colonizers from the colonies. These CO were to be a valuable asset for rebuilding national identity of the PO. However, there was concurrent development of the notion that "heritage" is a concept and its location is not necessarily physical. In fact, its home is the heart and the psyche. This notion was further developed to the paradigm that physical location is not as important as its existence among the humanity. This was then used as the foundation of the argument that even if a CO was earlier dislocated forcibly from its PO, it is better for it to remain in the present location because of its accessibility to a larger number of people. After all, its very existence should be sufficient for the people it came from originally since the connection is more psychical than physical. In any case, the CH does not belong only to the people who created it; it is universal.

This is the crux of the nationalist-internationalist debate in the canon of CH scholarship. Put simply, internationalism views all culture as the CH of humankind. Its origin does not matter as much as the fact that it should be accessible to all for enjoyment and increase of knowledge. This viewpoint is often advocated by the "market-nations"/former colonizers. Nationalism, generally espoused by the "source-nations"/former colonies, views that the country in which a CO has originated or which has the most significant connection to it should be viewed as the owner. If the said CO is not within its territory or ownership, it should be restituted. The nationalists deal with the internationalist argument of CH being the "common heritage" by pointing out that this refers to responsibility towards all CH and

not to its location. It should not be used to retain displaced significant CO in the collections and museums of the former colonists and other developed nations[57]. The internationalist, on the other hand, say that if a CO is adequately preserved in a particular setting, it should not be forced to return. After so many years, it is not necessary to get back CO to build a national identity. It is not true that every individual values their CH and furthermore, the modern people of a country are not the same as those living there even a century back[58]. The bond between them and the CO in question may be more idealistic than real. But nationalist reply is that even if the modern citizens are different than those when the CO was removed, they are still closer to the said CO as compared to those of the colonizing state where the CO would be placed now. In any case, it takes time to build up nationhood and in time, more identification will come about.

This debate had been present earlier too but was formalized by Merryman in his seminal article: "Thinking About the Elgin Marbles"[59] in 1985 where he consolidated the internationalist position. It was further elaborated by him in: "Two Ways of Thinking About Cultural Property"[60]. These two positions became more entrenched over the ensuing decades. however, there is no denying that the hitherto colonized nations are traumatized due to memories of domination and colonialism. They say that if, after restitution, the source nations do not have

[57] Daphne Voudouri, *Law and the Politics of the Past: Legal Protection of Cultural Heritage in Greece* 17 (3) Int. J. Cult. Prop. 547, 558-9 (2010), https://www.academia.edu. This entire article connects beautifully an analysis of the contemporary Greek law related to cultural heritage; and history, ethical concepts, political realities and legal norms.

[58] Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations* 8 (1) Chi. J. Int'l L. 213, 222-6 (2007). This article discusses restitution and return of cultural property and heritage from various perspectives with some focus on why both are not feasible.

[59] John Henry Merryman, *Thinking about the Elgin Marbles* 83 (8) Mich. L. Rev. 1880 (Aug. 1985), https://blogs.bu.edu/aberlin/files/2011/09/Merryman-1985.pdf.

[60] John Henry Merryman, *Two Ways of Thinking About Cultural Property* 80 (4) Am J Int Law 831-853 (Oct. 1986).

the means to protect or preserve the CH, the international community should be helping out to preserve them instead of demanding to keep CO in their own museums or countries. This is an essential part of the universality of CH and the resultant responsibility of all. Internationalism should signify international cultural co-operation. In any case, it would be difficult to accept that universal/encyclopaedic museums can thrive only in the western nations. As Macmillan quotes, "There is also a *faux* naivety in this idea of the "encyclopaedic collection" as though it was somehow free from the circumstances in which it was formed, and as though all components of the collection will look exactly the same from wherever they are viewed"[61]. Overall, it should be kept in mind that history does not equal CH[62]. A wish to keep historical record intact should not interfere with another's right to their significant CH. History can be satisfied with retaining digital images or replicas in the place of the original CO. But the need for CH can only be satisfied with the original with all its connotations and associations.

More recently, Singh has raised an interesting line of thought in this regard[63]. She says that the universal museums themselves are worth preserving in their current state. They have come into existence because of the conditions and events in world history and this is the reason for their universal collection. These conditions and events are not likely to be repeated. So they are themselves a part of CH and hence should be preserved as they are. Additionally, they represent different things to different people such as oneness of mankind; historic wrongs and a

[61] Fiona Macmillan, *The Protection of Cultural Heritage: Common Heritage of Humankind, National Cultural 'Patrimony' or Private Property* 64 (3) Northern Ireland Legal Quarterly 351, 355-6. (2013), https://www.academia.edu.

[62] Gosling, *Supra* note 5, at 9 for a good discussion which implies this.

[63] Kavita Singh, *Universal Museums: The View from Below in Lyndel V. Prott (ed.), Witnesses to History: A Compendium of Documents and Writings on the Return of Cultural Objects* 123 (UNESCO Publishing, Paris, 2009), https://www.academia.edu.

cosmopolitanism. They are thus "a significant cultural phenomenon"[64].

Soirila has pointed out another line of thought and says that the categories of internationalism and nationalism do not represent the entire scope of CH. As a result, those who do not fit within these paradigms may get marginalized. These include the indigenous voices and others for whose collective identity the CH is imperative[65]. This concern has got translated into reality after Germany has announced recently that it will return the relatively few (as compared to the United Kingdom) Benin Bronzes it had taken away during the colonial rule. The conflict lies in the fact as to who should eventually keep them. Should it be the Government of Nigeria in which the State of Edo is situated which is the PO of these Bronzes? Or should it be the Oba of Edo who is the traditional ruler of the Benin people from whom those Bronzes were taken away originally?[66] Answers can no longer be static in the cross-currents of the shifted territorial boundaries after de-colonization.

An interesting off-shoot of the nationalist-internationalist debate was demonstrated in The Parliamentary Assembly of the Council of Europe: Resolution 808 on the Return of Works of Art, 1983[67] which called upon member states to cooperate in the negotiated return and with ICPRCP for certain items of cultural property to their country of origin. Interestingly enough, it is

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[64] *Id*. at 126.

[65] *See* Pauno Soirila, *Indeterminacy in the Cultural Property Restitution Debate* Int. J. Cult. Policy, https://doi.org/10.1080/10286632.2021.1908275, for an extensive discussion of the nationalist-internationalist debate; other debates surrounding the restitution of cultural heritage; a history of international law relating to protection and restitution of cultural property among the western nations; and international law "New Stream" theory.

[66] Opuku Kwame, *Benin Bronzes Belong to Oba of Benin Opinions*, https://www.modernghana.com/news/1105713/benin-bronzes-belong-to-oba-of-benin.html.

[67] Parliamentary Assembly Council of Europe, *Return of works of art*, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16219&lang=en.

based on the point that the claims for the return of cultural property within European cultural area must be considered to be different from those outside it. It also says that the European CH belongs to all Europeans and the diversity of CH should remain easily accessible in all countries of Europe. "Aware of the imbalance that exists at world level in the distribution of cultural property, a disproportionate amount of which is concentrated in major collections in Europe and North America"; "Particularly concerned at the lack of representative national collections in certain countries, and recognising the reasonableness of the wish of these countries to recover their cultural heritage". Hence it adopts an amalgamation of the nationalist and internationalist positions. The "international" within Europe becomes the national. The CH of different nations may be considered to be common CH. But outside it become the international and it is acknowledged that the "nationalist" or country-of-origin interests should outweigh the "internationalist" or country-of-current-location interests.

3. Inter-generational justice

There is no doubt that the significance of CH has a strong emotional component. This is why the 2005 Faro Convention[68] could say: "[N]eed to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural heritage"[69]. It is probably this strong fundamentally emotional appeal that Chechi calls the "human dimension of cultural heritage" and says that the change of nomenclature from "property" to "heritage" marks its recognition[70]. It is certainly true that the changing terminology depicts the fact that we don't merely enjoy the rights but also fulfil our responsibilities towards culture which is a medium for maintaining a healthy diversity

[68] It is regarded as one of the most progressive conventions in all the aspects of cultural heritage; going far towards contributing to the emerging socio-legal thought that culture is the fourth pillar of sustainable development.
[69] *Id*. in Preamble.
[70] Chechi, *Supra* note 37, at 349; and 367-8 for the role of cooperation between the states in the context of restitution.

throughout the world. One of the most potent ways is by retaining the connection between CO and their PO whether as a resource for sustainable development or some other human aspiration. That resource will be at its most effective if it is the closest to the heart of a given society[71].

Hence it becomes incumbent upon one generation to pass the CH on to the future generations for retaining and continuing their sense of identity and bonding with their past. The very term "heritage" connotes that it is meant to be preserved for future generations, much more so than "property". Even if all CO are not uniformly distributed across settlements or country or is not susceptible to being neatly handed over generation after generation, at least a significant part of the CO should be accessible. And it should be accessible as part of the environment which would reasonably be considered to be their own by an average human being. Furthermore, it should have ample opportunity to be protected and preserved for posterity. This would then constitute actual intergenerational justice (IJ). Of course, IJ also requires that we all have access to the TCH and ICH of all peoples while being able to retain and have a special relationship with those of ours. If need be, the relationship should have the opportunity to be exclusive[72]. And restitution gives a chance for that. If the really significant CO, at the very least, are not restituted, they may get lost in the global ambience. As decades pass, all CO from a larger region may get amalgamated and the core relationships may not be clear to the succeeding generations. This crucial need was recognized more than 4 decades back and the 1978 UNESCO Plea put across this in

[71] Hafstein and Skrydstrup have commented that over decades, cultural "property'-type claims are rights-based and oriented towards resolutions. The cultural "heritage"-type claims and solutions are more ethical in nature. See Valdimar Hafstein, *Martin Skrydstrup, Heritage* v. *Property. Contrasting regimes and rationalities in the patrimonial field in The Routledge Companion to Cultural Property* 38-53 (Jane Anderson, Haidy Geismar, 2017), https://www.academia.edu.

[72] *Also see* Fincham, *Supra* note 32, for a comparison of cultural justice and environmental justice; cultural heritage justice and environmental justice movements; especially at 47-52, 67-90.

impassioned words: "These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish...return it to its country of origin, so that the young will not grow up without ever having the chance to see, at close quarters, a work of art or a well-made item of handicraft fashioned by their ancestors."[73]. The Plea asked for limited restitutions but nevertheless, it was the commencement of the principle whose magnitude has had inter-disciplinary reverberations.

Keeping the above in mind, let us now turn to the very famous case of Parthenon Marbles and examine its non-restitution in the light of the above legal and ethical developments. The Parthenon Marbles (PM) have inspired a scholarship of their own over time and may be said to be the touchstone of the arguments for and against restitution of CO as a whole.

IV. AN ANALYSIS OF THE DEBATES SURROUNDING THE NON-RESTITUTION OF THE PARTHENON MARBLES

In the previous section, the trend of IL relating to restitution was analysed. However, this is the trend, not the entire story. There are many CO and PO which still await restitution. And resolution doesn't appear easy or early. Probably the best-known among them are the Parthenon Marbles, currently housed in the Duveen Gallery of the British Museum in London. Their PO – Greece – has repeatedly requested for their restitution, without success, giving rise to unending debates. The facts, considered to be relevant to the purpose of this article, are narrated briefly. They will be followed by the arguments forwarded by the proponents of their non-restitution and

[73] 1978 UNESCO Plea, *Supra* note 12.

restitution respectively. These arguments will then be examined in the backdrop of the foregoing discussions in this article.

A. Narration of relevant facts[74]

1. The Parthenon is a monument situated in Acropolis in Athens, Greece. It was used as a temple of Goddess Athena and depicted ancient mythology.
2. The Ottoman Turkish empire conquered and occupied Greece from 1453 AD, for about 400 years.
3. After the victory of the United Kingdom over Napoleon, Lord Elgin was appointed ambassador to the court of the Sublime Porte in 1799. He was fascinated by the beauty of Parthenon's architecture. He was encouraged by Dr. Philip Hunt, chaplain of the British embassy in Constantinople, to apply for permission to take away the sculptures which were not part of the inner structure.
4. Lord Elgin appears to have got a permission – *firmaan* – whose only existing copy is in Italian language. It is from the Turkish government in Constantinople to its governor in Athens. The wordings can be translated to mean that either "any" or "some" pieces of stone with inscriptions and figures can be taken away by Lord Elgin. No other copy of the *firmaan* in any other language is known to exist.
5. On the basis of this *firmaan*, Lord Elgin's workmen dismantled hundreds of pieces of the sculptures. They were eventually shipped to be displayed in his house in London in around 1812-13.
6. However, Lord Elgin very soon desired to sell the Marbles to the British Museum and an Act of Parliament was passed on 11 July 1816 "To Vest the Elgin Collection of Ancient Marbles and Sculptures in the Trustees of the British Museum for the Use of the Public". However, there was a lot of disagreement amongst the House of Commons prior to

[74] These facts have been taken from Greenfield, *Supra* note 35, at 47-105; unless indicated otherwise.

passing of this Act, primarily on the grounds of economy and mode of acquiring the sculptures.

7. After the PM were acquired by the British Museum, they were displayed in the Duveen Gallery. While there, they had been cleaned in an inappropriate manner in 1937-38. It is said to have resulted in some damage to them.
8. Since having acquired them, the British Museum has never shown any inclination towards their restitution to Greece despite repeated requests from the country or arguments from other sources world-wide, including scholars, lawyers, statespersons, international organizations and so on.
9. Greece had gained its independence in 1830. In 1983, it had lodged its case with the ICPRCP for restitution of PM. It is still pending[75]. The British Museum or the government did not evince that any of the UNESCO Resolutions[76] applies to the restitution of PM and no action was taken. In 2013, UNESCO had offered its help in the case of restitution of PM. However the British Museum had refused the offer[77]. ICOM has not been involved in any restitution request. In 2018, the ICPRCP called upon United Kingdom and Greece to intensify their efforts to resolve this long-standing issue[78]. However there has been only stalemate.

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[75] The British Committee for the Reunification of the Parthenon Marbles (BCRPM) provides latest and comprehensive news about the developments from around the world regarding Parthenon Marbles. It is a group of British people who have worked tirelessly for the return of Parthenon Marbles to Greece. Their website hosts numerous resources including legal, https//www.parthenonuk.com/about-bcrpm/the-case-for-return.

[76] See Section II-A of the present article for a list. There are additional resolutions which have not been added to this list to avoid repetition.

[77] BBC News, Elgin Marbles: *U.K. declines mediation over Parthenon sculptures*, April 8 2015, https://www.bbc.com/news/uk-32204548.

[78] Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, ICPRCP/18/21.COM/Decisions Paris May 2018: Recommendation 21., www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/movable/pdf/21_ICPRCP_EN_FINAL_01.pdf.

B. Arguments against restitution

1. The PM were taken away from Greece legally as the required permission was obtained from the legitimate authorities ruling Greece at that time.
2. They are housed in the Duveen Gallery of the British Museum very safely with suitable conditions which protect them against natural disintegration. They may not be so well preserved outside the British Museum.
3. They have been in Britain for so long that they have become part of the British history too. Their removal would be tantamount to removing a CO from a PO. In any case, the Greeks of today have very different culture and society from those in the days that the PM were constructed. So the connection of the modern Greeks to PM is not greater than that of the modern Britishers.
4. The restitution of the PM would set off a trend which would empty the great museums of the world from their treasures. All the former colonized/occupied countries would want their CO back. But significant CO such as PM belong to the entire world. The British museum may well be regarded as the epitome of a universal/encyclopaedic museum which displays the history of the entire world to a wide audience, even if its universality is based on a colonial, imperial past[79].
5. Art, culture and civilization should not be confined within the borders of one country but be accessible to all to admire. This is even more true of such CO as the PM as they represent the finest pinnacle of western civilization and creativity. Restitution of PM would affect the amount of attached viewership and scholarship as it will not be as accessible anywhere else as in the British Museum.
6. The case for restitution is limited by the elapsed time-period between Greek independence from Turkish rule and when it started its demand for restitution.

[79] Singh, *Supra* note 63 for a discussion of her view of such universal/encyclopaedic museums themselves being part of the world cultural heritage.

C. Arguments for restitution

1. Even if the *firmaan* authorized the excavation and removal of some parts of the PM, it has not been established without doubt if the explicit permission was to remove small parts of the PM or as large as actually were removed. Furthermore, it is not clear if the permission was to remove any part of the PM outside the country itself. It may have been only for removal to Lord Elgin's residence in Greece. The entire basis of the permission for removal is the *firmaan* which has not survived in original. Its Italian version has survived whose terminology is ambiguous and open to more than one interpretation.
2. Even if the permission was actually granted and Lord Elgin acted under it, the noteworthy point is that what was done was wrong. It is not acceptable from an occupying authority to strip a nation of so much of its significant CH so casually. Even if the *firmaan* permitted the entire transaction, it could not be condoned. The Turkish rulers were foreigners who had merely occupied Greece and it cannot be expected that they could identify with the PM as native Greeks could. Reparation should be done[80].
3. It is not correct to say that the Greek leaders should have objected to the removal in the first place. The whole transaction may not have been known to the entire public. Moreover, the people subjugated under a colonial power do not have the authority or power to resist. The colonizing nation holds a lot of might which is feared by those colonized for a long time.
4. It may have been true in the past that the British Museum had better conditions for preserving the PM. However for the past some time, a dedicated museum, New Acropolis Museum, has been ready outside Athens, with state-of-art environment for housing the PM upon return. It has all the facilities which

[80] Izidor Janzekovic, *The Elgin Marbles, A series of (un)fortunate events* 16 The Journal of Art Crime 55, 68-9 (Fall 2016), https://www.academia.edu.

are needed for continued preservation of the PM on a long-term basis. At the same time, conditions have not always been perfect at the British Museum either. In 1937-38, they had been cleaned in an inappropriate manner in the Duveen Gallery.

5. Aesthetically and politically, the sculptures are integral with the Parthenon monument outside Athens. They were created for that cultural and spiritual contexts[81]. They should be viewed together to be able to interpret their meaning and appreciate their place in the western culture and history. The New Acropolis Museum has been constructed in such a manner that when the PM are in their designated place, they will be against clear glass from which the Parthenon monument can be seen in the distance as a composite unit.
6. In today's technologically sophisticated ambience, a person who can travel to London for serious scholarship and viewership, can also travel to Athens for the same. For the regular viewer, a high-quality replica can be placed in the British Museum which will satisfy the quest for aesthetics and knowledge. It will give them the "Parthenon Experience"[82].
7. It is true that the Greeks of today may not be the same as those in the times when PM were constructed. However, due to oral traditions, collective consciousness and historical continuity, the modern Greek can still identify much more with PM than the modern Britisher. Even if the modern Britishers also identify with the PM due to their long location in their country, they are also well-versed with the ancient and more significant connection of the PM to the country of Greece, as a whole. The average Britisher does not connect PM to their history but to the Greek history and people.

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[81] Hafstein, Skrydstrup, *Supra* note 71, at 41for a detailed discussion.

[82] As Stephen Fry, a Britisher who wears many hats including those of actor and writer, put it succinctly in an interview *in* Andriana Simos, *'A Classy Act': Philhellene, Stephen Fry, on returning the Parthenon Marbles to Greece The* Greek Herald, https://greekherald.com.au/community/events/classy-act-philhellene-stephen-fry-returning-parthenon-marbles-greece/.

8. The argument that the restitution of PM would result in the emptying of eminent museums all over the world is not well-founded. Restitution of CO is done on a case-to-case basis. The restitution of famous and much-contested CO such as PM will not return in an automatic surge of demands from all over the world since each request involves complicated applications, procedural formalities. In any case, as most source nations say, they do not want each and every artefact back. They are interested only in the ones most significant and representative of their culture[83].
9. The issue of limitations should not apply in the case of PM which are a highly significant and important piece of CH[84]. The spirit behind the evolving IL jurisprudence of CH should apply to a case such as the PM which were part of a religious monument. It should not get obfuscated by a plethora of legal technicalities which are imperative for the stability of any legal system; but should not override the very purpose of any legislation or rule.

D. Search for resolution

Greece had been asking for restitution earlier too, but since the 1980s, these requests have become more urgent, persistent and public. Earlier, Greece had made the claim on basis of illegality of removal under the Turkish rulers. However, it was difficult to prove or disprove the facts which were the foundation of this legality. These could be refuted. More recently, Greece has modified its case for restitution, arguing that it is based on ethics. The objective of the present analysis is to highlight the presence of such an ethical basis; independent of the legal one.

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[83] Derek Fincham, *The Parthenon Sculptures and Cultural Justice* 23 (3) Fordham Intell. Prop. Media, & Ent. L. J. (2013) 943, 1013, https://www.academia.edu.

[84] *Id*. at 1006-1010 for an encouraging account of return of Byzantine Frescos to Cyprus. *See also* Irini A. Stamatoudi, *The Law and Ethics Deriving from the Parthenon Marbles Case* Legal and Ethical Issues, www.parthenon.newmentor.net/legal.htm, for powerful arguments why Greek claim should not be limited by time.

Legal redressal is based on provable facts and in this case, the facts are obscure, going back into history. Hence it would be difficult to ascertain them beyond reasonable doubt. In any case, even if the contemporary legality/illegality of the removal of PM could be proved, the reality is that restitution is being requested for today, in the contemporary legal-moral-political ambience. In a developing jurisprudence, the legal and moral are not necessarily exclusive. In fact, the evolution of law is based on moral concepts which then crystallize into legal principles. The progression of the domestic and international laws relating to all aspects of CH is one of the most compelling demonstrations of this assertion.

In this vein, when we juxtapose the foregoing discussion in this article to the case of PM, it should be evident that the spirit which has been driving the evolution of CH jurisprudence is one of respecting CH of all peoples and countries and taking responsibility for its well-being. It also recognizes that the CO of other countries, even during times of conflict, are not to be harmed[85]. Even a fleeting look at the evolving changes in the terminology used in conventions, recommendations, declarations, resolutions, domestic legislations, bilateral treaties, diplomatic negotiations etc. clearly demonstrate this. For instance, the Second Protocol of 1999 of the 1954 UNESCO Convention provides an enhanced protection to the cultural property which can be considered to be cultural "heritage" of the greatest importance to humanity; in the conditions of occupation and armed conflict. In fact, the change in both terminology and perception – of CO being heritage and not property – is indicative of the quality of significance attached to it. This is also the reasoning behind the suggestions often made that considerations such as limitation of time in filing of claim, circumstances of taking away of CO, the time it has been present in the country of

[85] This is, of course, the primary mandate of the 1954 UNESCO Convention. *See also* Stamatoudi, *Supra* note 84, for the analysis of (il) legitimacy of the removal.

current location etc. should be of secondary importance[86] in the case of as significant a CH such as the PM.

Simultaneously it has been made clear in the IL relating to CH that the significance and universal value of such CO do not make them eligible for being placed only in a universal museum. This is reiterated by the spirit of the 1970 UNESCO Convention which clearly enunciates that the true value of cultural property can be appreciated only in relation to its origin, history and traditional setting[87].It is clear that to re-unite CO with their PO and with the people who identify with it the most is the ultimate aim of the legal force behind restitution at any given point of time and PM are prime example of this[88]. This holds true whether the Convention is talking about restitution of CO taken away during or after colonial period. The ideal behind this remains the same for both.

And these ideals are not merely theoretical. Nations who were earlier reluctant to part with the CO taken away by them in colonial period, have returned them to the PO voluntarily and in spirit of friendship. The restitutions of Bogazkoy Sphinx by Germany to Turkey; G'psgologx Pole by Sweden to Haisla First Nation; Icelandic Manuscripts by Denmark to Iceland; Venus of Cyrene by Italy to Libya; the proposed restitution by Germany of the Benin Bronzes in its possession; and many others not mentioned in the present article, exhibit what can happen when the intentions are lofty and correct. This is especially admirable in view of the fact that the IL governing such restitutions is soft and persuasive in nature. What bound these restitutions were the will and patience of all the concerned parties. As the author, Don Morgan Nielsen, who supports Greece's efforts for the restitution of the PM, has said recently: "As human beings, it is accepted

[86] *See* Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, 1968. Article 1 of the Convention proscribes statutory limitations to the plunder of public or private property, amounting to a war crime, https://treaties.un.org/.
[87] Preamble.
[88] Hafstein, Skrydstrup, *supra* note 71, at 42.

that we will, from time to time, make mistakes that cause pain to others. It is also accepted that the right thing to do in such cases is to admit our wrongs, apologize and try to put things right…Isn't justice on a large scale simply justice on an individual level writ large?"[89]

These restitutions described above could also have taken a different – the internationalist – route. The route which the arguments of the internationalists follow in the context of PM. The core of such arguments is that momentous CO such as the PM belong in a universal/encyclopaedic museum setting as they are the heritage of all humankind and should be enjoyed by all. These prime examples of western excellence in art and architecture should be accessible to as many people as possible. These arguments are not tenable in the contemporary scenario. The removal of PM from London does not "lose" them to the world. In fact, a state-of-the-art is museum is waiting in Athens to house them in such a way that they can be viewed in their former historical context. They cannot be enjoyed in the same way at the British Museum even if it is a more "universal" institution. The average viewer can be regaled with digital images of the PM in the British Museum itself. Alternatively, excellent replicas can be placed in the British Museum for viewership. The "real" PM are more relevant to Greeks whose culture they are an integral part of. This way, it will be amenable to all parties to the debate.

The PM, besides being a universal CH, have an extremely significant and exclusive connection with the entire Greek history, culture and people. It is not a CO which has come down to the world from a people who are extinct now and hence each existing country may have the same amount of connection with them as the other, as part of the world-heritage. The modern Greeks are the direct descendants of the historical Greeks in

[89] Don Morgan Nielsen, *THE PARTHENON REPORT: What does Justice require?* Greek City Times, https://greekcitytimes.com/2021/09/04/parthenon-report-what-does-justice-require/.

whose time the Parthenon and the Marbles were carved. This is also the reason that PM is fraught with emotions for the Greeks and hence the stronger connection. The right for IJ for the Greek people is entwined with the emotionality and exclusiveness bound up with the PM. This generation should be able to enjoy the entire composite PM themselves and leave it intact for their future generations to find their place in history. And PM has a big place in their history.

There have been significant and interesting developments very recently. In September 2021, the 22nd session of the ICPRCP was held. It has been reported that ICPRCP has said that the governments of Greece and the United Kingdom should enter into a dialogue to discuss the restitution of the PM. The matter has been pending for a long time and it should be resolved now in the backdrop of ethics and justice. The decision should be taken by the British government and not left to the British Museum as the case has an inter-governmental character[90]. 2021 is also the bicentennial anniversary of the year of the commencement of the Greek War of Independence against the Ottoman rule. It is hoped that the day may not be far when the PM are ensconced in the place they have been away from centuries but actually belong to. Which is as near to the Acropolis as possible.

V. CONCLUSIONS AND THE WAY FORWARD

The objectives of this article were to examine the legal and ethical dimensions of the restitution of CO removed from their PO during colonization across the world; and to underscore the urgency for a comprehensive and consistent international regime in this area. The debates surrounding the non-restitution of the Parthenon Marbles (PM) were used an illustration of all the ramifications involved. The discussions and analyses

[90] George Vardas, *PARTHENON SCULPTURES: From UNESCO to the leaking galleries of the British Museum*, Greek City Times, https://greekcitytimes.com/2021/10/11/parthenon-sculptures-from-unesco-to-the-leaking-galleries-of-the-british-museum/.

throughout the article clearly demonstrated that the restitution of CO being discussed in the present article enjoys moral validation. This validation should urgently be transmuted into legal reality.

Apart from the ethical considerations, in a practical sense too, the process of restitution is presently fraught with expenditure of resources which may be beyond the capability of many of those requesting for it. The lack of a settled regime of IL makes the outcome uncertain which makes this expenditure all the more a daunting prospect. A comprehensive legal regime would ensure that some nations do not suffer a "double whammy": of being deprived of their CH earlier, and then spending extensively from their already diminished resources. It would also ensure that the rather difficult situations, as in the case of Benin bronzes taken away by the British, may be prevented and countries do not have to purchase back their own CH[91]. This would contradict the entire premise of restitution and reparation of past wrongs.

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[91] Gosling, *supra* note 5, at 21-25 for a vivid description of the facts which are being presented concisely as follows: In 1897, the Kingdom of Benin, located in modern-day Nigeria, was invaded by British naval and military forces in a punitive expedition. The British took 3000 plaques dating from 16-17 centuries A.D. from the royal palace which were then handed over to the British Foreign Office. They were then acquired by the British Museum. It was acknowledged during the transaction that the plaques (also known as Benin Bronzes) were "booty" but also that they were acquired by the British Museum legally. However, not all of them are still there as after the World War II, a number of them were sold by the British Museum and they are spread around the world; with many of them finding their way to Nigeria before the coming into force of the legislation implementing the 1970 UNESCO Convention. They were actually bought by the Nigerian authorities. The government of Nigeria formally demanded the return of Benin Bronzes from the British government only in 2002.
It was reported in December 2018 that some of the most iconic pieces across the museums of the world would be loaned for display in the new Benin Royal Museum in Edo State, in the coming 3 years. This was after initiatives taken by the Benin Dialogue Group. This was reported in Kieron Monks, *British Museum to return Benin Bronzes to Nigeria* CNN Inside Africa (December 14, 2018), https://edition.cnn.com/2018/11/26/africa/africa-uk-benin-bronze-return-intl/index.html.

The legal reality of an international regime is urgently required. No doubt the restitutions delineated in this article and many other effected ones are heartening to know. They are the products of the existing IL and other arrangements, which speaks for the respect accorded to them. However, their relatively small number and the special features which characterize them should not delude us into thinking that such restitution is for the asking. It certainly needs fortification. Such a fortification could take the form of an international convention on the same liberal lines as espoused in the conventions which deal with CH as a whole. It should emphasize the essential and positive role of international cooperation and diplomacy in this sector. The elements of the nexus between CH and cultural identity of nations and peoples; obligation of reparation of past wrongs; and the difference between possession of CO and responsibility towards preserving it – all of these should be taken care of.

Indeed, the recognition of the importance of intergenerational duty vis-à-vis CH has also been paid tribute to in the Model Provisions on State Ownership of Undiscovered Cultural Objects, 2011, prepared jointly by UNESCO and UNIDROIT.[92] Its provision 1 says that "the State shall take all necessary and appropriate measures to protect undiscovered cultural objects and to preserve them for present and future generations". It is as fundamental for restitution as for IJ. It is equally fundamental for acknowledgement and part-reparation of past deprivations.

[92] Expert Committee on State Ownership of Cultural Heritage, *Explanatory Report with model provisions and explanatory guidelines* United Nations Educational, Scientific and Cultural Organization (UNESCO), International Institute for the Unification of Private Law (UNIDROIT) (2011), www.unesco-unidroit_model_provisions_en.pdf. This documents is meant to assist domestic legislative bodies in the establishment of a legislative framework for heritage protection; for establishment and recognition of State's ownership of undiscovered cultural objects – to facilitate restitution in case of unlawful removal.

Whether it is the ethical dimensions or the emotionality attached to CH or the legal right to reparation of former wrongs, the need for a strong IL regime for restitution of CO which make a people one with their past is undeniable. As the late Melina Mercouri, former Minister of Culture and Sports in the government of Greece (1981-1989) who brought the issue of restitution of PM to the forefront of global consciousness and Greek sense of nationhood had said famously: "You must understand what the Parthenon Marbles mean to us. They are our pride. They are our sacrifices. They are our noblest symbol of excellence. They are a tribute to the democratic philosophy. They are our aspirations and our name. They are the essence of Greekness"[93]. It is generally believed that she speaks for all Greeks. However the emotion in this appeal is the same across all nations.

[93] Melina Mercouri was a Greek film star, singer and later politician. More information on her stand on the Parthenon Marbles; her work in bringing them to international gaze; and her life generally, https://en.wikipedia.org/wiki/Melina_Mercouri.

STATUS OF LIVE-IN RELATIONSHIP IN INDIA: A JUDICIAL APPROACH

Neha Aneja[*]

ABSTRACT

The concept of live- in relationship is highly controversial yet it has become a latest trend of 21st Century generation which does not want to get married per se. Youth who are educated, independent, and professionally employed are more likely to cohabit than marry in order to avoid liabilities, thereby retaining their single status and financial independence. With changing times and attitude of the people, the number of Live-in relationship is increasing gradually. In metropolitan cities this is a practice owing to the high cost of accommodation and reduced societal control. Such relationships in India are not illegal but the society is not accepting and it is considered as immoral. "When two adult people want to live together what is the offence. Does it amounts to an offence?" As far as personal laws are concerned, there is no explicit provision regarding live-in relationships and their consequences. The Indian judiciary, however, has taken a lead to fill the gap due to the absence of a specific statute pertaining to live-in relationships. In order to deliver justice and prevent a miscarriage of justice, our country's distinguished courts have, from time to time, given its interpretations suitable to the circumstances of such cases of live in relationships. The judiciary has balanced societal norms with constitutional values while deciding various cases. Despite this, it remains a contested battlefield veiled in the fog of ambiguity. In the paper, the author discusses judicial activism in connection with Live-In Relationships and the regressive outlook of society.

I. INTRODUCTION

"Law takes time to eloquent such social changes through a process of amendment. That is why in a changing society it is not possible that law remains static. If one notices the history of development of Hindu Law, it will be clear that it was never stable and has changed according to time to meet the challenges of the changing society pattern." – Hon'ble Justice A.K.Ganguly & G.Singhvi in *Revansiddapa & others* v. *Mallikarjun & others.* [1]

Society is a web of social relationships. Social relationships include social processes and social interactions. The first bond of social relationships is marriage, the next our children; then the whole family and all things in common.[2] Marriage is the civil status of one man and a woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.[3] Marriage is a universal institution and it is the social relationship which is found on everywhere in the world. However, it is not possible to trace the beginning of institution of marriage on the basis of any authentic recorded history. But we cannot deny this very institution has pillared the human civilization. Marriage give approval to the sexual relationship of two persons of opposite sex and permit them to live together as husband and wife and allow them to arrange into neat family units and bring about coherency and security to all. This institution of marriage has sustained the continuity of human race along with the insurance for the survival of the group along with its culture. But in the last few decades, this essential and time-tested institution of marriage has come under the threat. This hard to believe, but the fact is that the

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[1] (2011)11 SCC1 at para 27 (India).

[2] S. Mururgesan and C. Loganathan, *Live in Relationships in India: The need for Special Legislation*, SASCV 329 (2013).

[3] Bhavana Sharma, *Hindu Marriage: Sacrament to Live-in Relationship*, 47 (1) Civil & Military Law Journal 25 (2011).

institution of marriage has somewhere started to lose its importance, glory and sanctity.[4] There are many reasons for this and some of them are degradation of morals and ethics, liberal atmosphere, secular education and scientific temperament of people, disintegration of joint families, working parents, etc. The result is that today's generation has no belief in age-old morals and customs, they are in the habit of questioning everything and they want to lead an independent life without any interference, the result is the birth of the concepts of live-in relationship in which the two persons has no obligation and responsibility, they are free to do whatever they want to.[5]

Live -in relationship is a relationship devoid of commitment to marriage and a person can have association of multiple partners simultaneously. Moreover, terms and conditions of a contract determine the rights and duties of partners in such relationships. The major advantage of live-in relationship is that it can be brought to an end easily while to dissolve a marriage, one has to go through a lengthy, complicated and expensive divorce procedure.[6] Other reasons why people enter into live-in relationships are - to test their compatibility, to avoid hassles of marriage ceremonies, to establish financial security, if they are of the same sex or inter-religion and unable to marry because of illegality. However, the section of society which is favouring the concept of live-in relationship has hailed it as a pragmatic move. They advocate live-in relationship as it focuses on the freedom of an individual and gives a fair chance to understand the personality of their partner. On the contrary, sociologists have even expressed their concerns, according to them live-in relationships may cause early age pregnancies, abuse of drugs, violence. Many felt that legalizing such an objectionable behaviour will make our future generation a spoilt brat.

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[4] *Id.*

[5] *Id.*

[6] Rupam Jagota, Live-In-Relationship- A twist to Pedigree, 1 Indian J. L. & Just 146(2010).

Furthermore, live-in relationship may encourage adultery and extra marital affairs which may lead to increase in marital dispute and divorce. The High Court in the case of *Alok Kumar* v. *State of Delhi*[7] held that live-in relationship is a type of "walk in and walk out relationship" which is based on a contract. This contract needs to be renewed every day and can also be cancelled by either one of both the partners, who want to walk out. Thus, live in relationships are very fragile and can break at any point of time.

The purpose of the paper is to highlight the importance of union of man and woman which is the architect of social structure and therefore it does not matter whether we call it marriage or live-in relationship because ultimately the aim of the both is same except that former is solemonised in traditional way by performance of sacred rites and rituals while the latter is based on the understanding of man and woman, which is more important for a successful marriage.[8] The author has also highlighted that unlike other countries India has no specific law to recognize the live-in relationship. The author has also discussed how the Indian judiciary has stepped in to fill the gap created when there were no specific statutes governing live-in relationships.

II. MEANING OF LIVE IN RELATIONSHIP

A live-in relationship is between two persons who live together but not sanctioned by one's religion and government thus it maintains one's civil status as single.[9] Initially, it refers to a practice wherein heterosexual couples lives together without getting formally married. Nowadays, homosexuals, gays, lesbians, married men and women whom law earlier did not give a right to marry are also maintaining live-in-relationship.[10] So, it is a mutual cohabitation which is informal in nature. In the past

[7] CRL.REV.P. 447/2009 (India).
[8] SHARMA, *Supra* Note 3.
[9] See *Id*.at 29.
[10] JAGOTA, SHARMA, *Supra* Note 6, at 148.

that kind of relationships were called "out of wedlock". Thus, if any child is born to such a couple, then such child is considered born "out of wedlock". The legal definition of live-in relationship is "an arrangement of living under which the couple which is unmarried lives together to conduct a long-going relationship similarly as in marriage."[11] Usually, a couple seeking cohabitation or living together explores their compatibility before going for some commitment. Financial worries or homosexuality can also be reasons of cohabitation. In simple words, in such kind of relationships, the couple is living together without marriage or without any sanction.[12] Live-in relationship can be classified as 'relationship by circumstance' or 'relationship of choice'. In the former case of 'relationship by circumstance' partners are into a misconception that they had validly given divorce to their previous partners or mistaken of a valid marriage between them. In the latter case, both partners may be legally wed to someone else. If a couple voluntarily decides to live together, it is called relationship by choice. There may be a situation wherein unmarried couple entered into live-in relationship as a matter of preference.[13]

III. LIVE-IN RELATIONSHIP IN INDIA: IS IT GIFT OF WESTERN COUNTRIES?

It is evident that the number of unmarried partners living together is scaling high. Just a generation or two ago, it was scandalous for an unmarried man and woman to live together. But change happened so quickly that it is no wonder now. Under the impact of globalization, westernization, rapid growth of economic structure, disintegration of Hindu joint family and people getting more and more self-centred, the concept of live-in

[11] Devanshi Lohia and Rishika Goyal, *Live- In Relationship: The Legality of Unconventional relationship in India*, 3:4 International Journal of Law and Management & Humanities 23(2020).
[12] SHARMA, *Supra* Note 3.
[13] Shruti Shreya, *A Social-Legal Study of Live in Relationships and its Impact on the Institution of Marriage*, 2:1 SUPREMO AMICUS, 365, www.supremoamicus.org.

relationship has adjusted its roots in East also. Though, cohabitation is a common practice among people living in abroad and primarily live-in relationship is a western ideology. But traces of it are deeply embedded in Indian history, as, for millennia, in India, men and women have lived together without marriage.[14] In prehistoric times especially during the period of kingship, the Maharajas, Kings, Nawabs and the rich elite men used to live with several women apart from their numerous wives.[15] It was not at all considered immoral for men to live with women outside of marriage. Indeed in all parts of India, it was common for a man of means to maintain an additional household for his entertainment and relaxation away from his responsibilities.[16] Though these relationships are not openly discussed or condemned in ancient Hindu texts but there is clear mention of "dasiputra" (i.e. born to an exclusively kept (women) concubine) and son born to women other than a wife and concubine or born of adulterous or casual intercourse.[17] And children born out of such relationship were never considered as a "filius nullius", but infact they were entitled to maintenance and it has been laid down in number of cases much before coming of the codified Hindu Law.

After independence, the Indian society is in transition as patriarchal system is gradually disappearing from India. With the progression of society, women became more empowered to make their own choices and they can live the way they desire. In today's era, women are equally competing with men and financially independent as men. Gone are the earlier days of dependency, there is no threat to their economic status and they are no longer considered to be inferior to men. The days when women used to be at men's beck and call which shows their subservience are gone. Traditionally, only men were maintaining live-in relationship with various women but in today's era women are also entering into live in relationships. Generally,

[14] SHARMA, *Supra* Note 3, at 30.
[15] SHREYA, *Supra* Note 13, at 372.
[16] SHARMA, *Supra* Note 3, at 30.
[17] See *Id*.

young girls settling in live-in relations are the ones who come from monetary stable background and are highly educated, well settled and self-reliant.[18] Therefore, the question of uncertainty related with live-in relationship making women susceptible becomes irrelevant.[19]

IV. LAW ON LIVE IN RELATIONSHIP

The law relating to marriage and other personal affairs in India, which has sustained itself in the post- independence era is a set of laws in the field of family laws. These are separate for the five communities, namely Hindu (includes Sikhs, Jains and Buddhists), Parsi, Muslim, Christian and Jews. Distinct laws for each community and the application of law is purely in accordance with the religion one follows.[20] But when it comes to live in relationship, there seems to have no explicit provisions relating to it in these personal laws. However, the Indian Evidence Act, 1872 inclines in favour of live-in relationship if a man and woman live as husband and wife in the society for long time without any other conclusive evidence to the contrary, then there would be a reasonable presumption of marriage in their favour.[21] Therefore, in cases where a man and a woman reside together for a prolonged period of time as a couple, then the presumed marriage occurs and generates rights and obligations.

The Protection of Women from Domestic Violence Act, 2005(hereinafter DV Act) is the only legislation which has acknowledged the live- in relationship and bestows all benefits on women who are not legally married and living in such kind of arrangement which falls under the category of 'Domestic Relationship'. Section 2(*f*) of the DV Act defines:
"Domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in

[18] See *Id*.
[19] See *Id*.
[20] Joan L Erdman, *Marriage in India: Law and Custom*, 5 UPDATE ON LAW RELATED EDUCATION 22, 48 (1981).
[21]Section 114, Indian Evidence Act, 1872, Acts of Parliament, 1872.

a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

The DV Act recognizes the live-in relationship and provides rights and protection to the females related by "marriage" or "relationship in the nature of marriage". Such official recognition of live- in relationship confers equal status to a woman of live- in relationship at par with legally wedded wife.

The increased cases of live-in relationship (mostly live-in by 'circumstances') highlighted the emergent need for reformation. Therefore, in November 2000 Malimath Committee was constituted under the chairmanship of V.S Malimath. In 2003 when the Malimath Committee submitted its report, it made several recommendations under the head "offences against women". The first and the foremost recommendation was to amend section 125 of the Criminal Procedure Code, 1973 (hereinafter Cr.P.C.) which deals with the maintenance. The committee suggested to make amendments in the word "wife" (under section 125 of the Cr.P.C.) and to include women who are living with a man for a reasonable period of time during the subsistence of the first marriage. The committee also gave its explanation regarding this and said that any woman who married a man unaware of his first marriage is not considered his wife as their marriage is invalid in the eyes of law. Generally, man suppresses their previous marriage when marrying a second wife, so in such a case, the second wife is not eligible for maintenance under s. 125 Cr.P.C., regardless of any fault on her part. The Maharashtra government accepted this Malimath committee report which was a positive sign of acceptance.[22]

Further, in June, 2008 the National Commission for Women made recommendations to include female cohabiters

[22] Dr. Justice V.S. Malimath Report, *Committee on Reforms of Criminal Justice System*, GOI, Ministry of Home Affairs, Vol-1, India, March 2003, https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf.

under the purview of section 125 Cr.P.C. so that they are also entitled to the right of maintenance if her live-in relationship partner deserts her.

V. JUDICIAL APPROACH TO LIVE-IN RELATIONSHIP IN INDIA

Article 21 of the Constitution of India guarantees fundamental "right to life and personal liberty" to all citizens of India, which means one, is free to live as he pleases. In Indian society, live-in relationships may seem immoral, but legally they are not "illegal." However, the legal status of such cohabiting couples is still lacking. And, these couples' rights and obligations, as well as the status of children born out of such a bond, emanate vagueness. Though, the concept of live-in relationship in Indian society is hundred times more complex than western society which is being attempted to be resolved by the judiciary. And, even in the absence of any specific statute relating to live-in relationships, the Indian judiciary has stepped up to fill the gap that was created.

A. Validity of live in relationship

There are some events where the courts had acknowledged such relationships. In the case of *A. Dinohamy* v. *W.L Blahamy*
[1]the Privy Council held that, "where a man and a women are proved to have lived together as a man and wife, the law will presume, that they were living together in consequence of a valid marriage, unless the contrary can be proven." Thereafter, the same principle was reiterated by the Supreme Court in case of *Mohabbat Ali* v. *Mohammad Ibrahim Khan*[2], held that if a couple is living together for a long time that does not make their relationship legally valid. Once again in the case of *Gokul Chand*

[1] AIR 1927 P.C.185 (India)
[2] AIR 1929 P.C. 135 (India)

v. *Pravin Kumar*[3], the apex court reiterated the same principle though it warned that the couple would not be considered as legitimate if the evidence of them living together is rebuttable. Then post-independence in *Badri Prasad* v. *Dy. Director of Consolidation*[4], the court for the first time recognized live-in relationship and considered it to be a valid form of marriage, the court granted legal recognition and validity to the cohabitation of couple aged 50.

The main problem remains the traditional-oriented society and its belief that live-in relationship is detrimental to the sanctity of marriage which creates major obstacle for live-in relationship acquiring social- legal status in India. In the beginning the idea was also considered to be immoral and even legally abhorrent. Neither the society nor the courts were willing to give a careful consideration in this regard[5]. The Supreme Court held in *Yamunabhai* v. *Anant Rao*[6], held that where a man who already has an existing wife got remarried, his second 'wife' had no claim to maintenance under Section 125 Cr.P.C, even though she was unaware of his earlier marriage. The SC declined to recognize that they had lived together even if their marriage was void and the man was allowed to take advantage of this, although he had defrauded the woman by concealing his earlier marriage. The SC would not grant any rights to the woman in such a live-in relationship 'by circumstance'. Even in 2000, *Malti* v. *State of Uttar Pradesh*[7], the woman was a cook in the man's house and she stayed with him and shared an intimate relationship. The Allahabad HC held that a woman living with a man could not be considered as his wife. The Court however refused to extend the meaning of the word "wife" in Section 125 Cr.P.C to include a live-in partner's maintenance claims.

[3] AIR 1952 SC 231 (India)
[4] 1979 SCR (1) (India).
[5] SHREYA, *Supra* Note 13 at 368.
[6] AIR 1988 SC 644 (India).
[7] 2000 Cri LJ 4170 (All) (India).

However, in recent years the Courts have considered the long cohabitation period and assumed it to marriage and have laid down that live-in relationships are not illegal per se. The Allahabad High Court in case of *Payal Sharma* v. *Superintendent, Nari Niketan, and others*[8], Justices M Katju and R.B Mishra stated, "in our opinion, a man and a women, even without getting married, can live together if desires to do so. This may be regarded as immoral by the society, but it is not illegal in the eyes of law. There is distinction between law and morality."

This view was supported by the Supreme Court in the case of *Lata Singh* v. *State of U.P*[9], by laying down that live-in relationship is permissible in the eyes of law only in unmarried major persons of heterogeneous sex. Similar opinion was reiterated by Apex Court in *S. Khushboo* v. *Kannianmmal & Anr.*[10] and held that a live-in relationship or sex before marriage is not illegal. It further states that a live-in relationship is only legal for unmarried adults of heterogeneous sexes. The Supreme Court also observed that two adults in live-in relationship are not considered as offenders just because there is no formal marriage. There is no legislation which publicly declares cohabitation as illegal. *Tulsa & others* v. *Durghatia*[11] reiterated the same principle supporting live-in relationship and held in the case of a long-term relationship between men and women, the presumption is that they are both married, unless they provide convincing evidence to rebut the claim. The court also ruled that children born to such couple will also be legitimate and will have all rights of a legitimate child.

Thereafter, in the year 2013, the Supreme Court of India in the case of *Indra Sarma* v. *V.K.*V. *Sarma*[12] held that "live-in relationship or marriage like relationship is neither a crime nor a

[8] AIR 2001 AII 254 (India).
[9] AIR 2006 SC 2522 (India).
[10] AIR 2010(4) SC478 (India).
[11] AIR 2008 SC 1193 (India).
[12] 2014 (1) RCR (Crl) 179 (SC) (India).

sin though they are not socially acceptable in India"[13]. In this landmark judgment, bench headed by Justice K. S. Radhakrishnan formulate guidelines to take live-in relationship within the expression "relationship in the nature of marriage" u/s 2(f) of the Protection of Women from Domestic Violence Act 2005. These guidelines are:

> (1) Duration of period of relationship: a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.
>
> (2) Share household: the parties must have shared household as defined under Section 2(s) of the DV Act.
>
> (3) Pooling of Resources and Financial Arrangements: for supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.
>
> (4) Domestic arrangements entrusting the responsibility: especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.
>
> (5) Sexual Relationship: Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.
>
> (6) Children: having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.
>
> (7) Socialization in Public Holding out to the public: socializing with friends, relations and others, as if they

[13] See *Id*. para 2.

are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.
(8) Intention and conduct of the parties Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship."[14]

Further the bench said. "*Parliament has to consider over these issues, bring in proper legislation or make a proper amendment of the Act, so that women and the children, born out of such kinds of relationships should be protected, though those types of relationship might not be a relationship in the nature of a marriage*."[15]

Further, in 2020, the Uttarakhand High Court in *Madhu Bala* v. *State of Uttarakhand and Others*[16] held that consensual cohabitation between two adults of the same-sex is legal.

Despite recognition of live-in relationship by judiciary as legal in the eyes of law, still such relationships are considered a taboo in the society and lacks social acceptance along with legal legislation in its regard. Moreover, recently in *Smt. Aneeta & Anr.* v. *State of U.P. & Ors.*[17], the Division Bench of Hon'ble Allahabad High Court denied police protection to couple of live –in relationship on the ground that it may indirectly results into recognition of illicit relationship. The Court also declares that live-in cannot be given validity at the cost of social fabric of this country.

[14] See *Id*.at para 55.
[15] See *Id*.at para 62.
[16] 2020 SCC OnLine Utt 276 (India).
[17] Writ C.No.14443/2021 (India).

B. Maintenance Rights of women in Live-in relationship

In the *Chanmuniya* v. *Virendra Kumar*[18] the court held that the word 'wife' under Section 125 Cr.P.C. needs to be interpreted in broader aspect to include those women who are living in cohabitation with their partners for a reasonable period of time. Also, section 7 of Hindu Marriage Act, 1955 (hereinafter HMA) should not be considered as an essential pre-condition for grant of maintenance u/s 125 Cr.P.C.

However, in order to prevent the misuse of the legal provisions most important factor which should be kept in mind is that, while safeguarding the women who are genuinely aggrieved, the undeserving ones should be kept of the ambit of such provisions in order to provide justice. And for this purpose the Supreme Court in the case of *D. Veluswami* v. *T. Patchaimmal*[19] laid down that to claim benefit under DV Act a woman must be in a relationship in the nature of marriage. Further Court laid down the criteria to differentiate between live-in relationship and relationship in nature of marriage:

1. the couple must represent themselves as spouses in the society.
2. they must be of legal age.
3. must fulfil all the pre-requisites of a valid marriage.
4. must be cohabiting willingly.

The court even highlighted that spending few months together or one night with someone would not come under the purview of live-in relationship in the eyes of law.[20] The same view was upheld by Punjab and Haryana High Court in *Poonam* v. *Vijay Kumar Jindal*[21]

However, in *Badshah* v. *Sou.Urmila Badshah Godse & Anr*[22], Justice A.K.Sikri extended the benefit of maintenance under

[18] (2011) 1 SCC 141(India).
[19] (2010) 10 SCC 469 (India).
[20] SHREYA, *Supra* Note 13 at 372.
[21] 2015(4)RCR(Crl)300 P&H (India).
[22] (2014)1SCC188(India).

section 125 Cr.P.C. to the 'wife' of a void marriage who enters into a relationship with a married man with without knowledge of his marital status

But where the woman has knowledge then such live-in relationship will not be amounting to relationship in the nature of marriage for claiming benefit under DV Act and Section 125 Cr.P.C.[23]

C. Rights of children born out of live-in relations

To keep the spirit of law in the direction of justice and quell the social ills wherein illegitimate children were deprived of their rights, the HMA gives a status of legitimacy to children irrespective of birth out of a void, voidable or valid marriage. Therefore, the definition brings within itself the scope of cohabitation and children born out of such relations. The inheritance and succession rights are now enjoyed by a child born through live-in partners in same manner as are enjoyed by a child of married couple. Under Hindu Law legitimacy is a pre-requisite for the inheritance rights. And for this purpose the primary condition which needs to be fulfilled is that the couple should be in cohabitation for a reasonable period of time. The courts have safeguarded the maintenance and inheritance rights of a child born out of live-in relationship which exists for a long period of time. As stated above, in *Tulsa & others* v. *Durghatia*[24] the court has laid that children born out of live-in will be legitimate and will also have all rights of a legitimate child. In *Dimple Gupta(minor)* v. *Rajiv Gupta*[25] the Supreme Court held that Child born out of live-in relationship can claim maintenance from his biological father under section 125 of the Cr.P.C. In 2015, Bombay High Court also upheld the maintenance rights of

[23] Dimple Jatin Khanna@ *Dimple* v. *Anita Advani and Another* 2016(1) RCR(Crl) 530(Bom) (India).
[24] *Supra* Note 33.
[25] AIR 2008 SC 239 (India).

children born out of live-in relationship in Deepak @Gajanan v. State of Maharastra[26],

Moreover, in the case of *Vidyadhari* v. *Sukharna Bai*[27], the apex court passed a landmark judgement in which it granted the inheritance rights to the children born out of cohabitation and ascribed to them.[28] The Supreme Court held that a child born out of live-in relationship is only entitled to claim a share in the parent's self-acquired property and are not entitled to a share in Hindu ancestral coparcenary property. The Bench set aside Madras High Court judgment, wherein it was held that a presumption of marriage would be raised in case where cohabitation exists for a long time and this would entitle a child born out of live-in relationship a share in ancestral property.[29]

Repeating an earlier ruling, Vacation Bench of Justices B.S. Chauhan and Swatanter Kumar said,

> "*In view of the legal fiction contained in Section 16 of the Hindu Marriage Act, 1955 (legitimacy of children of void and voidable marriages), the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents."*[30]

Other laws have not yet guaranteed the legality of children born through such relationship, so the legal status of children is gradually diminishing leading to widespread abuse of

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[26] (2015)(3)RCR(Crl)1002 (Bom) (India).
[27] AIR (2008) SC1420 (India).
[28] *Supra* Note 1 at para 6.
[29]J. Venkatesan, *No ancestral property for children from live-in relationship: court*, THE HINDU, May, 29th, 2010, https://www.thehindu.com/news/national/No-ancestral-property-for-children-from-live-in-relationship-court/article16304232.ece
[30] *Bharatha Matha & Anr*. v. *R. Vijaya Renganathan & Ors* AIR 2010 SC 2685 at para 23 (India).

regulations resulting in escape of liability. Therefore, the legitimacy of children is questionable in other laws and must be proved beyond doubt. In case where the partners decide to separate, the future of the child will be badly affected. The first and the foremost right granted by the Supreme Court to a child born out of the live-in relationship is the legitimacy right.[31] In the case of *S.P.S Balasubramanyam* v. *Suruttayan @ Andali Padyachi*[32], in this case the Supreme Court said that if a man and a women have been living together under a same roof and cohabiting for a long period of time, there will be a presumption under section 114 of Indian Evidence Act that they are husband and wife, also a child born to that couple will not be illegitimate unless proved contrary. The court also explained that legitimacy of children born through cohabitation is also a part of Article 39(f) of the Constitution of India. The State is given the responsibility to provide favorable conditions for the welfare of children[33].In the case of *Madan Mohan Singh and Ors* v. *Rajni Kant & Anr*[34], the only pre-requisite for the legitimacy is that he must not born out of a mere walk in & walk out relationship.

The courts in India have continued to ensure that no child is "bastardised" and to support the interpretation of law in such a manner as to protect them, which has been seen in the case of *Bharat Matha & Anr.* v. *R. Vijaya Renganathan & Ors.*[35] wherein the Supreme Court held that the child born out of live-in relationship may be entitled to succeed inheritance in the property of his parents but clearly mentioned that such rights does not extend to ancestral/coparcenary properties. Using the ratio of earlier case of *Jinia Keotin & Ors* v. *Kumar Sitaram Manjhi & Ors*[36]., the court further held that the purpose of section 16 HMA 1955 which is dealing with legitimacy and property rights of children born out of void and voidable marriages is to

[31] See *Id.*
[32] AIR 1992 SC 756 (India).
[33] SHREYA, *Supra* Note 13 at 373.
[34] AIR 2010 SC 2933.
[35] AIR (2010) SC 2685.
[36] (2003) 1 SCC 730.

provide such children legitimacy in the eyes of law who otherwise have been branded illegitimate.

With above discussed cases, it is evident that judiciary has recognized the live-in relationship and has played a very intensive role to settle the issues related to it, yet there is fog of ambiguity and partners to such relationship are able to escape their legal liabilities successfully. For example, in *Koppisetti Subbharao @Subramaniam* v. *State of A.P*[37] the man was accused of harassing his live- in partner for dowry but the court could not make him liable as he was not married to his live-in partner and section 498A of Indian Penal Code provides protection and relief in relation to a marital relationship. Thus, in order to avoid such situations, there is need to pass a separate legislation in this regard.

VI. CONCLUSION

Live-in relationships have always been a part of debates and discussion as being a matter of great concern for our social system. In live-in relationships, as in marriages, women often face various physical, verbal, emotional, and economic abuses. While unlike to women in marital relationships, women in live-in relationships do not have many legal options. Unfortunately, there is no specific law which deals with such relationships, the law creeps into the courtrooms. To render justice and prevent a miscarriage of justice, the distinguished courts of our country have from time to time given its beneficial interpretations suiting the circumstances of live in relationship. However, judiciary is playing a commendable role to strike a balance but there is an urgent need of legislation to govern live-in relationships so that there is no ambiguity faced by the courts while dealing with such cases. A live-in relationship specific legislation will help in demonstrating a clear picture and will resolve so many doubts associated with such relationships like, the minimum period of

[37] 2009 Crl.L.J.3480 (India).

time which is required to provide recognition to such cohabiting couple, legal rights of women and most importantly children born out of such relations so as to secure their future.

Furthermore, as social demands change, law must adapt, while maintaining a balance that grants equal rights to all irrespective of gender, as well as to those who comply with traditional marriage norms or those who defy them out of necessity. In line with Article 21 of the Indian Constitution which guarantees the fundamental right to life and personal liberty the right of consensual cohabitation should be equally available to homosexual people as homosexuality is not any more illegal. Thus, there is urgent need to replace all words like man/woman/husband/wife with the person and suppose respectively. The emphasis should be on making live-in relationship valid, acceptable and consecutively respectable. However, in order to avoid the misuse of such relationship a minimum time period should be fixed after which a live-in relationship can be taken as legitimate. Further, if a married person enters into live-in relationship he/she should be punished under the offence of bigamy. Furthermore, there is need to create awareness in society about the positive and negative aspects of live-in relationship in society so that people do not accept such relationships just for the sake of trial.

ACCOMMODATING HUMAN RIGHTS CLAIMS IN INVESTOR STATE DISPUTE SETTLEMENT FRAMEWORK: MIXING OF OIL AND WATER?

Daniel Mathew[*]

ABSTRACT

Foreign investments are considered to be of extreme importance, especially for developing countries given their lack of resources and technical knowhow. Yet making of such investments is fraught with uncertainties, often leaving foreign investors at the mercy of the State where the investment was made (host state). International investment law has sought to address this gap, and was developed with an aim of providing international protection to foreign investment, particularly by endowing the foreign investors with the ability to raise claims against host state under the international law before an international arbitral tribunal. History, however, is replete with instances where working of international corporations (MNCs) have led to gross human rights violations, which often go inadequately addressed as MNCs are able to escape host State's jurisdiction, in many instances by shifting resources outside its jurisdiction. In recent years the workings of various arbitral tribunal within the investor state dispute settlement (ISDS) framework has given rise to the possibility of inclusion of human rights claims in investment arbitration proceedings. This article attempts an analysis of the possibility of raising such claims, with specific focus on Indian investment arbitration regime. It would first attempt a look at conditions required for raising human rights-based claims in ISDS proceedings, and then evaluate

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Indian investment arbitration experience to ascertain whether such utilisation has happened, if so, under what condition, and what more could be done to secure the continuing possibility of raising human rights-based claims in the future.

I. INTRODUCTION

Sustainable development is the modern-day mantra. Yet most states though desirous of achieving high rates of development often lack the wherewithal to do so. As a result, they often become dependent on outside agencies for assistance. Such assistance may come from numerous sources be it developed nations, international aid agencies or private entities such as multinational corporations. Of the three the last usually is the most preferred source given the extent to which the host state is able to exercise its regulatory power over it and in turn align its working with the State's overall development vision.

However, every investor that undertakes an investment in a foreign jurisdiction assumes certain amount of risks beyond what the domestic investors of that jurisdiction undertakes. Yet such assumption happens without the corresponding power to alter policies though participation of democratic process, something which the domestic investor enjoys. In other words, while the domestic investor is able to, say through means of election, have a legitimate say in the law and policy pursued by the host state, for a foreign investor no such possibility exists. It is this idea that prompted development of an international regime for grant of additional protection to foreign investors and their investment. Over the years, globalisation and all its concomitants features have facilitated increasing cross border trade and investment. As a result, protection of alien property continues to retain its importance under international law. Current days efforts therefore could well be considered as an extension of numerous prominent efforts that had been made over the last two centuries to settle the standards of protection to be accorded to alien property. Be it was the Calvo Doctrine (1868), Drago Doctrine (1907) or the Hull Doctrine (1938), all attempted to outline

regulatory limits of the host state against foreign investors, and the protections that foreign investors enjoyed against the host states, particularly as regards damages for expropriation.

The idea and rules that evolved under the international law for treatment of alien property came to be referred to as international minimum standards.[1]

Post World War II developments reformed international economic relations which in turn had a profound impact on the discussions concerning protection of foreign investments. The newly independent countries actively sought foreign investments, and in that effort concluded treaties that granted greater protection to foreign investment than required under customary international law. Modern investment treaties began their journey with the Germany-Pakistan BIT in 1959. Many countries adopted this route and by 2019 almost 3000 investment treaties had been entered into. These treaties provided for extensive guarantees to foreign investors including the possibility of ISDS, which enabled a foreign investor to, among other, initiate arbitration as a method of dispute resolution, against host states for damages caused by adverse host state action. Till October 2020, over 1000 investment arbitrations had been initiated mostly against developing countries.[2]

II. OVERVIEW OF INVESTOR-STATE DISPUTE RESOLUTION

Modern international investment law is captured in a patchwork of *atomised, multi-lawyered* and *multifaceted* treaties, which includes bilateral investment treaties. UNCTAD in its 2008 report observed "*The system is universal, in that nearly every country has signed at least one BIT and the majority of them are members to several, if not numerous IIAs. The structure*

[1] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Second Edition, Oxford University Press, 2012, page 3.

[2] UNCTAD, Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement.

of agreements is atomised, that is it consist of thousands of individual agreements that lack any system wide coordination or coherence. The IIA universe is multi-layered – as IIAs now exist at the bilateral, regional, intraregional, interregional, sectoral plurilateral and multilateral level – and IIAs at different levels may overlap. The system is multifaceted, meaning that IIAs include not only provisions that are specific to investment, but also rules that address other related matters, such as trade in goods, trade in services, intellectual property, labour issues or environmental protection."[3] Through this process of treatification foreign investors were provided with enhanced substantive and procedural protection.[4]

The defining feature of the modern international investment agreement (such as a BIT) is the grant of ability to foreign investors to raise its claims before an impartial international investment tribunal comprising of private individuals, which may make binding awards. This is unique because the traditional method of foreign investor protection involved diplomatic protection, which meant the investor was always at the mercy of his home state. Diplomatic protection would require the home state to take up the issue with the host state, with no role for the investor.[5] In other words, the foreign investor would be a mere spectator, with no say in the proceedings, including on issues that were raised; quantum of

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[3] As noted in Andrew Newcombe, *Developments in IIA treaty-making*, in Levesque and De Mestral, (eds.) *Improving International Investment Agreements*, Routledge, 2013, pages 18-19.

[4] Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 Law & Bus. Rev. Am. 155 (2007), page 155.

[5] The Permanent Court of International Justice (PCIJ) in *Mavromamatis Palestine Concessions*, PCIJ, Series A. No.2,12, observed "*It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting it own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.*"

damages sought; etc. In the extreme, the foreign investor could never be certain of receiving any damages even when damages were awarded to the home State. In comparison the new ISDS feature enables the foreign investors to raise a claim directly against the host state without the involvement of his home state. So while under diplomatic protection the State asserted a right that emerged from the harm caused to its national, under the ISDS system the investor asserted a direct claim arising from the harm done to itself. [6]

Investor state arbitration thus involves a foreign investor raising a claim against a state before an arbitral tribunal comprising of private individuals. The basis of the claims are the guarantees noted either in the investment treaty or an investment contract, which incorporates the possibility of international arbitration. On the breach of substantive obligations by the host State, the investor could activate dispute resolution provisions noted in the relevant instrument. For instance, the India-Australian Bilateral Investment Treaty (now terminated) in Article 12, outlined a framework for settlement of dispute, which provided for amicable settlement, adjudication by domestic judicial or administrative bodies, conciliation and arbitration.

A. Consent to arbitration

It is important to remember that alternatives to domestic court-based method of adjudication see consent to such alternatives as a critical component. This is true for ISDS, including investment arbitration, which requires consent to be provided by both the parties (State and foreign investor) before arbitration can take place. Consent therefore is an indispensable requirement to investment arbitration. Under the current framework, consent for investment arbitration may be provided through a direct agreement between the parties; through national

[6] Zachery Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, page 11. He refers to this as *direct claim*, as opposed to a *derivative claim* witnessed under diplomatic protection.

legislations and finally as part of an investment (bilateral or multilateral) treaty.[7] Of the three only a direct agreement provides for an immediate reciprocal consent. In the case of legislation or treaty, the State in the first instance extends a unilateral consent which is later accepted by the foreign investor. This leads to what Prof. Paulsson refers to as '*arbitration without privity*'.[8] The reciprocal consent of the parties determines the jurisdiction of the arbitral tribunal. In words, claims the arbitral tribunal could look at is contingent of the scope of consent of the parties. As a result, scope of consent becomes a relevant factor in ascertaining the ability of arbitral tribunal to look at human rights claims in an investment proceeding.

Ascertaining the precise scope of consent can be a problematic exercise especially in instances of treaties. Most treaties would include broad phrases such as '*all disputes*', '*all disputes concerning an investment*', '*any dispute relating to investments*' or a variation thereof. Considering that arbitration as a method of dispute resolution is not bound by the notion of precedent, every arbitral tribunal interprets these provisions *de novo*. The result can be incoherent jurisprudence as regards how such provisions are to be understood and interpreted.[9] Perhaps the starkest example of such incoherence could be found in the SGS set of matters, where the consent clause which provided for '*disputes with respect to investments*' was provided diametrically opposite interpretations.[10]

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[7] See for instance India Model BIT 2016, Article 17 which provides "*17.1 Each Party consents to the submission of a claim to arbitration in accordance with the terms of this Agreement*."

[8] Jan Paulsson, *Arbitration without privity*, ICSID Review - Foreign Investment Law Journal, Vol 10(2), 1995, pages 232–257. Such usage indicates that the time of grant of consent, the State is unclear as to who the opposite party would be.

[9] This is not resolved by adoption of means provided for in Article 31 and 32 of the Vienna Convention on the Law of Treaties 1969. Almost every arbitral tribunal utilises these provisions as the starting point, and yet may reach contradictory conclusions.

[10] *SGS* v. *Pakistan*, ICSID Case no. ARB/01/13, Decision on Jurisdiction, (Aug 6, 2003), para 161; and *SGS* v. *Philippines*, ICSID Case no. ARB/02/6,

The appeal of international arbitration also lies in the provision of a well-defined international framework for enforcement. This is important especially considering the remedies that the arbitral tribunal can provide to foreign investors. Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001, outlines *restitution, compensation* or *satisfaction* as reparation of wrongful acts under the International law.[11] Together with costs the total sum awarded in an investment arbitration can run into millions of dollars.[12] Given such outcomes, it is possible that States may refuse to honour an award. Therefore, enforcement framework and mechanisms are of crucial importance.

Institutional arbitration such as those under the aegis of ICSID have a very well-defined enforcement framework. For instance, Article 53-55 of the ICSID convention provides for how an award rendered under the ICSID convention are to be enforced.[13] In the case of non ICSID awards, enforcement is

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Decision on Jurisdiction (Jan 29, 2004), paras 131-135. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Second Edition, Oxford University Press, 2012, page 260-261.

[11] Article 34 – "*Forms of reparation – Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter*."

[12] Perhaps the most extreme example of this was the USD 50 billion that was awarded to Yukos Oil Cooperative against the Russian Federation. Shona Simkin, *The Yukos settlement: an insider's view into the largest arbitration award in history* (March 10, 2015), https://today.law.harvard.edu/the-yukos-settlement-an-insiders-view-into-the-largest-arbitration-award-in-history/.

[13] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention). "Article 53(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. **[…]Article 54** (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the

subject to the laws of the jurisdiction where it is sought and in appropriate cases the provisions of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[14] For instance, in India the latter framework applies as a result of which international arbitral awards are enforced under Part II of the Arbitration Conciliation Act 1996 (1996 Act).[15] Part II of the 1996 Act mirrors the New York Convention.

III. HUMAN RIGHTS AND INVESTOR STATE DISPUTE RESOLUTION

A. Ineffectiveness of domestic adjudicatory framework

Sustainable development requires more than mere investments. Wide and equitable distribution of the benefits and burden of the investment in the society is crucial to achieve development. Among the many ways of ensuring such just distribution, adherence to human rights values and principle is an important one.[16] The bigger concern remains how ideals of human rights are to be accommodated with the working of foreign investments. Traditionally such balance is achieved through domestic laws which mandate specific policy goals that all foreign investors are required to adhere to. Disregard of such domestic norms, including those pertaining to human rights, in the working of investment would make the foreign investor liable under domestic laws. Such disregard could then be pursued by

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pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.[…]".

[14] 330 UNTS 38.

[15] That said whether the Arbitration and Conciliation Act 1996 at all applies to investment arbitral awards is a matter of controversy and is dealt with in greater detail in Section 5.5 later.

[16] Megan Wells Sheffer, *Bilateral Investment Treaties: A friend or a foe to human rights*?, 39 Denv. J. Int'l L. & Pol'y 483 (2011), page 483.

the affected party, be it the State or private individuals, before domestic forums, which in turn would be competent to render binding directions to address human rights violations committed by foreign investors.

That said there are some assumptions that underlie the above assertion, namely that State is not complicit in the human rights violation, or that the State has adequate wherewithal to take on giant multinationals. Such shortcomings may make domestic courts an inadequate forum to address human rights violations by such corporations. It is in this context that international law becomes relevant as providing the relevant norms, obligations, and forum where corporations could be called to account for violation of international human rights.

While theoretically it may sound appealing, in practice this is far from reality. This is so because while international investment law articulates a framework pertaining to foreign investments, it mostly aims at protection of foreign investment rather than preservation of regulatory space for states. In other words, international investment agreements are mostly asymmetrical as they accord substantive rights to investors without subjecting them to any specific obligations. As a result, foreign investors under international investment law could be considered as subjects of international law that possess only rights but no obligations.[17] This forms a major impediment in holding foreign investors accountable for their human rights violation even under the international investment law.

B. Human rights and investment claims

Over the years though increasing efforts have been made induct human rights-based claims within the investment arbitration spectrum. While some concrete progress in the form

[17] Patrick Dumberry, *Corporate investors' international legal personality and their accountability for human rights violations under IIAs*, in Levesque and De Mestral (eds.), *Improving International Investment Agreements*, Routledge, 2013, page 179.

acceptance of *amicus curiae* petitions have been witnessed, on the whole human rights references are given a miss in the international investment dispute adjudication. As mentioned earlier, this is unsurprising considering that the international investment agreements fail to outline any substantive investor obligations concerning protection and promotion of human rights. Arbitral tribunal which are creatures of parties' consent, accordingly understand their jurisdiction in accordance with the specific terms of the investment agreement.

However, absence does not imply conflict, and therefore the suggestion that the international investment law completely undermines international human rights law is perhaps inaccurate. This is so because international law has often been understood as being comprised of specialised areas with their own principles and institutions, often working without any overlap from other areas of international law, leading to what scholars refer to as fragmentation of international law. The International Law Commission's Study Group on the Fragmentation of International Law in its consolidated report had suggested that "*The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by general international law has become the field of operation for such specialist systems as trade law, human rights law, environmental law, law of the sea, European law and even such exotic and highly specialized knowledge as investment law or international refugee law, etc. - each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-*

systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law."[18]

While at first brush it may seem, particularly in view of the above assertion, that fragmentation witnessed in international law is fatal to the possible interaction between international investment law and international human rights law, review of international arbitration outcomes belie this assertion.[19] It is therefore safe to suggest that while difficulties remain as regards existence of specialised rules and principles regulating specific areas, but to suggest that they are self-contained and therefore beyond any contribution from other regimes is incorrect. Such regimes are therefore neither as autonomous nor self-contained, as a result of which focus has increasingly shifted to seeking methods of harmoniously reading them together.

International human rights law and international investment protection regime have also been subjected to such harmonious reading. Importantly though, it was not just normative concerns that drove this desire towards convergence, instead practical realities of how the system had been utilised by foreign investors and awards rendered by various arbitral tribunals that fuelled calls for reform. The ISDS regime post the Argentinean economic crisis and the numerous investment

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[18] International Law Commission, 58th Session, *Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 [hereinafter Consolidated Report] (finalized by Martti Koskenniemi) (Apr. 13, 2006), https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.
Fragmentation can be understood as "*the breakdown of the substance of general international law into allegedly autonomous, functionally oriented, 'self-contained' regimes.*" Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8(1) Theoretical Inq. L. 9, 18 (2007).

[19] See generally, PM Dupuy, *A Doctrinal Debate in the Globalisation Era: On the 'Fragmentation' of International Law*, 1 European J of Legal Studies (2007), pages 1–19. Marjan Ajevski, *Fragmentation in International Human Rights Law- Beyond Conflict of Laws*, 32(2) Nordic Journal of Human Rights (2014), pages 87-98.

arbitration awards rendered in its aftermath suffered an intense legitimacy crisis. This crisis was worsened by States abandoning prominent ISDS systems such as ICSID,[20] with others contemplating exclusion of ISDS mechanism from future treaties.[21] This crisis had its roots in the discontent and disenchantment of States with the ISDS which saw the current regime of ISDS as only favouring foreign investors ignoring the enormous costs in terms of adverse human rights fallout that States had to endure.[22] Thus a tangible way towards addressing this legitimacy crisis, was to increase the scope of ISDS regime, in particular, to acknowledge regulatory space of States including State actions taken to, among other things, protect and promote human rights, labour rights, and environmental concerns. Such a conclusion is also relevant for two more reasons – (i) a crucial principle of international law is that of *systemic integration*;[23] and (b) the inalienable and indivisible character of human rights and the concomitant duty to respect protect and fulfil human rights. It is perhaps for this reason that many investment arbitral

[20] States like Bolivia and Ecuador have withdrawn from the ICSID convention. *Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims*, (December 2, 2010), https://unctad.org/en/docs/webdiaeia20106_en.pdf.

[21] Australia became one of the first developed countries to suggest rejection of investor state dispute resolution. See for instance *Australia's rejection of Investor-State Dispute Settlement: Four potential contributing factors*, (July 12, 2011), https://www.iisd.org/itn/en/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/.

[22] See generally Waibel, Kaushal, Chung and Blachin (eds.), *Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International (2010). See also Anthony DePalma, *Nafta's Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, New York Times, March 11, 2001. The author noted "*Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged*," (March 11, 2001), https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html.

[23] See generally C McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, (2005) 54 ICLQ 279.

tribunals have refused to hold that international investment law and international human rights law are neither inconsistent, contradictory or mutually exclusive has been consistently been held by various investment arbitral tribunals. [24]

IV. HUMAN RIGHTS WITHIN INVESTMENT ARBITRATION: POSSIBLE ENTRY POINTS

Therefore, starting from the premise that the current investment arbitration framework is not agnostic to human rights references, it becomes relevant to enquire into the available entry points in the current framework that could be utilised to introduce human rights references into investment arbitration. There are currently three entry points that could be utilised, namely:

a) Jurisdiction clause;
b) Treaty protections and limits thereon; and
c) Governing or applicable law provisions.

A. Jurisdiction clause

Limits of authority of investment arbitral tribunal is outlined by the jurisdiction clause. In other words, whether an arbitral tribunal can take cognisance of a particular dispute or otherwise is contingent on the wordings of the jurisdiction clause and the interpretation accorded to it. That said, the various instruments, in particular, investment treaties adopt a wide array of phrasing when it comes to jurisdiction clause. Jurisdiction clauses therefore can range from expansive (all disputes) to specifically tailored (outlining specific disputes). It has been argued that expansive clause could encompass disputes beyond the BIT itself.[25] However most jurisdiction clauses are bounded off with the following limitation '*arising in connection with*

[24] Kube and Petersmann, *Human Rights in Investment Arbitration*, 11(1) AJWH 65 (2016), page 71.

[25] Christoph Schreuer, *Consent to Arbitration*, page 8-9, (February 27, 2007), www.univie.ac.at/intlaw/con_arbitr_89.pdf. *Compañía de Aguas del Aconquija S.A. & Vivendi Universal* v. *The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, para 55 (July 3, 2002).

investment.' As a result, inclusion of human rights claims within investment proceedings would depend on the arbitral tribunals finding as to whether such claims arose *in connection with the investment*, namely the relation between human rights and investment.

B. Substantive protections

The second entry point concerns the interpretation that may be accorded to substantive protections and other important provisions and terms. For instance, a commonly adopted principle in investment arbitration is the *clean-hands* doctrine as regards investment, which suggests that an unlawful investment would not be granted any protection under the treaty. In other words, the arbitral tribunals have utilised the principle of clean hands/good faith to ascertain lawfulness of investment to evaluate whether a claim raised by the investor is eligible for BIT protection.[26] The question of lawfulness of investment is determined under the applicable law, which often is international law or domestic law or both. In such instances, the burden of proof lies on the State to show that investment was unlawful or made in bad faith. However, the conflation of clean hands doctrine and requirement of adherence to local laws, and its relationship human rights remains contested.[27]

Similarly, acknowledgement of human rights within the Preamble of the investment treaty as one of its objectives may provide an important gateway for introduction of human rights

[26] *Abaclat and others (Case formerly known as Giovanna a Beccara and Others)* v. *Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011); *Malicorp Ltd.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (Feb. 7, 2011). In *Fraport AG* v. *Philippines* the tribunal rejected jurisdiction as the investment was not made in accordance with the host state's laws, *Fraport AG Frankfurt Airport Services Worldwide* v. *Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, para 401-04 (Aug. 16, 2007).

[27] Schill and Bray, *Good Faith limitations on protected Investments and Corporate Structuring*, in Mitchell, Sornarajah and Voon (eds.), *Good Faith and International Economic Law*, Oxford University Press, 2015, page 98.

references. The Vienna Convention on the Law of Treaties 1969 (VCLT), Article 31(1) and (2) requires treaty interpretation to be done in "good faith, in accordance with ordinary meaning of the text understood in their context, and in the light of their *object and purpose*." This may again however not be as straight forward as the Preamble may list many, often contradictory, objectives without clearly outlining any weightage to accorded to each. In such situation the arbitral tribunal may find it difficult to prioritise one over the other.[28] Further, treaty objects and purposes do not contain direct obligations.[29] That said, it is important to reiterate, the issue is not of a hierarchy, rather that of consideration. The arbitral tribunal ought not to be forced to outrightly reject human rights invocation merely on the ground that the relevant investment agreement carries no explicit mention of human rights.

Human rights reference may also form a crucial part of how substantive protections are understood and applied. For instance, legitimate expectation which forms part of FET and expropriation, could become form an entry point for human rights. This is because it is now an accepted understanding within investment law framework that legitimate expectation does not imply standstill of legislative environment, which may be modified in response to emergent human rights situation or for fulfilling State's human rights obligations under international law.[30] As a result, assessment of legitimate expectations may turn heavily on investors conduct and failures. Similarly, another principle that originally evolved in the human rights

[28] Arbitral practices have often refused to limit reading object of the treaty only from the Preamble, and have instead read the whole text of the treaty as a more comprehensive indication of object and purpose of the treaty. *Continental Casualty* v. *Argentine Republic*, ICSID Case no. ARB/03/9, Award, para 258, (Sept 5, 2008); *SGS* v. *Pakistan*, ICSID Case no. ARB/01/13, Decision on Jurisdiction, para 165, (Aug 6, 2003).

[29] Trinh Hai Yen, *The interpretation of Investment Treaties*, Brill Nijhoff, 2014, page 64.

[30] Ursula Kriebaum, *Human Rights of the Population of the Host State in International Investment Arbitration*, 10 J. World Inv. & Trade 653 (2009), page 669.

jurisprudence namely, proportionality balancing, which requires the need to weigh different yet competing interests, also forms a potent entry point. That said, while arbitral tribunals have alluded to 'balancing' of stakes, it has failed to clearly outline how such balancing was to be done or the specific outcome of such balancing.[31] The above discussed principles would not only operate at the stage of jurisdiction or merit, but further enter into consideration at the stage of assessment of damages.[32]

C. Applicable law

The third gateway that could be utilised to introduce human rights references into investment arbitration proceedings is through the law applicable to the investment dispute. This would require human rights law to be part of the applicable law. Applicable law could both be international law and domestic law. In treaty-based investment arbitration since investor protection is under international law, the applicable law to the dispute would be the international law which in accordance with Article 38 of ICJ Statute would include international treaties, customary international law and general principles of law. Both the international treaties (reading in the principle of systemic integration) and general principles of law would include within its folds human rights norms and principles going beyond the jus cogens norms.[33] However, contrary interpretation have also been adopted by investment tribunals to suggest that not all general principles of law would be included within the ambit of international law applicable to investment disputes.[34]

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[31] *SAUR International SA* v. *Republic of Argentina* ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, (June 6, 2012), paras 330-332.

[32] *Yukos Universal Ltd. (Isle of Man)* v. *Russian Federation*, PCA Case No. AA 227, Final Award, para 1633 (July 18, 2014).

[33] Kube and Petersmann, *Human Rights in Investment Arbitration*, 11(1) AJWH 65 (2016), page 96.

[34] See for instance *Bernhard von Pezold et al.* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (June 26, 2012), where the arbitral tribunal agreed with the claimant's assertion that rules of general international law as may be applicable does not incorporate the universe of international law into the BITs or into disputes arising under the BITs.

V. INDIAN INVESTMENT ARBITRATION EXPERIENCE

India always have had a tentative relationship with foreign investments. For long it had adopted a heavily regulated regime for foreign investment, where it did not enter into any investment agreements for protection and promotion of foreign investments. India's policy focused on developing domestic industries and becoming self-reliant, as a result of which its overall approach was protectionist and inward looking.[35] It was only in 1994 that India entered into its first BIT with United Kingdom, aimed at incentivising foreign investment. It also formed the template both for latter BITs and the Model BIT 2003.

The emphasis, as is evident from the text of these treaties, was on attracting and incentivising foreign investments. This objective was to be achieved at the cost of regulatory space of the State, to which scant attention was paid in the text. For almost two decades this regime lay dormant as a result of which scant attention was paid to its working or indeed the text of the BITs that were being routinely entered into. It was only with the initiation of arbitration claims against India, in particular the *White Industries* matter, that finally woke the establishment from its slumber to evaluate the extant foreign investment regulation regime in India.

A. White Industries v. India

The UNCTAD records 33 instances of investment arbitrations involving India, with 25 wherein India is the respondent, and 8 wherein Indian investors have initiated proceedings against foreign States.[36] But perhaps the most

[35] Nishith Desai Associates, *Bilateral Investment Treaty Arbitration and India: With special focus on India Model BIT*, 2016, February 2018, page 7.
[36] UNCTAD, Investment Policy Hub (December 31st, 2020), https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india.

prominent of this lot is the *White Industries* matter,[37] which marked a watershed movement for the Indian investment regulatory regime. The matter concerned a long-term mining contract between White Industries and Coal India Limited (a State enterprise) in 1989. Disputes arose between the parties and was submitted for arbitration under ICC Arbitration Rules. In May 2008, the arbitral tribunal awarded USD 4.08 million in favour of the White Industries. The problem commenced post this occurrence, as Coal India moved the Calcutta High Court to have the award set aside, while White industries approached the Delhi High Court to enforce the award. The Delhi High Court stayed the proceedings pending decision of the Calcutta High Court. White Industries at this juncture appealed to the Supreme Court of India, where the matter remained pending for nine years until 2010. In 2010, White Industries commenced an investor state arbitration under the India-Australia BIT,[38] utilising its MFN clause to draw in the guarantee of "*effectives means to asserting claims and enforcing rights*" from the India-Kuwait BIT.[39] The investment arbitral tribunal agreed with the contention of *White Industries* that the delay in the Indian courts had effectively denied it effective means of asserting claims and enforcing rights, awarding it approx. USD 4 mn in damages, legal fees and costs.[40]

The *White Industries* outcome led to expansive changes in the Indian investment regulatory regime which included issuance of a new Model BIT 2016, termination of 58 of its

[37] *White Industries Australia Limited* v. *Republic of India*, UNCITRAL, Final Award, 2011(November 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

[38] Agreement between The Government of The Republic of India and The Government of Australia on the Promotion and Protection of Investments 1999 (India-Australia BIT, now terminated).

[39] Agreement between The State of Kuwait and The Republic of India for the Encouragement and Reciprocal Protection of Investment, 2001 (India-Kuwait BIT, now terminated).

[40] *White Industries Australia Limited* v. *Republic of India*, UNCITRAL, Final Award, 2011, para 16.1, (November 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

existing BITs and re-negotiation of the remaining ones. It also engaged in issuance of joint interpretive statements as regards existing BITs and IIAs. For instance, in 2017 a joint interpretive statement was issued in the context of Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (2009).[41] Additionally, BITs modelled on the lines of the Model BIT 2016 were also entered into with Cambodia (2017), Belarus (2018), Kyrgyzstan (2019) and Brazil (2020).[42]

B. Model BIT, investment adjudication: experience and pragmatic concerns

Subjecting the above, namely the international investment agreements and various investment arbitral awards rendered against India to a human rights analysis paints a dismal picture. As regards international investment agreements, none of the now terminated or existing BITs which were based on the previous 2003 Model BIT carried an explicit reference to human rights. Absence of an explicit reference, as discussed above, poses a serious impediment for the arbitral tribunal to take cognizance of human rights references. This would then leave other provisions such as jurisdiction, applicable law and other substantive protection clauses which could be utilised as points of entry for human rights in investment proceedings. That said even such entry points would be difficult to utilise considering the phrasing utilised therein. For instance, Article 9 of the 2003 Model BIT containing the provision relating to settlement of dispute, provides "(1) *Any dispute* between an investor of one Contracting Party and the other Contracting Party *in relation to an investment* of the former under this Agreement shall, as far as

[41] Department of Economic Affairs, Ministry of Finance, https://dea.gov.in/sites/default/files/JIN%20with%20Bangladesh.pdf. A similar Joint Interpretive Declaration was executed with Colombia in October 2018, with the addition of denial of benefits provision.

[42] Ministry of External Affairs GOI, *Indian Treaties Database*, https://www.mea.gov.in/treaty.htm.

possible, be settled amicably through negotiations between the parties to the dispute." While the provision to begin with adopts an expansive scope 'any dispute', it tempers the same by adding the limitation '*in relation to an investment.*' As noted above such utilisation are often read narrowly, and unless the party intending to raise human rights claims can exhibit a clear link between the human rights claims and the investment made, such invocations are likely to be rejected. However so long as such link could be established, an independent claim based on human rights seemingly could be raised under such formulation.

In equal measure, all present arbitration matters (concluded or pending) against India have been initiated under BITs based on the 2003 regime. While most had been initiated prior to release of Model BIT 2016, it is likely that any new matter that is initiated would also be based on the Model BIT 2003 regime. This is owing to the presence of sunset clauses which would ensure that protection under a BIT carry beyond the termination of the relevant treaty.

Of the 25 investment arbitration matters initiated against India, only three, namely - *White Industries* v. *India*,[43] *Deutsche Telekom AG* v. *India*,[44] and *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd, and Telecom Devas Mauritius Limited* v. *India* (2012),[45] carry a reference to human rights. To begin with in none of the matters a claim of human rights was raised. The reference however came by way of utilisation of jurisprudence of human rights institution such as the European Court of Human Rights, by the parties. While the arbitral tribunal was not persuaded by such invocation, yet the manner in which

[43] *White Industries* v. *Republic of India* (Final Award, 2011, UNCITRAL) (November 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

[44] PCA Case no.2014-10 (Interim Award, 2017) (December 13, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw10496.pdf.

[45] PCA Case no. 2013-09 (Award on Jurisdiction and Merits, 2016) (July 25, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw9750.pdf.

each arbitral tribunal dealt with the invocation is instructive. The White industries tribunal summarily dismissed the invocation, the Devas tribunal failed to specifically engage with it, and the Deutsch Telecom utilised it to support its conclusions. While this is promising, yet the divergent approaches only further cement the view that the engagements with human rights references remains optional, as result of which, levels of engagements, if at all any, with human rights remain heavily contingent on the interpretations and approach adopted by the arbitral tribunal.

More promise perhaps is held in the Model BIT 2016. The 2016 Model BIT as a new generation investment agreement template incorporates a chapter on investor obligations. This would have been unheard of in the previous generation BITs that focussed only on guarantees provided to investors and obligations owed by the host states. Protection that investors enjoyed were earlier not contingent on any reciprocal obligations. While application of international law ensured that while some obligations such as principle of good faith working, legality of investments, etc., applied in all situation, specifically negotiated obligations were usually given a go by in the drafting of investment treaties. Model BIT 2016 by explicitly outlining investor obligations seemingly engages in a balancing act between investor protection on the one hand and preservation of regulatory space for host State on the other.

C. Corporate social responsibility

Once such obligation outlined in the Model BIT 2016 concerns corporate social responsibility, within which an explicit reference to human rights is found. Model BIT 2016, Article 12 – Corporate Social Responsibility provides "*Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human*

rights, community relations and anti-corruption." While this is indeed a step forward, it is disappointing for its vague articulation. This is so because even otherwise corporate social responsibility is considered as incorporating linkages with human rights. Observations of the *Urbaser* tribunal in this regard are well worth quoting:[46]

> "*1195. The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual*." (emphasis supplied)

[46] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v. *The Argentine Republic*, ICSID Case No. ARB/07/26, Award, (Dec 8, 2016), para 1195. Scholars such as Megan Wells Sheffer, *Bilateral Investment Treaties: A friend or a foe to human rights*?, 39 Denv. J. Int'l L. & Pol'y 483 (2011), page 491, observe that "*given that BITs are widely used and that the investment arbitration tribunals are very effective, BITs may be a promising choice to serve as a mechanism for the promotion of corporate social responsibility and the protection of human rights*."

As a result, the formulation of the CSR provision in the model BIT 2016 leaves much to be desired. This is so because on the one hand its placement within the chapter titled investor obligations seem to indicate towards its mandatory nature, use of the words '*shall endeavour to voluntarily incorporate'* seemingly dilutes it to an optional requirement. Investors are unlikely to adhere to an optional requirement unless it clearly benefits them. Respect and promotion of human rights by the investor ought not to be contingent on whether it benefits the investor in the first place. Further holding an investor liable for human rights infringement in the absence of an explicit obligation is likely to be extremely difficult. This therefore would represent a lost opportunity whereby explicit human rights obligations could have been incorporated within treaty.

D. Non-precluded measures

Another potential entry point concerns non-precluded measures clause, which often incorporate both the essential security interests (ESI) and circumstances of extreme emergency (CEE). Interpretation of ESI clause provided by various arbitral tribunals could be read as either in favour of[47] or leaning against the reading of human rights into it.[48] Circumstances of extreme emergency though may hold more promise as it provides a lower threshold than 'security interests' of a State. Considering the qualifications that may attach to 'emergency', this provision may provide for greater regulatory space to address human rights violations, without the State infringing treaty obligations. The Model BIT 2016 provides both for general exceptions,[49] and

[47] *Continental Casualty* v. *Argentine Republic*, ICSID Case no. ARB/03/9, Award (Sept 5, 2008), paras 173-180; *Sempra Energy Int'l* v. *Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept 28, 2007), para 374.

[48] *El Paso Energy Int'l Corp.* v. *Argentine Republic*, ICSID Case No. ARB/03/15, Award (2011), para 588.

[49] Model BIT 2016, Article 32.1 "*1. Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Part of measures of general applicability applied on a non-discriminatory bass that are necessary to: (ii) protect human, animal or plant life or health.*"

protects action taken to protect essential security interests including domestic emergency.[50] While the security exception formulation is self-judging indicated by the usage of terms "*which it considers necessary for*," the general exception is not so. Indeed, the model BIT clearly requires the arbitral tribunal to assess *necessity* of actions taken under the general exceptions clause, as indicated by the footnote which provides "*In considering whether a measure is necessary, the Tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to a Party*."[51] As a result, actions taken to protect human life or health including their rights would be protected only if the arbitral tribunal finds these actions necessary. This then would represent another lost opportunity whereby action taken by the host state to prevent or remedy human rights violations by the investor could have clearly been included within the ambit of protection granted under the general exceptions clause.

E. Enforcement of investment awards: applicability of the arbitration and conciliation act 1996

While investment arbitration proceeding is one part of story, an equally relevant portion concerns enforcement of awards rendered by an investment tribunal. The question of enforcement becomes important considering the number of investment arbitration pending against India. The applicable regime for enforcement would depend on various factors such as the involvement of institutions like ICSID, which often provide an expedited framework for enforcement of awards. For non ICSID regimes, enforcement could also occur under the New York Convention and the domestic legal framework of the host state. The convention provides a framework for recognition and

[50] Model BIT 2016, Article 33.1(ii) "*1. Nothing in this Treaty shall be construed: (ii) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to: (b) action taken in time of war or other emergency in domestic or international relations;*".

[51] Footnote 6, Model BIT 2016.

enforcement of arbitral awards. Part II of the 1996 Act specifically incorporates the New York Convention into the Indian legal system, providing among others mechanism for enforcement of foreign arbitral awards.

That said, the more pertinent question that does arise is whether the 1996 Act is applicable to investment proceedings and its outcomes. The question of applicability has been considered in decisions rendered by the Delhi High Court in *Union of India* v. *Khaitan Holdings (Mauritius),*[52] and *Union of India* v. *Vodafone Group plc*,[53] and the Calcutta High Court in *Board of Trustees of the Port of Kolkata* v. *Louis Dreyfus Armatures*.[54] The two courts adopted divergent views. The Calcutta High Court acknowledged the applicability of the 1996 Act to grant an anti-arbitration injunction under restricted circumstances. The Delhi High Court, on the other hand, declared inapplicability holding that investment arbitration was distinct from commercial arbitration, which when coupled with India's commercial reservation as regards applicability of New York Convention, did not fall within the ambit of 1996 Act. It must be immediately clarified, that the issue of enforcement of investment awards was not directly in consideration in these cases, yet the observations made therein remain relevant for future discourse on this issue.

Before parting with this issue, a final thought on the reasoning adopted by the Delhi High Court, which drew a distinction between commercial and investment arbitrations, to exclude the latter from the ambit from the operation of 1996 Act. Such distinction seems unnatural given the term commerce as included in Article 301 of the Constitution of India was given an expansive meaning by the apex court in *Atiabari Tea Co. Ltd.* v. *State of Assam,*[55] which was later cited with approval in *RM*

[52] CS(OS).46/2019 (https://indiankanoon.org/doc/93336839/).
[53] CS(OS) 383/2017 (https://indiankanoon.org/doc/15132051/).
[54] GA No.1997/2014 (https://indiankanoon.org/doc/11219533/).
[55] 1961 SCR (1) 809.

Investment & Trading Co Pvt Ltd (India) v. *Boeing Company*[56] to include a wide array of activities. Both these matters are pre 1996 Act, and a bare reading is enough to convince that the court articulated the understanding of commerce bearing in mind the ordinary understanding prevailing at the time when the decisions were rendered. Thus, it would not be too much of a stretch, therefore to suggest that the court would also have located investment within the broader notion of commerce.

Additionally, two ideas lend credence to the above assertion, namely – (a) understanding of commercial as articulated in the UNCITRAL Model Law on International Commercial Arbitration which formed the template for the 1996 Act; and (b) the Commercial Court Act 2015 which identifies appropriate jurisdiction for resolution of commercial disputes. In a clarification provided as regards the scope of application of the UNCITRAL Model Law on International Commercial Arbitration 1996, UNCITRAL had urged that "*The term commercial should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road*."[57]

Similarly, the Commercial Court Act 2015, in Section 2(1) provides – "*(1) In this Act, unless the context otherwise requires - (c) commercial dispute means a dispute arising out of*

[56] 1994 (4) SCC 541, "*the expression commercial should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today*."

[57] UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, 2012, page 7.

– *(vi) construction and infrastructure contracts, including tenders; (xi) joint venture agreements; (xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; (xvi) technology development agreements; (xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;*" A cursory glance would indicate that most entries noted above are also included as part of investments in the Model BIT 2016. Though inclusion in a model BIT is of no consequence as regards definition of commercial in the domestic arbitration law, yet the listing of specific disputes regarding particular assets as commercial disputes, is indicative of how *commercial* may be understood within the Indian jurisdiction. A further indication is this direction is the explanation to section 2(c) which notes "*Explanation. – A commercial dispute shall not cease to be a commercial dispute merely because—(b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions*." Clearly thus, participation of a State entity carrying out public functions, which is the hallmark of an investment arbitration, would not alter the nature of arbitration. The dispute in such instances would continue to be considered as commercial dispute. If both – the type of assets and participating entities are inadequate to alter the nature of dispute, then to suggest that the law draws a distinction between *commercial* and *investment* in so far as dispute resolution is concerned is drawing an artificial barrier.

Clearly therefore in view of the above discussion it could be suggested that while the 1996 Act does not specifically include investment within the ambit of commercial dispute, it is relevant to not lose sight of the fact that it does not exclude it either. Rather reading of other relevant law and apex court decisions, seem to indicate that the term commercial is broad enough to include the notion of investment within its spectrum. If this line of thought were to be adopted then Part II of the 1996 Act would be applicable to investment awards, enforcement of

which is sought in the territory of India. This would have important repercussions such as applicability of Section 48, 1996 Act which outlines conditions whereunder enforcement of foreign arbitral awards may be refused, including among other on the ground of public policy. The provision clarifies that an award would be in conflict with the public policy only if it is in contravention with the fundamental policy of Indian law. Considering protection of basic human rights is a fundamental policy of Indian law, an arbitral award that was rendered in ignorance of (deliberate or otherwise) of basic human rights could be considered as being against fundamental policy of Indian law, and therefore against the public policy of India.[58] Whether such an interpretation would at all be adopted, will have to wait determination by the courts in India. Yet such interpretation does outline an important gateway for human rights consideration to be utilised in evaluating outcomes of international investment arbitration system, if not, specifically within the arbitral proceedings.

VI. CONCLUSION

In the last decade or so, sustainable development has become something of a mantra. International agencies are increasingly outlining various methods and outcomes, achievement of which would secure sustainable development. While economic development is considered to be crucial, human rights are also considered to be an integral part of the overall scheme of things. As a result, for development to be sustainable both economic development and protection and promotion of human rights are considered as absolutely critical. It is this crucial idea that drove the enquiry into the interlinkages of foreign investment (an important source of development) and human rights, particularly in the context of investment disputes adjudication.

[58] For a more detailed discussion on public policy as understood within the Indian arbitration law see, Daniel Mathew, *Situating Public policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance*, 3(1) JNLUD (2016).

The interface of human rights and investment arbitration is a complex one. Though initially such interface was frowned upon, in recent times it has been more readily accepted. This is so because in initial years, international investment law and international human rights law were considered to be distinct and exclusive domains of international law. The resulting exclusivity implied that investment arbitral tribunals would often refuse jurisdiction noting that human rights had no role to play in investment disputes. In recent years, arbitral tribunals have come around and limited outright rejection of interlinkages merely on normative grounds. Instead there is a growing trend whereby arbitral tribunals ground their conclusion as regards human rights utilisation either in limitations noted in treaty text or absence thereof in applicable law. That said increasingly investment arbitral tribunals are utilising principles from human rights jurisprudence such as proportionality, clean hand doctrine, margin of appreciation, etc., in interpretation of substantive protection outlined in international investment treaties.

A more encouraging trend in investment treaty drafting has been inclusion of investor obligations therein. Such obligations include the norm of corporate social responsibility which in turn acknowledges an obligation to respect and protect human rights norms in the conduct of investment operations. Yet most, as particularly exhibited by the Indian Model BIT 2016, fail to make these obligations mandatory, instead contending to leave adherence at the discretion of foreign investors.

India is relatively new entrant to this interaction. In only three out of the twenty-five instances of investment arbitration to which India was a party, were human rights referred to. In none of the three instances was the arbitral tribunal persuaded to utilise these norms in any substantive manner. This is not surprising considering it is still early days for such interlinkages, yet considering the growing acceptance of the importance of such inclusion India must take proactive steps to explicitly include in all existing and future BITs - (a) human rights-based investor

obligations; and (b) human-rights based clarifications that could be utilised by arbitral tribunals as a guide to interpretation of various treaty provisions.

LEGISLATING NET ZERO: THE *DEUS EX MACHINA* FOR A RESILIENT DECARBONIZED FUTURE

Chiradeep Basak[*]

ABSTRACT

There is a mammoth plethora of scholastic legal literature on Climate Change. The dynamic issue of Climate Change is not unknown to us because of its multifaceted prospects and challenges. In this ocean of climate law literature, this paper purports to delve into the emerging scholarship of net zero emission targets. The concept of net zero has gathered momentum since the adoption of Paris Agreement, in 2015. However, there are certain practical aspects of the net zero goal, which has been explored in the said paper. The said article in its introduction, tables the new campaign of race to zero. It further discusses the regulatory pathways to net zero under the said campaign and attempts to draw a parallel analogy from the climate action pathways as emerged under the auspices of UNFCCC, Kyoto Protocol and Paris Agreement. Thereafter the paper discusses the core objectives of several country specific domestic laws pertaining to aspect of net zero in it. While in its penultimate stage, the paper draws a succinct analysis of the net zero frame and thereafter concludes with the notion gathered from the review of this said discourse.

"*Climate Change is not a problem waiting for a solution but it is an environmental, cultural and political phenomenon which is reshaping the way we think about ourselves, our societies and humanity's place on Earth.*"

\- *Mike Hulme*

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I. INTRODUCTION

On November 10, 2016, federal district court Judge Ann Aiken issued an astonishing decision in the atmospheric trust climate case, *Juliana* v. *United State*
[1]- that the children and young adults ranging 9 to 21 years old, have a fundamental right 'to a climate system capable of sustaining human life'.[2] Furthermore, the said decision also recognized the public trust obligation of the federal government towards the conservation of natural resources from the adverse impacts of climate change. Subsequently in 2020, the Dutch Supreme Court in *Urgenda Foundation* v. *State of the Netherlands* breaks a novel ground by upholding that the Dutch State is obliged to reduce, by the end of 2020, its greenhouse gas emissions by at least 25 percent compared to 1990.[3]

Albeit, there is no scientific consensus about the precise level of atmospheric carbon that will induce an unacceptable level of climate change, about whether or when irreversible tipping points may be reached, or even about the level of climate change that would be acceptable.[4] But it is quite acceptable that in the case of climate change and the acceptable levels of greenhouse concentrations in the atmosphere, we are well past the zero-sum threshold.[5]

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[1] Order Denying Motion to dismiss, Civ. No. 6:15-CV-01517-TC, 2016 WL 6661146.

[2] Shalanda Baker, Robin Kundis Craig, Keith Hirokawa, Sarah Krakoff, Jessica Owley, Melissa Powers, Shannon Roesler, Jonathan Rosenbloom, J. B. Ruhl, Jim Salzman, Inara Scott, David Takacs & John Dernbach, *Beyond Zero-Sum Environmentalism*, 47 ENVTL. L. REP. News & Analysis 10350 (2017).

[3] Jaap Spier, *The Strongest Climate Ruling Yet: The Dutch Supreme Court's Urgenda Judgment*, 67 NILR. 319 (2020).

[4] Matthew J. Kiefer, *Toward a Net-Zero Carbon Planet: A Policy Proposal*, 80 U. COLO. L. REV. 963 (2009).

[5] *Ibid*.

In the decades to come, innovation could make severe cuts in emissions, also known as 'deep decarbonization', achievable at reasonable costs by reshaping key sectors in global economy- including electricity, transport, agriculture, by reinforcing positive change where it is already happening and investing heavily wherever it isn't.[6] In this given paper, an enviro-legal navigation of certain nuances of net zero targets have been presented. There are several pre-existing literatures that have delved deeper into these nuances and unravelled certain gaps and opportunities of net-zero. However, this paper aims to explore the global and national legislative approach towards achieving the net zero targets so as to ascertain the prospects of climate resilience in years to come.

II. WHAT IS NET ZERO?

The causal relationship of human induced activities and climate change has been established beyond any reasonable doubts. However, to attain a balance between the crucial variables of anthropogenic gases emitted and the proportion of the same that has to be removed from the atmosphere, a realistic approach of net-zero target has been recognized. Bringing down emissions to absolute zero (gross zero target) might be utopian because we have already opted for a linear singularity towards natural resource exploration and exploitation. By mid-century, the planet is going to lose 10 percent of its total economic value if we fail to achieve our envisaged goals and envision targets of Paris Agreement and Net zero emissions, respectively.[7] Considering our present climate action, the trajectory of temperature escalation will lead to global warming of 2.0-2.6

[6] Ines Azevedo, Michael R. Davidson, Jesse D. Jenkins, Valerie J. Karplus & David G. Victor, *The Paths to Net Zero: How Technology Can Save the Planet*, 99 FOREIGN AFF. 18 (2020).

[7] Guo J, Kubli D and Saner P, *'The Economics of Climate Change: No Action Not an Option'* 34, https://www.swissre.com/institute/research/topics-and-risk-dialogues/climate-and-natural-catastrophe-risk/expertise-publication-economics-of-climate-change.html.

degree Celsius by the middle of the century.[8] In the worst case scenario of a 3.2 degree Celsius escalation in temperatures, the global GDP will take a terrible hit, further leading to a substantial loss of economic value of as much as 14 per cent higher than the targets set under Paris Agreement.[9] The Intergovernmental Panel on Climate Change defines net zero carbon dioxide emissions as a , '*a condition that occurs when the amount of carbon dioxide emitted into the atmosphere by human activities equals the amount of carbon dioxide removed from the atmosphere by human activities over a specified period of time*'.[10]

The adverse impact of Climate Change has a severe implication on the economy. There are associated transitional and physical risks to this negative effect. The physical risks are determined on the basis of damage caused to human lives and property due to extreme climate events while transition risks are associated with the stranded natural resources that comes under the head of conventional forms (coal reserves, fossil fuel deposits) which emerges due to regulatory changes to switch towards new and renewable energy for a low carbon economy. These stranded natural resources reserve further causing systemic deflation risks to the global economy. The anthropogenic greenhouse gases were relatively stable for thousands of years before the onset of industrial revolution. According to the sixth Assessment Report of Intergovernmental Panel on Climate Change, "Achieving global net zero carbon dioxide emissions is a requirement for stabilizing carbon dioxide induced global surface temperature increase, with anthropogenic carbon dioxide emissions balanced by anthropogenic removals of carbon dioxide".[11] Further, the Report also points out that limiting further climate change would require substantial and

[8] *Ibid* at 1.
[9] *Ibid* at 2.
[10] *IPCC Sixth Assessment Report 2021,* https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf.
[11] *Supra* 10.

sustained reductions of greenhouse gases emissions.[12] The science surrounding climate change has crossed the threshold of uncertainty but any successful transition to a resilient net zero emissions framework would require an action driven approach coupled with resilient technological and financial support. The action driven approach to attain a decarbonized economy would require a concrete roadmap of participatory management in actualizing the goals of sustainable development.

Given such prominent dire predictions on climatic events, many environmentalists have fairly advocated for resilient policy making and significant lifestyle changes that crucially involves reduction of carbon dioxide emissions. Their consistent enviro-legal advocacy have also posed serious concerns over the non-realization of three crucial pillars of environmental decision making- right to information, public participation and access to environmental justice delivery system. The urge to raise the benchmark of climate related actions and sustainability have been strongly realized in the last two decades and yet, the existing standpoints are way away from screened targets. To meet the ends of these under-performing measures, many environmentalists have recommended that country parties across the globe should reduce their dependence on conventional sources of energy generation and endeavor to abide by and adopt international initiatives mandating carbon dioxide emission reductions. Furthermore, keeping in mind the respective capabilities of countries, they have also urged the governments to promote, formulate and thereafter implement policies, plans and programs containing such measures to mitigate climate change by targeting economic activity that aims to incentivize cleaner and greener actions or disincentive certain activities that results in substantial amounts of anthropogenic gases. These plans, policies and programs should address all sectors, ranging from energy, transport, real estate, industry, agriculture, forestry, waste management, land use, land use change etc. Since the United Nations Conference on Human Environment in 1972, the

[12] *Ibid*.

world has witnessed several remarkable environmental outcomes and economic transitions. These outcomes have created a multiverse of normative standards across several facets of international, regional and national environmental issues. With the Earth summit of 1992, the countries realized the competing interests of environment and development and gave us the framework convention to deal with climate change (commonly known as the United Nations Framework Convention on Climate Change, UNFCCC). Thereafter, the Kyoto Protocol, which introduced several market based mechanisms where the developed country parties have set economy wide caps for their domestic emissions and developing country parties on the other hand, have focused on specific sectoral plans and programs. These approaches were further shaped and articulated with specific targets through Copenhagen Accord and Cancun Agreements, where the developing country parties agreed to implement several nationally appropriate mitigation and adaptation actions with the aid and assistance of developed nations, while the developed nations on the other hand communicated their quantified economy wide emission targets for 2020. The never ending debacle surrounding climate finance has caused many of these targets, gone on snail-speed. The global negotiations on climate change have not yet managed to break the barriers of geopolitics and semantics because we are barely concerned about this overwhelming crisis and we are already lagging behind. However, with the ushering of this new era of climate actions under the aegis of Paris Agreement, we are still optimistic to escalate our abilities and capabilities to adapt to the adverse effects of climate change and also foster a climate resilient future by enhancing our adaptive capacity and reducing vulnerabilities with an objective to contribute to our envisaged goals of sustainable development. These pre-existing climate actions of mitigation and adaptation have captured immense attention and criticisms since the inception of the UNFCCC but on my way forward, the pre-existing strategies might not ensure desired results. Hence, the '*Race to Zero*' initiative!

III. INTRODUCTION TO RACE TO ZERO CAMPAIGN

The race to zero campaign is a global initiative to rally support and leadership from several stakeholders, ranging from business entities, regions, cities, investors for a resilient zero carbon economy that aims to ensure an inclusive and sustainable growth. It mobilizes a coalition of leading net zero initiatives, representing 733 cities, 31 regions, 3,067 businesses, 173 of the biggest investors, and 622 Higher Education Institutions.[13] Under the said campaign, the members have adopted a Climate Ambition Alliance which commits to achieve net zero carbon dioxide emissions by 2050. This alliance is led by the governments of United Kingdom and Chile with the aid and assistance of the United Nations Development Program (UNDP) and UNFCCC. On the other hand, the non-governmental organizations are led by the High Level Climate Champions for Climate Action. The European Union is also an integral part of this Global Alliance. The goal of this Alliance is in consonance with one of the objectives of the Paris Agreement, i.e. to push for net zero carbon dioxide emissions in line with latest available scientific information. The intensive transformation towards the net zero target requires an active mobilization of several stakeholders across several segments of society. The Race to Zero is the first campaign of its kind to mobilize initiatives and their members to meet rigorous criteria reviewed by an independent Expert Peer Review Group chaired by the University of Oxford.[14]

The Race to Zero is an umbrella campaign driven by science that aggregates net zero commitments from a range of leading networks and initiatives across the climate action

[13] United Nations Climate Change, *Race to Zero Campaign*, https://unfccc.int/climate-action/race-to-zero-campaign.

[14] Global Climate Action, *Climate Ambition Alliance: Net Zero 2050*, https://climateaction.unfccc.int/views/cooperative-initiative-details.html?id=94.

community.[15] This campaign has given an unprecedented thrust to form the largest ever climate alliance committed to attaining net zero carbon emissions by 2050. In the core of any environmental decision, lies the spirit and values of three components: access to information, public participation and access to justice. The United Nations High Level Champions for Climate Action along with the Race to Zero Partners have initiated a public consultation program by calling for written submissions to help articulate the future prospects of the Race to Zero campaign. The written submission emphasized upon four specific areas, which includes: creation of verification climate plan; tracking climate action and quantifiable impact; encouraging a positive policy to ensure integrity; and supporting members and holding them accountable to their commitments, which ensures transparency.[16] The future course of actions is based on the feedback received from several stakeholders in this entire process of public consultation.

A. The triple 'P's of race to zero

The Campaign also draws a starting line by prescribing four 'P's Meta criteria for its participation: *Pledge; Plan; Proceed* and *Publish*:

Pledge at the head of organization level to reach net zero emissions as early as possible, in consonant with the global endeavor to limit the warming to 1.5 degree Celsius. It also set an interim target to attain in the next decade, which reflects maximum effort toward or beyond a fair share of the 50 per cent global reduction in carbon emissions by 2030 identified in the Intergovernmental Panel on Climate Change Special Report on Global warming of 1.5 degree Celsius.[17]

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[15] Water in a Net Zero World, *Introduction to the Race to Zero*, WATER UK, https://www.water.org.uk/netzerowater/racetozero/.
[16] United Nations Climate Change, *Public Consultation on the future of Race to Zero*, https://unfccc.int/climate-action/race-to-zero-campaign#eq-1.
[17] *Ibid*.

Plan envisaged the climate actions that will be undertaken towards attaining the set goals of both aforementioned long term and interim pledges;

Proceed goes with an immediate climate action towards attaining net zero, consonant with the interim targets specified in the *Pledge*

Publish is to ensure access to correct information on the progress of interim and long term pledges, as well as the relevant climate actions being undertaken, annually.

The major setback of climate related actions revolves around the prospects of finance to fund the mitigation and adaptation measures. The High Level Climate Champions under the auspices of this Campaign have established a Finance Sector Expert Group for Race to Zero and Race to Resilience to further advise the Champions on several crucial aspects on fair, rigorous and consistent interpretational guidelines on climate finance. The rationale behind this collective global endeavor is based on the principle of cooperation. The climate action narrative of the Race to Zero campaign is an evolving mechanism that is able to guide and justify its chalked out course of action. Most of the endeavors mull over the need to do something about the adverse impacts of climate change but the said Campaign has shaped an action plan that focuses on what precisely should be done, by whom, how and what cost is dependent on its actual implementation.

B. The sectoral breakthroughs for decarbonized world

The Conference of Parties (COP) 26 President designate Mr Alok Sharma pointed out that, '*it is vital that businesses go net zero, as part of our fight against climate change. which is why we look to all sectors to reach a point at which a clean way of operating becomes the norm. Because if every sector plays its*

part, we will see the global economy on the right path to achieving net zero by 2050.'[18]

In this context, the said Campaign has adopted elaborate sectoral breakthroughs to deliver on its ambition. The Breakthrough ambition has been measured by keeping the challenges of inertia and competition in mind, that often deter any climate based ambition, where an individual stakeholders cannot take the first step without getting themselves at a distinctive disadvantage in the near term but instead the breakthrough could happen, only when multiple sectors with different actors across those sectors streamlines and synchronizes with each to aid and support the gradual transition that will ultimately be beneficial for them. The Campaign has identified five groups where the key actors are falling in to drive a Breakthrough. They are[19]:

- Supply side companies covering the producers, manufacturers and supply chains;
- Demand side companies such as service providers, retailers and distributors;
- Finance actors such as asset managers, asset owners, public funds and banking institutions;
- Policy makers such as regions, states, countries, cities etc.;
- Civil society such as educational institutions, voters, customers, local organizations, sports teams etc.

When each of these groups of actors can see each other working towards a common goal, their actions and progress are mutually reinforcing and it becomes possible to overcome

[18] Race to Resilience, *Launch of the UN Race to Zero emissions Breakthroughs*, https://racetozero.unfccc.int/breakthroughs/.

[19] UNFCCC, *Upgrading our systems together- A global challenge to accelerate sector breakthroughs for COP26- and beyond*, at 5, https://racetozero.unfccc.int/wp-content/uploads/2021/08/2020-Breakthroughs-Upgrading-our-sytems-together.pdf.

obstacles.[20] Such synchronization is easier said than done. Notwithstanding, the varying extent of sectoral amplitude, the influence of an actor (predominantly the big companies) over their contemporaries does not come from their market domination alone. Even in highly fragmented sectors, commitment from the top corporations often generate enough momentum for the whole sector to progress towards their respective sectoral goals by means of external media interest or/and internal best practices sharing.[21] In order to address this issue, the Campaign has adopted a unique approach of targeting specific key actors, or, the biggest corporations, within each respective sector, with a target to recruit 20 percent of their key actors in Race to Zero goal. To attain a decarbonized economy, the sectoral approach aims to engage market influencers and leaders from all segments of the society because that can act as a catalyst for a systemic change in our approach to combat Climate Change. Several sectors have been identified, which includes energy as a core component with clean power, green hydrogen, land use and agriculture, passengers and heavy goods vehicles etc. as its sub-components. In addition, the Breakthrough also identifies specific ambitions, goals and outcomes of real economy sectors such as aviation, heavy industry, chemicals, aluminium, consumer goods, cooling, modes of transport, engineered carbon removal, fashion, information and communications technology, metals and mining, mobile, oceans, pharma and plastics.[22]

IV. CLIMATE ACTION PATHWAYS UNDER UNFCCC

The Marrakesh Partnership for Global Climate Action[23] is facilitated by several tools to enhance climate action for an

[20] *Ibid*.
[21] *Ibid* at 6.
[22] *Ibid* 13, 14.
[23] The Marrakech Partnership for Global Climate Action supports for an effective implementation of the Paris Agreement aiming to strengthen collaboration between key stakeholders and governments to immediately reduce carbon emissions and enhance resilience against adverse impacts of

effective implementation of the objectives of the Paris Agreement. The Climate Action Pathways is an integral tool of the said Partnership. The Pathways were launched in 2019 with a sectoral vision to achieve a 1.5 degree Celsius resilient world in 2050 by bringing overarching transformational milestones.[24]

The Pathways incorporate insights about the exponential nature of the necessary systemic and technological change within sectors, but also focus on the synergies and interlinkages across the thematic and cross-cutting areas in order to assist all actors to take an integrated approach.[25] The given Pathways aim to render a roadmap to enable the country parties and non-party stakeholders to UNFCCC, identify necessary climate actions that are required, by 2021, 2025, 2030 and 2040 as the stepping stones to attain the 2050 vision. Just like the Campaign, the Pathways also have several thematic areas ranging from energy, human settlements, industry, oceans and coastal zones, transport, land use and water with resilience and finance as the cross-cutting areas.

V. Climate resilience under action pathway

The cross-cutting area of climate resilience under Climate Action Pathway is to be determined on the basis of three interdependent outcomes, namely- resilient people and livelihoods, resilient business and economies and resilient environmental systems.[26]

Climate Change and these climate actions are guided by prescribed goals of Paris Agreement and in compliance with 2030 Agenda for sustainable development.

[24] United Nations Climate Change, *Climate Action Pathways*, https://unfccc.int/climate-action/marrakech-partnership/reporting-and-tracking/climate_action_pathways.

[25] *Ibid.*

[26] UNFCC Vision Statement, *Climate Action Pathway Climate Resilience-Executive Summary*, https://unfccc.int/sites/default/files/resource/ExecSumm_Resilience_0.pdf.

Outcomes	Actions
Resilient People and Livelihoods	Early warning systems, green jobs, resilient value chains, social protection and ensuring climate finance for grass-root communities to achieve climate justice and just transition for all
Resilient Business and Economies	Risk management across and within several sectors with special emphasis on infrastructure, energy, transport, industry, cities, agriculture, food, natural ecosystems, ocean and coastal zones and water. In addition, access to climate risk insurance for all forms of enterprises (small/mid/large)
Resilient Environmental Systems	To ensure resilient planetary health and well-being along with sustainable development for all, the biodiversity and natural ecosystems are to be protected as they provide ecosystem services in form of food, air, freshwater, fertile soils and pollination.

The Pathways also enshrines six steps to build climate resilience, which involves:

- awareness generation and advocacy;
- pursuing climate risk assessments;
- develop and thereafter implement appropriate measures;
- mobilization of resources to scale up climate actions and capacity building;
- monitoring, reporting and verification;
- knowledge sharing.

The Pathway aims to meet one of the core priorities of the Presidency of COP 26 to advance adaptation and resilience measures by taking forward the action tracks of the Global Commission on Adaptation and the expected outcomes of the United Nations Climate Adaptation Summit in January 2021.[27] The milestones towards 2050 have to be achieved by segmentation of four target years (as mentioned above, i.e. 2021, 2025, 2030 and 2040).
By 2021, the Pathways targets to put up strategies in place to increase climate resilience of informal settlements and cities by ensuring plans that promote early actions, forecast based climate financing and mainstreaming of climate risks into infrastructure investments and value chains. Alongside, the milestones towards 2021 also promotes use of nature based solutions and gender inclusive climate actions. By 2025, the pathway aims to put early warning climate systems for the benefit of 1 billion people in developing countries; provide climate risk finance and insurance to vulnerable groups of around 500 million people and also ensure 50 developing countries mainstream climate based risks in their respective water resource management systems. The ambit and target figure increases further with slated years of 2030 and 2040, respectively. By 2030, the climate action aims to safeguard the interests of 600 million slum dwellers, 300 million smallholder farmers. In addition, annual investments of USD 6.9 trillion and USD 50 billion for infrastructure and agriculture have been targeted, respectively. Ecological restoration of 350 million hectares of degraded forests and lands are also earmarked for milestones towards 2030 and by 2040, the pathway intends to ensure insulation from climate based vulnerabilities such as flood.

Despite these concrete target settings, the repercussion of multiple climate based risks and vulnerabilities on humans have not been fully comprehended by many actors. Although there is necessary awareness, there is still a gap in the existing knowledge

[27] *Ibid* at 4.

on how to tackle the crisis, leading to limited or inappropriate climate action.

C. Transitioning finance to finance the transition

The real economy and financial markets are projected to be aligned with a resilient and sustainable net zero future by 2050. This is to guarantee that the rise in global temperature is limited to 1.5 degree Celsius. To support the objectives of the Paris Agreement, the business models of asset insurers, managers and owners have to be adjusted so that capital can be mobilized towards a climate resilient and sustainable development. The financial decision making has to consider the climate related risks. For example, the price signals have to be corrected so that the true costs of negative externalities are reflected in balance sheets.[28]

The markets have to be harnessed to ensure a just and smooth transition towards net zero future by framing several policy measures that enables resilient practices that pays heed to both planetary and human health, values and capital. In these schematics of climate resilient finance, the intergenerational equity, fairness and justice are the cornerstones and those long term investments should be rewarded which considers the health and well-being of nature and humans. To prosper in this direction, the environmental laws and policies should further strengthen the nexus between the climate based financial system and the thriving and climate vulnerable society. An increased understanding of climate risk coupled with other sustainability implications within the financial sector, and a shift away from a focus on short-termism and profit at any cost can only foster such a nexus between a thriving society and financial system.[29] This

[28] United Nations Climate Change, *Finance- Climate Action Pathway*, https://unfccc.int/climate-action/marrakech-partnership/reporting-tracking/pathways/finance-climate-action-pathway.

[29] United Nations Climate Change, *Vision and Summary for Finance- Climate Action Pathway*, at 3,

will require the support of both public and private finance mechanisms. Public finance has not given desired results and hence mainstreaming private finance to help corporations realign their respective business models for a net zero future is a plausible option available. Such measures will fund the initiatives and innovations of the private sector and turn billions committed to climate investment through private channels into trillions of total climate investment.[30] Capital has to flow to those who bring up innovative strategies under both adaptation and mitigation measures because it will further help the business houses to avoid increasing costs and risks of a highly carbonized economy.

The UNFCCC's Climate Action Pathway for green finance is guided by the vision that by 2050, financial markets, institutions and systems are in place to support and fund a resilient zero carbon economy and society, ensuring that temperature rise remains limited to 1.5 degree Celsius.[31] Primarily, '*every financial decision takes climate change into account*'. This core vision is in compliance with Article 2(1) of the Paris Agreement, 2015 that targets for a pathway towards climate resilient development and low emissions. The focus of market participants, regulators and non-financial actors on stewarding a smooth transition has avoided a 'Minsky moment' of collapse after over a century of emissions-intensive growth and instead, capital has flowed to providers of solutions for both adaptation and mitigation.[32]

All levels of environmental governance (especially in the developing, least developed and less developed countries) have collaborated with financial market participants to design zero emission, climate resilient projects, with the public financial entities crowding in private investment at the scale that is necessary to bring investable projects to market and this

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https://unfccc.int/sites/default/files/resource/Finance_VisionSummary_V2.pdf.

[30] *Supra* 25.

[31] *Supra* 27 at 2.

[32] *Ibid*.

continuous collaboration now represents business as usual.[33] Where business houses have failed to make a positive transition, support for retraining and employment in the zero emission, resilient economy has ensured a just transition that works for all, respecting the rights of communities and workers throughout the value chain.[34] As a result of this paradigm shift, the innovative power of the market has been harnessed and catalyzed by correcting its failures and the financial system has transitioned so as to enable, rather than thwart, a sustainable, resilient, zero emission economy.[35] The trajectory of further reductions in the emissions and rising emission removal moves through nature based solutions and technological breakthroughs, supported by robust investment is the way forward to limit the rise in global temperatures to 1.5 degree Celsius.

As a theory of change, the Climate Action Pathway for Finance has defined two high level impact areas that the global efforts should now focus on to realize its common objective for 2050, namely- Transitioning finance; and Financing the Transition in alignment with a 1.5 degree Celsius, resilient future. To this end, there are several actions that are to be taken by several actors. These actions include:

- *Closing the valuation gap*[36] by correcting the market failures and unpriced environmental externalities through carbon pricing, terminating fossil fuel subsidies, addressing stranded assets and advancing the circular economy. This is possible with a strong policy drive that can create a positive impact in the market in support of necessary investment to guide the sector transition in the real economy;
- *Handling the short termism and tragedy of the horizon* by promoting scientific knowhow, quantifiable interim targets to shift finance and investment onto a long term

[33] *Ibid*.
[34] *Ibid*.
[35] *Ibid*.
[36] *Ibid* at 6.

path aligned with the Paris Agreement and beyond and utilizing the lengthening of the investment and strategic horizons that a 2050 target brings to align investment horizons with the long term needs of beneficiaries, customers and other major stakeholders in a thriving society;[37]

- *Improving climate risk management and incentives*[38] by engaging with the real economy to acquire necessary and material climate based information. In this direction, the appropriate fiscal incentives should be adopted to drive change in the real economy and the risk management should be aligned with the net zero targets. This also emphasizes upon deploying green capital for several adaptation measures in developing countries;
- *Towards a Zero carbon resilient real assets and infrastructure* by adopting such mechanisms that will ensure capital flows to further strengthen the just and equitable transition away from a carbonized economy and also unlock such green financial flows that provide access to clean energy and other climate resilient solutions for a thriving society with special emphasis on climate based vulnerable groups. In this connection, the developing economies like India should further push to systemic policies that will help to increase access to climate finance for local communities by means of several measures such as financial intermediation, capacity building for project preparation and financial assessment and even emerging market practices of blended finance.

Under this given climate action pathway relating to finance, several initiatives have been launched to equip the financial entities to set and attain net zero goals by 2050. Finance sector initiatives have expanded along the Race to Zero Campaign, with the United Nations convened Net Zero Asset Owner Alliance investors with USD 6.6 trillion in assets under

[37] *Ibid*.
[38] *Ibid*.

management, the Paris Aligned Investment Initiative's Net Zero Asset Owner Commitment, the Net Zero Asset Managers Initiative and the Net Zero Banking Alliance all having come together in April 2021 to launch the Glasgow Financial Alliance for Net Zero.[39]

VI. LEGISLATIVE APPROACHES OF NATIONS TOWARDS NET ZERO

Many countries across the globe have enacted specific normative frameworks for meeting the target of net zero emissions by 2050. These progressive legislations have paved the way for a new horizon to combat climate change by appropriate actions.

Australia- Australia has enacted the *Climate Change and Greenhouse Gas Reduction Act 2010* which defines zero net emissions as 'any emissions of greenhouse gas in the Act are balanced by- avoidance and mitigation activities and emissions offsets outside the Act.'[40] The statute also enumerates that the principal target of the Act is to reduce the greenhouse gas emissions to attain zero net emissions by June 30th, 2045.[41]

Denmark- The Danish *Climate Act 2020* has set a new target to reduce its emissions by 70 percent in 2030 in contrast to the 1990 and climate neutrality by 2050.[42] The said legislation slates a range of measures with a rolling five year target, ten years in advance. Furthermore, the enactment also imposes certain obligations on the government to undergo a parliamentary examination of its actions towards attaining the said targets.

Canada has also enacted the Net Zero Emissions Accountability Act in 2021. This legislation has made Canada's

[39] *Ibid* at 9.
[40] Section 6(2), Climate Change and Greenhouse Gas Reduction Act 2010.
[41] Section 6(1), Climate Change and Greenhouse Gas Reduction Act 2010.
[42] LSE, *Denmark, The Climate Act, 2010*, https://climate-laws.org/geographies/denmark/laws/the-climate-act.

net zero emissions target, a concrete law. The said legislation mandates the successive Canadian administrations to establish carbon reduction targets and accordingly plan to meet those targets every five years from 2030-50.[43] The prime objective of this enactment is to respect transparency and accountability in Canada's endeavor to attain net zero emissions by 2050. This objective has to be achieved with the support of public participation and expert advice. Furthermore, the Canadian government also recognizes that the plan to attain net zero emissions by 2050 should enable the Canadian economy, grow more resilient, competitive and inclusive.[44] The said legislation has also defined net zero emissions as '*the anthropogenic emissions of greenhouse gases into the atmosphere are balanced by anthropogenic removals of greenhouse gases from the atmosphere over a specified period.*'[45]

France has adopted a long term emissions development strategy to attain its net zero target. The 'National Low Carbon Strategy' also known as the *Stratégie Nationale Bas-Carbone* envisages its 'ecological and inclusive transition towards carbon neutrality.[46] To this direction, the strategy aims to make energy production in France, fully carbon free by 2050; reduce energy consumption by half through energy efficiency moves (move to moderate lifestyles); reduce the non-energy emissions drastically (38 per cent in agriculture sector compared to 2015 and remaining 60 per cent in industrial sector compared to 2015 levels); & enhance and safeguard the carbon sinks by promoting forestry and carbon capture and storage technologies. France in alignment with the European Union's Green New Deal aims to introduce carbon pricing at European Union borders.

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[43] Parliament of Canada, *Summary (e), Canadian Net Zero Emissions Accountability Act, 2021*, https://parl.ca/DocumentViewer/en/43-2/bill/C-12/royal-assent.

[44] *Ibid See* the Preamble.

[45] Section 2, Canadian Net Zero Emissions Accountability Act, 2021.

[46] IISD, *France, Switzerland Present Roadmaps to Reach Net Zero by 2050*, https://sdg.iisd.org/news/france-switzerland-present-roadmaps-to-reach-net-zero-by-2050/.

Germany's Federal Climate Change Act of 2019[47] was under the radar of country's Constitutional Court, where the First Senate of the said Court held that the provisions of said enactment governing national climate targets and the annual emission amounts allowed until 2030 are incompatible with fundamental rights insofar as they lack sufficient specifications for further emission reductions from 2031 onwards.[48] The honourable Court held that the existing federal climate legislation of the country is insufficient and partly unconstitutional and hence, it has obliged the German government to introduce details on the emission reduction targets for the period post 2030. This unprecedented ruling has triggered a positive legislative action towards net zero emissions for Germany by imposing an element of state's obligation to protect the 'natural foundations of life', which also includes within itself, the climate protection and the same is closely related to the fundamental rights of citizens.

Hungary- The Parliament of Hungary has adopted a new law in 2020.[49] The said norm highlights climate change as an emergency and it further reaffirms Hungary's existing 2030 target of a 40 per cent reduction in emissions from 1990 levels, leaving the heavy lifting until next decade.[50] Hungary has a Green Bond Framework that contributes to support its ambitious

[47] *Bundesklimaschutzgesetz*.

[48] Bundeverfassungsgericht, *First Senate Federal Constitutional Court Press Release No. 31/2021 of 29 April 2021*, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html.

[49] A klímavészhelyzet kihirdetéséről szóló törvényjavaslathoz (T/7021.) benyújtott, részletes vitát lezáró bizottsági módosító javaslat vitájáról, https://www.parlament.hu/irom41/07021/07021-0010.pdf.

[50] Climate Home News, *Hungary sets 2050 climate neutrality goal in law, issues green bond*, https://www.climatechangenews.com/2020/06/04/hungary-sets-2050-climate-neutrality-goal-law-issues-green-bond/.

climate commitment and raises a part of the necessary funding from the capital markets.[51]

Ireland- The Irish government has passed the Climate Action and Low Carbon Development (Amendment) Act in July 2021. The given law has several key elements, which includes a commitment to pursue and attain national climate objectives no later than 2050 by taking a transitional approach to a climate resilient, environmentally sustainable, biodiversity rich and climate neutral economy.[52] The law also embeds the procedure of carbon budgeting into law and State administration is required to take a series of economy-wide five year carbon budgeting with sectoral targets. In this direction, the law requires a detailed sector specific Climate Action Plan and a national long term climate action strategy to be revised every five years. The law also imposes a legally binding responsibility upon the government ministers to ensure the implementation of net zero targets.

Japan- The Japanese government has revised its pre-existing climate plan from 2018, in 2021. Japan's target of no greenhouse gas emissions on a net basis by 2050 brings it into line with the European Union, which set a target of being carbon neutral by 2060.[53] As part of its commitment to net zero emissions, Japan plans to revise its coal fired power generation; promote research and development on second generation solar powered photovoltaic and carbon recycling technologies; & set up a platform for national and subnational governments to deliberate the way forward for a decarbonized economy.[54]

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[51] Hungary Green Bond Framework, *Hungary Green Bond Framework*, https://www.akk.hu/download?path=64709b3f-e69d-4969-b271-9d1db8f469bd.pdf.

[52] Preamble, The Climate Action and Low Carbon Development (Amendment), 2021.

[53] Reuters, *Japan aims for zero emissions, carbon neutral society by 2050-PM*, https://www.reuters.com/article/japan-politics-suga-idUSKBN27B0FB.

[54] Climate Action Tracker, *Japan's net zero by 2050 announcement a step forward, but 2030 target revision now crucial*,

New Zealand faces the maximum emissions from the farming sector. In 2019, the Kiwis enacted the Climate Change Response (Zero Carbon) Amendment Act. The said legislation provides a framework to develop and implement a stable and clear climate change policies that is in consonance with the goals of Paris Agreement to limit the global average temperature increase to 1.5 degree celsius above the pre-industrial levels and also allow the New Zealand administration to adapt to the impacts of Climate Change. The amended legislation has set a new domestic greenhouse gas emissions reduction target to reduce net emissions of all anthropogenic greenhouse gases to zero by 2050, except biogenic methane (which is the major source of greenhouse in New Zealand) whose emissions target has been set to 24-47 percent below 2017 levels by 2050.[55]

United Kingdom- The Climate Change Act, 2019[56] enunciates a legally binding long term goal to reduce its net emissions to zero by 2050. The Climate Change Committee of the United Kingdom recommended the net zero goal as an appropriate contribution to the Paris Agreement.[57] Based on conservative assumptions the Climate Change Committee estimated that the United Kingdom's net zero emission targets can be achieved at an annual resource cost of up to 1 to 2 percent of GDP to 2050.[58] The Committee also recommended separate targets for Wales and Scotland, which have their own climate laws.[59] The Scottish administration has set the target of net zero emissions by 2045 and Wales has aimed for 95 percent reduction

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https://climateactiontracker.org/blog/japans-net-zero-2050-announcement-step-forward-2030-target-revision-now-crucial/.

[55] Ministry for the Environment, *Preamble, Climate Change Response (Zero Carbon) Amendment Act, 2019*, https://environment.govt.nz/acts-and-regulations/acts/climate-change-response-amendment-act-2019/.

[56] Climate Change Committee, *CCC Insights Briefing 3 The UK's Net Zero Target,* https://www.theccc.org.uk/wp-content/uploads/2020/10/CCC-Insights-Briefing-3-The-UKs-Net-Zero-target.pdf.

[57] *Ibid* at 2.

[58] *Ibid* at 8.

[59] *Ibid*.

in emissions by 2050 relative to 1990 levels with agriculture as their major target sector.[60]

Sweden- Amongst all the countries with enacted laws, Sweden is the first country to upgrade its emissions targets since the adoption of Paris Agreement. Unlike other countries which aim for 2050, Sweden has committed to attain net zero emissions by 2045. The Climate Act of 2018 requires the Swedish government to present an annual climate report in its budget bill and adopt respective climate policies, elaborating climate goals and methodology to attain the same.[61]

VII. A SUCCINCT REFLECTIVE OBSERVATION

The international endeavours to meet net zero emission targets is highly ambitious but not all countries have enacted legally binding obligations in their respective domestic regime. Countries with concrete legislations are primarily from developed economies while the majority of the developing countries have either adopted strategic measures with non-binding elements or expressed intent to attain the goal in form of a submission to the UNFCCC Secretariat. Many of these developing economies are reluctant to adopt stringent laws to curb emissions. This flexibility is quite understandable, given the socio-economic differentiation in the entire political arena of global climate negotiation. Economic aspirations need to be dissociated from anthropogenic gas emissions and this is possible only if the law facilitates a transition from conventional to new and renewable energy sources, on a global scale. The resistance to such transition is still felt from the conventional energy lobby because switching towards greener energy is still perceived as a threat to existing business models. This apprehension can only be

[60] *Ibid*.

[61] Government Offices of Sweden Ministry of the Environment and Energy, *The Swedish Climate Policy Framework*, https://www.government.se/495f60/contentassets/883ae8e123bc4e42aa8d59296ebe0478/the-swedish-climate-policy-framework.pdf.

eliminated by bringing in a constructive move that will facilitate and promote a pragmatic win-win situation.

An effective ecological modernization can act as a tool to overcome the resistance that exists in the present scenario. The ecological modernization is a school of thought that addresses the concerns of sustainability as a design challenge.[62] The aim of ecological modernization is to decouple economic prosperity from environmental damage and this can be attained by transforming key economical, socio-political and technical institutions of modernity to further promote the uptake of more ecologically efficient production and consumption.[63] This move will reduce the existing pressure over natural resources and it will be fruitful for business because more ecologically efficient entities will spend less capital on raw materials. For an effective implementation of ecological modernization, there is a necessity to transition towards resilient technologies that are renewable in nature; there is a need to ensure a consistent incentives to promote the shift towards renewable energy (in form of feed-in tariffs, subsidies); the negative externalities should be internalized by imposition of cap & trade or carbon taxation; there should be engagement with social movements with the involvement of all stakeholders and finally win-win scenarios have to be encouraged where the competing interests of development and environment have to be balanced.

VIII. CONCLUSION

The climate system of the planet has degraded over the last few decades and this has resulted in serious socio-economic and political ramifications. The net zero goals have taken a dynamic shape over the last few years with countries adopting and enacting specific laws to facilitate these targets and in many cases, the judicial pronouncements have also contributed to do

[62] Howes M. (2018) *Joining the Dots: Sustainability, Climate Change and Ecological Modernisation*. In: Hossain M., Hales R., Sarker T. (eds) Pathways to a Sustainable Economy. Springer, Cham. p 18.
[63] *Ibid*.

the same. Although the remarkable Paris Agreement is a commendable achievement but the pledges and review process of the same is neither timed nor structured to attain its own goals. There is an emergence of creation of regulatory frame for low carbon investments but the neither the political pressure nor the regulatory certainty for the decarbonized investments are historically supportive or empirically convincing. Paris goals have created an ex-post rationalizations rather than a concrete design to actually bring them into reality. These net zero laws and several other policy expressions appear more of a heady optimism with a political glamour that only signals decarbonized investments but refrains from sharing concrete sectoral action plans. The architecture of net zero goals need a reasoned and practical standard setting rather than a glorified piece of text with a mere signal of enhanced action drawn from political interests and motives. The present momentum of low carbon technological transition could in fact overwhelm lock in political dynamics and inertia. Hence, the promotion of decarbonized/negative emissions technological knowledge needs a push to bring us back from the brink of further degradation. The existing legislative architecture of the Paris Agreement or even domestic measures might not be the decisive factor for revolutionary change but it surely does symbolize a universal approach to combat Climate Change.

TRANSPARENCY IN THE ELECTION PROCESS IN INDIA: THE NEED OF THE HOUR

Himanshu Ranjan Nath[*]

ABSTRACT

Democracy has been held as a "government of the people, by the people and for the people". It is the periodical elections to choose the government that provides the life to the flesh of democracy where peoples' participation is must. Elections are no doubt, is not the end of democracy. It is indeed, a means to attain and sustain a healthy democracy. Election and democracy therefore, can be considered as two sides of the same coin. This implies that without free and fair elections, democracy cannot sustain. Free and fair election in India, has been held as the part of Basic Structure of the Constitution. The Preamble to the Constitution of India pledges to provide political justice to the people of India. Without a free and fair election it cannot be assured. As election in a democracy determines the fate of power bearers therefore, in elections many practices which are against the democratic ethos seen to be undertaken by political parties/candidates to shape the electoral outcome to suit their interest and our electoral system is not an exception to it. In India, although, we have the Election Commission of India as a robust constitutional body to direct, monitor and superintendent elections, it is not fully able to prevent mushroom increase of different methods of electoral fraud despite numerous steps it has undertaken to eradicate the same. The authors in this paper makes an endeavour to understand the contours of bringing transparency in the electoral system of our country so that free

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and fair elections can be hold with an analysis of the relevant steps taken by the Election Commission, legislature and the judiciary in this regard.

I. INTRODUCTION

Free and fair election is considered as the backbone of a healthy democracy and it is also an inalienable right of the people living in a democratic setup. Affirming the need of a free and fair election, the *Universal Declaration of Human Rights* [1] states:

> "*Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right of equal access to public service in his country. The will of the people shall be on the basis of the authority of the government; this will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*[2]

The role of elections is unprecedented for a democracy. Election and democracy can be considered as two sides of the same coin. This means that without free and fair elections, democracy cannot sustain. Election is the method through which the preferences of electorates, voting in an election is converted into a political mandate that in turn forms the basis for all legal and policy decisions. As election in a democracy determines the fate of power bearers, sometimes, in elections many practices which are against the democratic ethos are seen to be undertaken by political parties/candidates to shape the electoral outcome to

[1] Adopted by the United Nations General Assembly on 10th December, 1948 and regarded as customary international law.
[2] Universal Declaration of Human Rights 1948, Article 21.

suit their interest. These practices include coercing or bribing the electors, booth capture, seeking vote in the name of religion, etc. The legal framework that lays down the basic principles for fruitful conduct of elections across the globe terms such unholy practices as corrupt practices.[3] It has been witnessed that these corrupt practices undermine the values of election in general and affects the public trust in the democracy in particular.

In India, elections are no less than a festival of democracy as it within its ambit encapsulates the wish and aspiration of millions of people as to their choice of governance. With elections, comes the responsibility of a number of people and state machineries including the Constitutional body, 'the Election Commission' to conduct those elections. Since India is the largest democracy with over 800 million registered voters, and in addition to that there is a multi-party system therefore, the responsibility reposed with the institution and people to conduct free and fair election is immense. The mushroom increase of different methods of electoral fraud is adding fuel in the fire and has become one of the leading causes of concern.

Electoral frauds can be of different types. It may be in the form of disproportionate spending by a candidate in his election campaigns or it may be in the form of huge unaccounted amount of money that political parties use to spend in their election campaigns, the sources for which always remain unknown. In addition to electoral fraud, the biggest challenge at the moment is the frequent entry of the criminals in the field of politics to save themselves from the scourge of law. They think that once they will become lawmaker, they will no more be considered as law breakers or it will be easy for them to remain scot free.

Due to the above mentioned anomalies, in India, it is considered that if one has to win an election he/she must have the backing of either money or muscle. To make elections free from

[3] For example: Section 123 of The Representation of the People Act 1951; Sections 594, 597, 606 of the Federal Election Campaign Act 1971.

all these practices and to bring more transparency in the electoral process, several reforms have been undertaken from time to time. These include the introduction of EVMs[4] and VVPAT.[5] The Election Commission of India on numerous occasions has cleared its position as to bring transparency and fairness in the election process.[6] A major and leading part has also been played by the judiciary in this regard. From time to time, the higher judiciary in India, through its dynamic and progressive judgments have indicated the need to conduct free and fair elections[7] and also to restrict the entry of the criminals in politics.[8]

The author in this paper makes an endeavour to understand the contours of bringing transparency in the electoral system of our country with an analysis of the relevant steps taken by the legislature and the judiciary in this regard.

II. EXAMINING THE CONTOURS OF INCLUDING POLITICAL PARTIES UNDER RIGHT TO INFORMATION ACT

Elections are the most basic and important facet of a democratic country. The life of democracy is dependent on the fruitful conduction of free and fair elections. Democracy as Abraham Lincoln termed is a "government of the people, by the people and for the people". The essence of democracy as

[4] Electronic Voting Machine, the electronic voting was developed and tested by the state-owned Electronics Corporation of India and Bharat Electronics in the 1990s. They were introduced in Indian elections between 1998 and 2001, in a phased manner. The electronic voting machines have been used in all general and state assembly elections of India since 2004.

[5] Voter Verifiable Paper Audit Trail, in India it was introduced in 8 of the 543 parliamentary constituencies as a pilot project in 2014 general election. It was implemented in Lucknow, Gandhinagar, Bangalore South, Chennai Central, Jadavpur, Raipur, Patna Sahib and Mizoram. It was first use in an election in India in September 2013 in Noksen (Assembly Constituencies) in Nagaland.

[6] Model Code of Conduct, *Law Commission of India 255th report on Electoral Reforms*, March 2015.

[7] *Indira Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299 (India).

[8] *Manoj Narula* v. *Union of India*, (2014) 9 SCC 77 (India).

depicted from the above statement is that in a democracy the peoples' participation is must and election is a primary facet of democracy where people can effectively participate in the making and unmaking of a government. In an election, the voters expect that their views are going to be represented through the leaders elected by them. Thus, the assurance of free and fair elections is indispensable for a functioning democracy.

The emphasis on the fact that democracy demands free, fair and unbiased election is trite but imperative. In India, under the Constitution, there is no provision regarding party system but it has gradually become an indispensable part of the democratic fabric of the nation.[9] The Supreme Court of India in this context has beautifully put forward the gospel truth in the following words*: "[T]o abolish or ignore the party system would be to permit a chorus of discordant notes to replace an organised discussion…It is, therefore, idle to suggest that for establishing a true democratic society, the party system should be ignored."*[10] The politics of India works within the framework of the country's constitution. India is a federal parliamentary democratic republic in which the President of India is the head of state and the Prime minister of India is the head of government. India follows the dual polity system that consists of the central authority at the centre and states at the periphery.

Political parties are indispensable for holding election in India. Majority of the candidates contesting elections in India, either for a seat in the Parliament or in the state assemblies are backed by some or other political parties. These political parties, on the other hand, are organised bodies which further their collective interest of securing power projecting their selected candidates in the constituencies. In most cases, win-ability of a candidate surpasses the other reasons like, education, honesty, social work etc. while selecting a candidate for a constituency.

[9] The 52nd Constitution (Amendment) Act 1985, however incorporated the word political party in the constitution for the first time in 1985.
[10] *Rama Kant Pandey* v. *Union of India* AIR 1993 SC 1766 [9] (India).

The predominance of political parties in election in India is such that, in the current Lok Sabha only 0.99% MPs are not affiliated to any party.[11] For the sustenance of healthy democracy in India, therefore it becomes imperative for the political parties to be transparent in its functioning and to ensure that the voter's faith in the electoral process is not compromised with.

The Right to Information Act[12] (hereinafter, the RTI Act) is the most commendable product of the Parliament of India whose primary objective is to provide people assurance of transparency in the working of the public offices. The RTI Act paved way for several whistle blowing unveiling lots of incidents of corruption. Although the Act is proved to be seminal in case of bringing transparency across public offices, it has very less contribution towards bringing transparency in the electoral system of our country. Because, with the mandate provided by the instant Act only those information can be accessed which belong to or are in possession of a public authority.[13] The political parties in India, as per the RTI Act cannot directly be termed as public authority and the larger problem is that the political parties are outrageous against such inclusion and have been constantly opposing the idea.[14] In the following discussions

[11] Sumalatha Ambareesh (Mandya, Karnataka), Navnit Ravi Rana (Amravati, Maharashtra), Naba Kumar Sarania (Kokrajhar, Assam), Mohanbhai Sanjibhai Delkar (Dadra & Nagar Haveli).

[12] Right to Information is an act of the Parliament of India which sets out the rules and procedures regarding citizens right to information. It replaced the former Freedom of Information Act, 2002. This law was passed by Parliament on 15 June 2005 and came fully into force on 12 October 2005. RTI is a legal right for every citizen of India. The authorities under RTI Act are quasi-judicial authorities. This act was enacted in order to consolidate the fundamental right in the Indian Constitution 'freedom of speech'.

[13] Right to Information Act 2005, s 2(h), (India).

[14] Political parties may have differences over most of the policy issues, but when it comes to opposing RTI, there seems to be an 'unusual' but strong consensus across party line, especially in the case of national parties. Major national parties including the BJP, the Congress and the Communist Party of India have expressed their displeasure towards the RTI on grounds such as 'snooping and spying' and 'interference in internal affairs of parties.

the authors delves into the development of potential nexus between the political parties and the RTI Act.

Section 2(h) of the RTI Act, 2005 defines 'public authority'. This definition mentioned in the aforesaid provision brings two sorts of authorities under its purview. Firstly, it includes bodies created under the Constitution of India, those created under Acts made by Parliament or State Legislature, and those created by order or notification issued by the central or the state government. Secondly, it includes:

a) Bodies owned, controlled and substantially financed by the central or state government,
b) Non-Governmental Organisations substantially funded (directly or indirectly) by central or state government.

The debate as to whether political parties should be included within the purview of Right to Information Act is connected with the second category of authorities mentioned above.

As per the definition given, in case of the second category of authorities under the RTI Act, an authority to be called as public authority must be directly or substantially financed by the central or state government. Now, let us examine whether political parties fall under this definition or not. A political party, in India, receives state aids and funds in the following manner:

a. Land which are received at concessional rates,
b. Houses received at concessional rates,
c. Free broadcasting facilities by All India Radio and Doordarshan,
d. Contributions made by individuals and companies which are deductible from the total income of the contributor as per Section 80 GGB of the Income Tax Act, etc.

From the above mentioned list it is apparent that political parties in India has backing of the government at least from the point of view of lands and houses it receives at a concessional rate from the government. Therefore, there was demand and debate as to the inclusion of political parties within the definition of 'public authorities' under the RTI Act. The debate was further boosted by the filing of an application under the RTI Act by the Association for Democratic Reforms[15] (hereinafter ADR) to all national political parties in India in 2010 seeking information about '10 maximum voluntary contributions' received by them in past five years. Not a single party came forward to disclose that information. The Indian National Congress (the party leading the then government) replied to the instant RTI that it does not fall under the preview of the RTI Act. The Bharatiya Janata Party (hereinafter BJP), the leading opposition at that time and a claimed crusader against all sort of corruption even did not bother to reply to the application made. This led ADR to file a complaint to the Chief Information Commission[16] (hereinafter CIC) against the parties for their refusal to the information sought. Subsequently, Mr.Anil Bairwal and Mr.Subhash Chandra Agrawal (two Delhi based whistle blower) filed a petition requesting the CIC to consider the inclusion of political parties under the definition of 'public authorities' for the purpose of the RTI Act.

The case was examined for long three years and after hearing all the sides the CIC delivered its largest judgment till date declaring six national political parties to be within the meaning of public authorities under the RTI Act. These parties

[15] The Association for Democratic Reform (ADR) was established in 1999 by a group of professors from the Indian Institute of Management (IIM) Ahmedabad. In 1999, Public Interest Litigation was filed by them with Delhi High Court asking for the disclosure of the criminal, financial and educational background of the candidates contesting elections. Based on this, the Supreme Court in 2002, and subsequently in 2003, made it mandatory for all candidates contesting elections to disclose criminal, financial and educational background prior to the polls by filing an affidavit with the Election commission.

[16] Right to Information Act 2005, s 6(1) (India).

included the Indian National Congress, Bhartiya Janata Party (BJP), Communist Party of India (Marxist) (hereinafter CPI), Nationalist Congress Party (hereinafter NCP), Bahujan Samaj Party (hereinafter BSP) and Communist Party of India (hereinafter CPI). The CIC in its judgment ordered that the above mentioned parties had to designate one Chief Public Information Officers and appellate authorities for each party at their headquarters within a period of 6 weeks times. But, this decision given by the CIC was not complied with by the mentioned political parties.

Instead of complying with the orders given by the CIC in an unprecedented move a Bill was introduced in the Lok Sabha on 12th August, 2013 to amend the RTI Act with a view to ensure that the political parties remain outside the purview of the definition of 'public authorities' and hence outside the RTI Act.[17] The statement of object and reasons of the abovementioned Bill states that if the political parties are included in the definition of 'public authorities', it would affect the internal functioning of the political party and would be lead to misuses by political opponents and rivals. The Bill tabled in the Lok Sabha proposes an amendment to Section 2 of the RTI Act that states: "Authority or body or institution of self-government established or constituted by any law made by Parliament shall not include any association or body of individuals registered or recognised as a political party under, The Representation of the People Act, 1951."[18]Additionally, the proposed Bill also inserted a new provision in the RTI Act that empowers the negation of any order or judgments passed in this regard by any Commission or Court. However, the Bill got lapsed in 2013 itself. The political parties, despite being institution whose duty is to uphold rule of law has not appeared to do the same in the instant case. If they were against the order of CIC they had the option to appeal against the same in the High Court or even in the Supreme Court. Instead,

[17] The Right to Information (Amendment) Bill 2013.

[18] Vidya Subramanian, *'First-ever amendment to historic RTI Act tabled in Lok Sabha'*, THE HINDU (New Delhi, 12 August 2013).

they conspiringly introduced a Bill to amend the RTI Act which is disgraceful.

The political parties did not respond to several notices issued by the CIC including an order of non-compliance issued in 2015 in the above matter. The ADR eventually filed a Public Interest Litigation[19] in the Supreme Court to bring the political parties under the RTI Act in May 19th, 2015. In an another instance, a writ petition was filed in the Supreme Court by Mr. Ashwini Upadhyay (advocate and BJP Leader) in 2019 to declare political parties registered under Section 29A of The Representation of the People Act, 1951 as 'public authorities' and hence within the meaning of Section 2(h) of the RTI Act.[20] Both the petitions are still pending.

In the humble opinion of the authors, political parties should be included within the meaning of the RTI Act. This will ensure transparency and accountability in the working of the parties and hence ensure peoples' faith in democracy. The disclosure would also ensure reduction of corruption, information about donations, expenditure by political parties, etc. It is manifestly arbitrary and a violation of the basic constitutional norms of democracy, as well as rights of voters under Article 19(1) (a) of the Constitution of India that provides for right to information as an un-enumerated fundamental right[21] as the voters are deprived and denied access and information concerning the sources of income as well as returns filed by political parties who avail of large scale exemptions under Section 13A of the Income Tax Act, 1961.

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[19] Public Interest Litigation means that even people who are not directly involved in the case, ay bring to the notice of the court, matters of the public interest. It is a privilege of the court to entertain the application for the public interest litigation. PIL is important because Justice is now available to the poor and weaker sections of the society.

[20] *Ashwini Kumar Upadhyay* v. *UOI & Anr* Writ Petition (Civil No. 941/2017) (India).

[21] *People's Union for Civil Liberties & Anr* v. *Union of India & Anr* Writ Petition (Civil No. 161/2004) (India).

III. ELECTORAL BONDS: AN INNOVATIVE MEASURE TO CHECK UNDER TABLE TRANSACTIONS

Political funding is a murky business in all sorts of democracies irrespective of its size and duration. Illegal and under the table donations intending to buy influence or policy favours have clouded all democracies and India is no exception to this malpractice. The addition of political financing scheme named Electoral Bonds (EB) by the National Democratic Alliance (NDA) in 2017 aroused huge public interest for its alleged role in furthering the murkier trends in political funding.[22]

Electoral Bonds were introduced as a novice measure and as a new channel for funding political parties in India through the Finance Bill of 2017. The same was notified by the Ministry of Finance on January 2, 2018. The Union Budget which devoted a full section on electoral reforms, particularly new channels of political funding, introduced the novel bonds scheme to check rampant "under the table cash transactions".[23] The primary aim with which these bonds were introduced was to infuse political system with white money.

An electoral bond is a bearer instrument as that of promissory note. It is an interest free banking instrument whereby a citizen or a business entity in India is eligible to purchase the bond from specified banks by the government either by a cheque or by digital payment. These bonds will be valid only for 15 days and shall not carry the donor's name. In order to receive donation by the Electoral bonds, a political party must be registered under Section 29A of The Representation of the People Act, 1951 and must have secured not less than one per cent of votes polled in the

[22] NiranjanSahoo, "*Decoding India's Electoral Bonds Scheme, 2019*", https://www.orfonline.org/expert-speak/decoding-indias-electoral-bonds-scheme-58260/.
[23] *Ibid.*

last general election to the House of the People or the Legislative Assembly of the State.[24]

Though, the introduction of electoral bond is a major step in order to bring transparency in the funding of political parties, this scheme has its own drawbacks. Several political parties in India including the Congress have opposed the introduction of the electoral bond system. The critics of this system has emphasised that the penultimate drawbacks that is associated with the bond system is its anonymity clause under which the political party is immune from disclosing donors identity. This opacity in donation has a tendency to make the free flow of black money smooth in the system. The introduction of electoral bonds has also removed the cap of 7.5% on corporate donations[25]; this will allow a lot more donations even from the companies making loss.

IV. THE ANTECEDENTS OF THE CANDIDATES: UNDERSTANDING THE PAST TO SECURE THE FUTURE

In the 170th Report[26] of the Law Commission of India (submitted to the Government of India in 1999) suggested amendments in The Representation of the People Act making provisions for the purpose of disqualifying persons facing criminal charges to obstruct the entry of criminals into politics. One of the suggestions that the commission has put forth was that antecedents as also the assets of each candidate at an election should be published before their nomination were accepted. But step heed was given by the government to these benevolent recommendations.

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[24] *Ibid.*

[25] The Finance Act, 2017 has removed the existing cap of 7.5% of the net profit in the last three years on campaign donations by companies and have legalized anonymous donations.

[26] Law Commission of India 170th Report on Reform of Electoral Laws, May 1999.

Subsequently, after this Report of the Law Commission, a writ petition was filed before the Delhi High Court by the Association for Democratic Reforms in December 1999. On 2nd November, 2000, the Delhi High Court held[27] that the court could not give a direction to the government or Parliament to amend the law; but the electors had a right to information as part of their fundamental right to freedom of speech of expression enshrined under Article 19(1)(a) of the Constitution, by virtue of which they can ask for the antecedents of the contesting candidate, which in turn will ensure that the persons with questionable backgrounds do not occupy seats in Parliament and state legislatures. The High Court directed the Election Commission to secure the voters certain information with regard to the antecedents of the contestant and the parties they represent either to the election of Parliament or state legislature. A per the instant Order the information should contain:

a) The criminal antecedents of the candidate, if any;
b) Assets possessed by a candidate, his or her spouse and dependent relations;
c) Educational qualifications of the candidate as well as facts regarding his competence, capacity and suitability for acting as law-maker; and
d) Information to access the capacity and capability of the political party fielding the candidate.

This order was challenged by the Central government by filing an appeal before the Supreme Court.[28] In appeal, the Election commission prayed to modify the direction given by the High Court, especially to give information regarding the capacity and capability of the political parties, as the Commission considered that it would impinge upon its neutrality and impartiality. After hearing contentions from both the sides the Supreme Court by its Order on 2nd May, 2002 held that:

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[27] *Association for Democratic Reforms* v. *Union of India and Anr* AIR 2001 Delhi 126, 2000 (57) DRJ 82 (India).
[28] *Union of India* v. *Association for Democratic Reforms* Appeal (Civil No. 7178/2001) (B. SHAH, B.P. SINGH, H.K. SEMA, JJ.) (India).

1) The Election Commission has a wide jurisdiction which provide it powers, to conduct smooth election;
2) The plenary powers of Election Commission are subservient to the laws made by the parliament or the state legislature. When there is no law, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair elections;
3) Disclosure of criminal antecedents as well as assets contemplates the fair election, because this gives the elector the choice to choose the competent candidate;
4) In a democracy the electoral process has a strategic role, and the commission can ask the candidates about the expenditure incurred by political parties to bring transparency;
5) The right to get information in democracy is recognized all throughout and it is natural right flowing from the concept of democracy; and
6) Casting of votes by a voter in India is covered under freedom of speech and expression, and for this purpose information about the candidate to be selected is must.

In addition to above, the Apex Court also directed the Election Commission to call for information on affidavit by virtue of its power under Article 324[29] from each contesting candidate seeking election to Parliament or the state legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:

a) Criminal antecedents of the candidate, if any, and whether he is punished with imprisonment or fine;

[29] Superintendence, direction and control of elections to be vested in an Election Commission.

b) prior to six months of filing the nomination, is there any pending case, of any offence which is punishable with the imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law, if so details of the same;
c) the assets of the candidate, his/her spouse and that of dependants;
d) liabilities, if any, particularly whether there are any over dues of any public financial institution or government dues; and
e) the educational qualification of the candidate.

The Election Commission of India issued an order on 28th June 2002, requiring the candidates to file affidavits giving the information asked for vide the Supreme Court's Order. Subsequent to this Order issued by the Election Commission of India, the President of India promulgated The Representation of the People (Amendment) Ordinance, 2002,[30] inserting Sections

[30] The Representation of the People (Third Amendment) Act, 2002, Act No. 72 of 2002 [28th December, 2002].

33A,[31]33B,[32] and 125A[33] in The Representation of the People Act[34] and amending section 169[35] of that Act, thereby diluting the Commission's order.

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[31] Right to information.- (1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub- section (1) of section 33, also furnish the information as to whether-
(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;
(ii) he has been convicted of an offence[other than any offence referred to in sub- section (1) or sub- section (2), or covered in sub- section (3), of section 8] and sentenced to imprisonment for one year or more.
(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub- section (1) of section 33, also deliver to him an affidavit sworn specified in sub- section (1). by the candidate in a prescribed form verifying the information.
(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub- section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub- section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.".
[32] Candidate to furnish information only under the Act and the rules - Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."
[33] Penalty for filing false affidavit, etc.- A candidate who himself or through his proposer, with intent to be elected in an election,-
(i) fails to furnish information relating to sub- section (1) of section 33A; or
(ii) gives false information which he knows or has reason to believe to be false; or
(iii) conceals any information, in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub- section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.".
[34] 1951.
[35] In section 169 of the principal Act, in sub- section (2), clause (a) shall be renumbered as clause (aa) thereof, and before clause (aa) as so renumbered, the following clause shall be inserted, namely :-" (a) the form of affidavit under sub- section (2) of section 33A.

The Association for Democratic Reforms and People's Union for Civil Liberties filed a writ petition[36] before the Supreme Court challenging the Constitutional validity of the Presidential Ordinance. Subsequently, the Supreme Court, by its order and judgment on 13th March, 2003, declared newly inserted Section 33B of The Representation of the People Act as illegal and null and void. After this judgement, the Election Commission issued a fresh Order on 27th March, 2003. The Commission's Order provided that:[37]

a) Every candidate shall furnish full and complete information in regard to all the five matters (mentioned above) as Specified by the Supreme Court, in an affidavit;
b) The said affidavit shall be duly sworn before a magistrate of the first class or a Notary and Public or a commissioner of Oaths appointed by the High Court of the state concerned;
c) Non- furnishing of the affidavit shall cause the nomination of the candidate cancelled by the returning officer;
d) The information furnished by the candidate on the affidavit shall be disseminated by the respective Returning officer; and
e) If any rival candidate furnishes information to the contrary, by means of a duly sworn affidavit, then such information will also be disseminated.

The above compulsory information to be submitted at the time of nomination by a candidate intended to contest an election is still binding and violation of the same will lead to cancellation of candidature.

[36] *People's Union of Civil Liberties and Anr v Union of India and Anr* Writ Petition (Civil No. 490/2002, 509/2002, 515/2002) (India).
[37] Election Commission of India Order Dated 27th March, 2003 Regarding Criminal Antecedents, Assets and Liabilities And Educational Qualifications Of Candidates.

In a recent Supreme Court judgment[38], the Court exercising its constitutional powers under Article 129[39] and 142[40] of the Constitution of India, issued following directions:[41]

a) It shall be mandatory for political parties (both at the Central and State election level) to upload on their website detailed information regarding individuals with pending criminal cases (including the nature of the offences, and relevant particulars such as whether charges have been framed, the concerned Court, the case number etc.) who have been selected as candidates, along with the reasons for such selection, as also as to why other individuals without criminal antecedents could not be selected as candidates.
b) The reasons as to selection shall be with reference to the qualifications, achievements and merit of the candidate concerned, and not mere "winnability" at the polls.

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[38] *Rambabu Singh Thakur* v. *Sunil Arora and Ors* Contempt Petition (Civil No. 2192/2018 In W.P. Civil No. 536/2011 with Contempt Petition Civil No. 428/2019 In W.P. Civil No. 536/2011 & Contempt Petition Civil No. 464/2019 In W.P. Civil No. 536/2011) (India).

[39] Supreme Court to be a court of record The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

[40] Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc. (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.
(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

[41] above 38, [4].

c) The required details mentioned in column a) and b) shall also be published in:

   One local vernacular newspaper and one national newspaper;

   On the official social media platforms of the political party, including Facebook & Twitter.

d) These details shall be published within 48 hours of the selection of the candidate or not less than two weeks before the first date for filing of nominations, whichever is earlier.

e) The political party concerned shall then submit a report of compliance with these directions with the Election Commission within 72 hours of the selection of the said candidate.

f) If a political party fails to submit such compliance report with the Election Commission, the Election Commission shall bring such non-compliance by the political party concerned to the notice of the Supreme Court as being in contempt of this Court's orders/directions.

The directives issued by the Supreme Court in regard to bring transparency and credibility in the electoral system portraits the tireless judicial approach in bringing fairness in elections to the Parliament and the State Legislative Assemblies in India.

V. ELECTRONIC VOTING MACHINE: INTRODUCING TECHNOLOGY IN THE ELECTORAL PROCESS

The Electronic Voting Machine (hereinafter, EVMs) was introduced in India as a replacement to ballot box. The idea to have EVMs in election in India was first conceived by the Election Commission in 1977 and the Electronics Corporation of India Limited, Hyderabad was assigned the task to design and develop it.[42] A proto type, developed in 1979, was demonstrated

[42] Election Commission of India, *Manual on Electronic Voting machine and VVPAT*, Document 2 edition 4, February 2019, p 1.

by the Election Commission of India before the political parties on 6th August 1980.

For the first time, the EVMs were supposed to be used in the Legislative Assembly election in Kerala in 1982, but the use of these voting machines was dropped, because there was no law at that point of time prescribing the use of such voting machines in elections. In 1989, The Representation of the People Act[43] was amended by the Parliament, to insert a new provision for the use of the EVMs in the election. A consensual introduction of the EVMs was reached in the year 1998, when it was used in 25 constituencies across three states (Madhya Pradesh, Rajasthan, Delhi), and it was further expanded to 45 constituencies in the year 1999. In the 2001 State Legislative Assembly elections of Tamil Nadu, Kerala, Pondicherry and West Bengal, EVMs were used in all the constituencies. Since then, for every State Assembly election, the Commission has used the EVMs. In 2004 general election EVMs were used in all 543 Parliamentary Constituencies in the country. An EVM consists of two units, namely, Control Unit and Balloting Unit with a cable (5t. long) for connecting the both.[44]A balloting Unit caters up to 16 candidates.

Section 61A was inserted in The Representation of the People Act, 1951, by the way of an amendment in the year 1988. The section reads as:[45]

> *"61A. Voting machines at elections- Notwithstanding anything contained in this Act or the rules made thereunder, the giving and recording of votes by voting machines in such manner as may be prescribed, may be adopted in such constituency or constituencies as the Election Commission may, having regard to the circumstances of each case, specify."*

[43] 1951.
[44] above 43.
[45] The Representation of the People Act 1951, s 61A (India).

Explanation- *For the purpose of this section, "voting machine" means any machine or apparatus whether operated electronically or otherwise used for giving or recording of votes and any reference to a ballot box or ballot paper in this Act or the rules made thereunder shall, save as otherwise provided, be construed as including a reference to such voting machine wherever such voting machine is used at any election.*

This provision of The Representation of the People Act[46] has been upheld by the Supreme Court of India in *All India Anna Dravida Munnetra Kazhagam* v. *Chief Election Commissioner and others.*[47] In this case, two issues were raised before the Apex Court. One issue was regarding the unconstitutional use of the EVMs and the other was regarding the possible tapering of it.

In the case of *Dr. Subramanian Swamy* v. *Election Commission of India*[48], the Supreme Court reaffirming its above mentioned decision added that the voter has a right to know his voting in the electronic voting machine and he can have a proof of it.

The main reason why the EVMs were introduced in India was the problem of booth capturing which was prevalent throughout India, when paper ballots were used. EVMs were considered to discourage these practices by limiting the rate of vote casting to five per minute.[49] Though, this factor did not immediately stop the practice of booth capturing but the instances of booth capturing were now lesser in number. Under paper ballots, signature or thumb impression of the voter was recorded on the counterfoil of a ballot, which was not open to inspection

[46] 1951.
[47] 2002(UJ) (1) 387.
[48] 2013 (10) SCC 500 (India).
[49] Madhavan Somnathan, '*India's Electoral Democracy: How EVMs Curb Electoral Frauds'* (*Brookings,* 5 April 2019), https://www.brookings.edu/blog/up-front/2019/04/05/indias-electoral-democracy-how-evms-curb-electoral-fraud.

expect under the orders of a court. But under EVMs they are maintained in a register which is open to inspection by public or anyone willing to file a petition to challenge the election. From this stand point, EVMs has brought more credibility in the election system. However, allegations by many political parties as to the hacking and tempering of EVMs by the party in power are also there.

VI. VOTER VERIFIABLE PAPER AUDIT TRAIL: ANOTHER STEP TOWARDS ELECTORAL TRANSPARENCY

Voter Verifiable Paper Audit Trail (hereinafter, VVPAT) is an independent system attached with the EVMs that allows the voters to verify that their votes are cast as intended.[50] A slip is printed on the VVPAT printer as soon as a vote is casted by the voter, the printed slip contains the serial number, name and symbol of the candidate and this remains exposed through a transparent window for 7 seconds.[51] VVPAT consists of a Printer and a VVPAT Status Display Unit (VSDU). VVPAT helps to detect potential election fraud or malfunction in the EVM. It helps in auditing the stored electronic results. EVMs and VVPAT has brought transparency in the election process and in addition to this they together have speed up the election process.

In the case of *Ms. Reshma Vithalbhai Patel* v. *Union of India*[52], the Supreme Court of India while indicating to the press note of the Election Commission of India as to the use of VVPATs in election has commented "the government of India has sanctioned funds for the purchase of the VVPAT Units, needed during the course of the elections, which are to take place in the immediate future. The position expressed leaves no room for doubt, that all future elections will be held using VVPAT."[53]

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[50] above 43.
[51] *Ibid.*
[52] Special Leave Petition (Civil No. 13598/2017).
[53] *Ibid* [1].

Furthermore, the Supreme Court in January 2019, on a joint petition filed by Former IAS officer M.G. Devasahayam, ex-diplomat K. P. Fabian and retired banker Thomas Franco Rajendra Dev, directed the Election Commission of India to increase the verification of VVPAT from one EVM per Assembly segment to five in the light of 2019 General Elections. While giving this direction it was observed that an increase in VVPAT verification "would be of greater satisfaction not only of political parties but also for the entire electorate."[54]

The crusaders of addition of VVPAT along with an EVM believes that its presence will increase the number of people voting as they will be able to ensure about their vote being casted to the candidate they intended to cast which will invariably bring credibility to the use of EVMs in elections. It has been witnessed that in the recent 2019 general election, VVPAT system has been introduced. However, its introduction did not prove to be fruitful as the voter turnout percentage has not seen to be significantly increased.

VII. CONCLUSION

India has a representative democracy, which implies that the people express their desire through the government chosen by them. A free, fair and transparent election is thereby not a utopian dream but a necessity in our country. Free and fair election is regarded as backbone of a healthy democracy. The Supreme Court of India, in one occasion[55] even held "democracy that implies free and fair election" as a basic feature of the Constitution of India which cannot be modified, altered or repealed. Hence, transparency in election process is not only desirable but also pertinent.

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[54] Aneesha Mathur, '*Supreme Court orders EC to increase VVPAT verification from one EVM to five'* (*India Today* 8 April 2019), https://www.indiatoday.in/elections/lok-sabha-2019/story/supreme-court-election-commission-increase-vvpat-verification-evm.

[55] above 7.

India, at different times through numerous initiatives of its institutions catered for managing democratic temper has tried to bring changes in its electoral process to bring efficiency and transparency in the election process. This has also ensured the faith of people in the democratic setup. This paper discussed the varied examples of how the electoral system has been endeavoured to make transparent through the initiatives taken by the Election Commission of India, Parliament of India and the Supreme Court of India. The authors while tracing the journey of elections from the traditional ballot boxes to the modern concept of VVPAT and Electoral Bond found the measures undertaken by the above mentioned institutions to bring fairness in the electoral system satisfactory. Although the steps taken to promote transparency have been enormous, yet the struggle towards transparency electoral system in India does not seems to end. Thus, the authors humbly prescribe the following suggestions to further the transparency in election process:

a) Bringing the political parties under the term of 'public authorities' under the Right to information Act;[56]
b) Abolition of the 'anonymity clause' in the electoral bond system under which a political party is immune from disclosing the details and the identity of a donor;
c) Strict implementation of the Supreme Court's guidelines as to the disclosure of criminal antecedents of a candidate in the manner and way prescribed; and
d) A robust plan for voter education at grass root level by the Election Commission of India as to the inclusion of VVPAT alongside the EVMs to aware people about its usefulness with an intention to increase voter turnout.

[56] above 21.

AN ANALYSIS OF SOCIO-ECONOMIC RIGHTS ENFORCEMENT IN SOUTH AFRICA

Saheb Chowdhury[*]

ABSTRACT

Human Rights contain both Civil and Political Rights and Socioeconomic Rights. Human Rights are considered interdependent in the sense that these rights are not exclusive and the fulfilment of one right quite often requires fulfilment of others. [1]*Political freedoms are not separate from equitable access to socioeconomic resources. Nelson Mandela had famously said, "We do not want freedom without bread, nor do we want bread without freedom." It means that freedoms will be meaningless without access to basic necessities for a dignified and autonomous life. Nor would mere access to basic material necessities without freedoms be enough for a meaningful and flourishing life. Both Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights have recognized different socioeconomic rights.*[2] [3] *Socioeconomic rights are important because they provide protection to one's dignity as well as freedom. They take the form*

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[1] United Nations Human Rights Office of the High Commissioner, *Key concepts on ESCRs- Are economic, social and cultural rights fundamentally different from civil and political rights?* (Feb. 22, 2019), https://www.ohchr.org/en/issues/escr/pages/areescrfundamentallydifferentfromcivilandpoliticalrights.aspx.

[2] United Nations, *Universal Declaration of Human Rights* (Feb. 22, 2019), https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[3] United Nations Human Rights Office of the High Commissioner, *International Covenant on Economic, Social and Cultural Right* (Feb. 22, 2019), https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

of certain obligations that the states have of providing to the people at least basic minimum education, food, shelter, healthcare, minimum wage etc. However, this is not universally accepted position as many argue that socioeconomic rights fulfilment, that require resources distribution, may over-burden the states capability to fulfil them when enough resources are not available and thus weakens its legitimacy. Moreover, making socioeconomic rights enforceable in the courts of law also raises concerns about judges venturing into the domain of policy making which is considered to be the legitimate domain of the elected branches of the government.[4] Nonetheless, there is a growing tendency of the presence of socioeconomic rights in more recent national constitutions in the form of enforceable rights.[5] The Constitution of the Republic of South Africa, 1996 is one such important national constitution that in its Bill of Rights includes various socioeconomic rights including Rights to Housing;[6] Health Care, Food, Water and Social Security;[7] Education[8] etc. It is not surprising that their realisation and enforcement in the court, especially the Constitutional Court of South Africa, have raised many interesting debates. These broadly involve approbation and disapprobation of the role of the court in realizing or failure in adequately realizing the constitutionalized socio-economic rights. While some cases like Grootboom[9] and Soobramoney[10] have received much criticism for court's unwillingness to take stronger position in support of

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[4] Natasha G. Menell, *Judicial Enforcement of Socioeconomic Rights: A Comparison Between Transformative Projects in India and South Africa*, CORNELL INT. LAW., J 723, 732 (2016).

[5] Courtney Jung et al., *Economic and Social Rights in National Constitutions*, AM J. COMP. LAW., 1043, 1043 (2014). https://www.jstor.org/stable/43669493

[6] S. AFR CONST., 1996. sec 26.

[7] S. AFR CONST., 1996. sec 27 and 28.

[8] S. AFR CONST., 1996. sec 29.

[9] *Government of the Republic of South Africa. & Ors* v. *Grootboom & Ors* 2000 (11) BCLR 1169. (CC).

[10] *Soobramoney* v. *Minister of Health, KwaZulu-Natal*, (1998) (1) SA 765 (CC) (South-Africa).

enforceable socioeconomic rights, others like TAC[11] have been eulogized for recognizing and enforcing rights like access to health care and other socio-economic rights. In the light of this, in the following sections I analyse the contributions of some leading scholars on socioeconomic rights and their divergent positions on the realisation of socio-economic rights in South Africa.

I. CIVIL SOCIETIES AND THE REALISATION OF SOCIOECONOMIC RIGHTS IN SOUTH AFRICA

Malcolm Langford[12] has done an analytical study on the role played by civil society, including different groups, marginalized local communities, non-governmental organisations, trade unions etc. and the strategies employed by them to the realise of socioeconomic rights. He finds that civil society motivated by the belief that there is a failure to comply with socio-economic requirements, have taken different rights based strategies to explore their varied outcomes. Malcolm has also explored various legal, policy based and institutional framework of socioeconomic rights in post-apartheid South Africa. For instance, African National Congress (ANC) has played an important role in the post-apartheid constitution making process with the ideas for a strong central government and a liberal democracy. Further, while framing the new Constitution, Civil and Political Rights as were under the International Covenant on Civil and Political Rights were also balanced by the inclusion of Socioeconomic Rights, that includes rights relating to housing,[13] food, water, healthcare, security,[14] education[15] etc., on the lines of the rights under International

[11] *Minister of Health* v. *Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).
[12] Malcolm Langford, *Introduction: Civil Society and Socio-economic Rights*., in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 1-27 (2013).
[13] *Supra* Note 6.
[14] *Supra* Note 7.
[15] *Supra* Note 8.

Covenant on Economic Social and Cultural Rights in the new constitution of South Africa. It has, however, been observed that many of such socioeconomic rights have remained unrealized as are indicated by the not so impressive reduction of inequality, poverty and still persisting high rate of unemployment.[16] Different causes are identified for the non-realisation of these rights that include, among others, certain constraints on the government, various incorrect economic and policy choices and the general governmental apathy. In this light Langford explains to us the important role played by civil societies, their re-emergence after the formation of the constitution and how their intensity of functioning had also risen subsequently with the emergence heterogeneous civic society bodies like the National Coalition of Gay and Lesbians, Treatment Action Campaign, the AIDS Law Project, the Legal Resources Centre, the Centre for Applied Legal Studies and the Community Law Centre at the University of the Western Cape. The nature of these movements were predominantly rights based with continuity in strategy, origin and their political stand with their predecessors, even though there were cases of certain discontinuous bodies as well. Their mode of functioning has been mostly to engage with the government on varied matters relating to socioeconomic rights. It has been found that this new rights based development has received criticism from both the left and the rights. Although these movements had many positive empowering effects, there has been certain negative effects of rights campaign too; for instance, in the reduction of political power of some marginalized groups or reduction of the structure of social justice etc. Malcolm, however, admits that it is difficult to attribute causal relation to the impacts of actions of civil society on socioeconomic rights and with their outcomes. However, the effectiveness of such rights based strategies definitely had variations in their outcomes in the different cases of rights.

[16] David Francis and Edward Webster, *Poverty and inequality in South Africa: Critical reflections*, 36 DEVELOPMENT SOUTHERN AFRICA, 788-802 (2019).

II. THE UNWILLINGNESS OF THE CONSTITUTIONAL COURT IN ENFORCING OF SOCIOECONOMIC RIGHTS

Stuart Wilson and Jackie Dugard[17] have analysed the role played by the South African Constitutional Court in protection of socioeconomic rights guaranteed under the constitution, especially in the more recent judgments known as second wave judgments[18]. It is found that in the first wave jurisprudence[19] the court adopted the non-interventionist and deferential approach towards the executive and the legislature. They explain that the court might have found itself without much existing jurisprudential support in enforcement of socioeconomic rights from other common law jurisdictions which was further aggravated by South Africa's existing conservative legal culture among judges.

III. COURTS UNWILLINGNESS TO TAKE MINIMUM CORE APPROACH

For instance, the court in some of the landmark initial cases on socioeconomic rights matters, i.e. *Grootboom*[20] and *Soobramoney*[21] *etc.*, had adopted the more fluid reasonableness standard as opposed to any minimum core entitlement as it exists even under the International Law. This, according to the authors was a missed opportunity for the court in defining an account

[17] Stuart Wilson & Jackie Dugard, *Constitutional Jurisprudence: The First and the Second Waves*, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 35-61 (2013).

[18] The second wave jurisprudence, the authors explain, refers to certain judgements of the constitution court of South Africa in the years 2008 and 2009 when it revisited the decisions on socio-economic rights of five decisions on the questions relating to rights of access to water, electricity, adequate housing and basic sanitation.

[19] The First wave jurisprudence, the authors explain, refers to six major judgments of the constitution court of South Africa between the year 1999 and the year 2004.

[20] *Supra* note 9.

[21] *Supra* note 10.

substantive rights jurisprudence. In *Soobramoney*, the first case on the right to healthcare, the court could have laid down the rights to specific healthcare services available. Similarly, in *Grootboom* as well, much discussion was about defining what constitutes reasonable which was to be determined in its context instead of focusing on and laying down the minimum core. However, there has been certain other cases in which the court had to deal with some negative invasion into socioeconomic rights. Wilson and Dugard explain that in matters of negative invasion the court was eager to accept a minimum core based interpretation of rights as was done in *Jaftha*,[22] in which the court had to decide on the nature of the right of access to adequate housing under Article 26 of the SA Constitution and held that it includes negative obligation on the state not to interfere unjustifiably with any persons existing access to adequate housing and thus protecting security of tenure. The courts have also adopted the administrative law model of adjudication that includes reasonableness, rationality and procedural fairness in the decisions of the court.

IV. THE RISE OF MOVEMENT BASED CLAIM AND PROCEDURAL PROTECTION OF SOCIOECONOMIC RIGHTS

A different trend is observed by Wilson and Dugard in the second wave of socioeconomic rights jurisprudence. It is noticed that there is a rise of a movement based claim for group rights as opposed to litigant based claims for individual rights and also the emergence of procedural aspect of socioeconomic rights. One important case is *Olivia Road*[23] in which the court had found procedural unfairness in the municipality's eviction order. In this case the City of Johannesburg had made an application to the Johannesburg High Court for an order of eviction of 400 residents in inner city buildings. It was claimed that the living

[22] *Jaftha* v. *Schoeman and Others*, *Van Rooyen* v *Stoltz and Others* 2005 (2) SA 140 (CC).

[23] Occupiers of 51 Olivia Road, *Berea Township and 197 Main Street, Johannesburg* v. *City of Johannesburg and others*, CCT 24/07.

condition in the buildings was unhealthy, unsafe and posed fire hazard. The city however refused to provide alternative occupation to those evicted which would have made them homeless. This would have had the effect of violating section 26 of the Constitution. This had led to the constitutional court ordering the parties to engage in a meaningful dialogue before hearing the case for a mutual solution and thus leading to procedural socioeconomic rights. The parties came to a mutual solution which was endorsed by the court. Wilson and Dugard however add a word of caution saying that for fruitful engagement and outcome the state has to be responsive to the needs of the community engaged with. Another important case discussed is *Thubelisha Homes*[24] in which occupiers of informal settlement in Cape Town appealed to the Constitutional Court for setting aside an eviction order granted by the High Court. Those to be evicted were not given alternative permanent housing. The court held that eviction was reasonable even when there's no meaningful engagement with the community. However, the condition was that adequate accommodation was provided as per the requirements set out by the court. Individual engagement with households was necessary before they move. Although emphasis was put on meaningful engagement but it is understandably point out by Wilson and Dugard that the reasonable test doesn't take account of the harsh consequences of the eviction on the occupiers. Further in the case of *Nokotyana*[25] reasonableness principle was used in giving effect to socioeconomic rights from within governments own policies by emphasizing on their implementation rather than shaping new rights. The case also showed court's unwilling to asses the policy. Subsequently there was a retreat back from the contextual interpretation of reasonableness adopted in the famous *Grootboom* case in the case of *Mazibuko*[26]. In this case the court ignored the economic condition of the applicant, their suffering due to inadequate

[24] Residents of the Joe Slovo Community, *Western Cape* v. *Thubelisha Homes and others* 2010 (3) SA 454 (CC).
[25] *Nokotyana and others* v. *Ekurhuleni Municipality* 2010 (4) BCLR 312 (CC).
[26] *Lindiwe Mazibuko & Others* v. *City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28.

supply of water due to restriction imposed by installing pre-paid water meters by the Johannesburg Water (Pty) Ltd. It was stated by the court that *'ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.*'[27] The court also said that it shall enforce socioeconomic rights in cases where no steps are taken to realise the rights, or the steps are unreasonable and where the government fails in its duty to review its policy to progressively realise the right. This Wilson and Dugard suggest is due to courts deference to the executive in matters of socioeconomic rights. Overall three developments are identified in the second wave jurisprudence, which have not been very encouraging for the cause of socio-economic rights. These include removal of the capacity of protection of interests by socioeconomic rights under the reasonable review; replacement of some substantive administrative law rights and too much deference to the state in formulating reasonable policies. In the light of the above it has been suggested to the future litigators that their claims are coloured by referring to concrete legislative entitlements or to the meaning attached to socioeconomic rights by the court in cases of negative infringement.

V. THE PRIVATE AND PUBLIC LAW DIVIDE AND SOCIOECONOMIC RIGHTS ENFORCEMENT

Sandra Liebenberg[28] has taken an interesting perspective on the liberal distinction between private and public law that restricts the application human rights laws to only public laws. She observed that this distinction is still very much in existence in jurisprudence of the times of the constitution. Therefore, there is a necessity for substantive interpretation of human rights that addresses this dichotomy by identifying the underlying social and

[27] *Id.*

[28] Sandra Liebenberg, *Socio-Economic Rights Beyond the Public-Private Law Divide*, *in* SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 63-87 (2013).

political context and power relations. It is argued that the classical liberal view with its emphasis on individual autonomy considers the state as the main threat to such autonomy. Therefore, such an approach regards human rights as a restraint on the state from interfering with private matters which have been completely within the domain of individual autonomy. What then constitute private matters? These are the matters relating to family and the marketplace which were considered as natural institutions as has been understood historically.

Further, it is also observed that socioeconomic rights discourse that was focusing on the positive and negative distinction has paid much less attention to the common law or customary laws concerning areas of family laws, property laws, contract laws and laws relating to tort or delict. The outcome, according to her, is that certain private actors have become immune from the effect of human rights. Therefore, it becomes necessary to analyze the different application of human rights laws in matters of private law under the Constitution. She argues that the Bill of Rights under the 1996 Constitution apply directly to private parties and therefore the libertarian opposition to such horizontal application of rights including the typical arguments from separation of power, balancing competing rights as not being judicial function and individuals being the only bearers of rights and not obligations are mistaken. It is found that such claims had been rejected by the constitutional court itself in various cases. *Khumalo and others v Holomisa* [29] is one such case in which the constitutional rights have had overriding effects on the common law when the Constitutional Court of South Africa refused to develop the common law definition of defamation and add a new element that "published statement must be false". Moreover, under certain family law cases protection of rights were extended as against customary laws. *Fourie*[30] is an important case in which common law and statutory definition of

[29] *Khumalo and Others* v. *Holomisa* (CCT53/01) [2002] ZACC 12.
[30] *Minister of Home Affairs and Another* v. *Fourie and Another* (CCT 60/04) [2005] ZACC 19.

marriage were declared as unconstitutional to the extent the same was denied to same sex couples. The court found that constitutional values of human dignity, equality, and freedom encompassed the right of any two people to marry, irrespective of their sex, gender, or sexual orientation.

The role of the court in protection of rights under property laws and with respect to evictions of people from homes however depict a contrasting picture. The author criticizes the almost absolute right to possession of the owner of her property in South African private law. Section 26 of the Constitution and certain other laws softens this by providing certain procedural and substantive safeguards to unlawful occupiers. The constitutional court has also found certain principles to determine just and reasonable eviction that includes evacuee's homelessness, availability of alternative accommodation and their active participation in evacuation disputes. There are, however, certain important cases including *Abahlali,*[31] *Modderklip,*[32] *City of Johannesburg Metropolitan Municipality v Blue Moonlight*[33] etc. are some cases in which the court has take progressive stand. For instance, in the above mentioned *Blue Moonlight* case the court had to decide whether it was just and equitable to remove unlawful occupiers from privately owned buildings under the Prevention of Unlawful Occupation and Illegal Evictions Act. Question also involved as to whether the City of Johannesburg had to provide emergency interim accommodation to the evictees. The court concluded that the city unconstitutionally breached the rights of the occupiers of access to adequate under Section 26 of the Constitution by not providing interim accommodation. The private-public distinction therefore leaves much room for enquiry into how it affects the realisation of socio-economic rights. However, it is quite apparent based on Sandra

[31] *Abahlali Basemjondolo Movement SA and Another* v. *Premier of the Province of Kwazulu-Natal and Others* (CCT12/09) [2009] ZACC 31.
[32] *President of the Republic of South Africa and Another* v. *Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005] ZACC 5.
[33] *City of Johannesburg Metropolitan Municipality* v. *Blue Moonlight Properties 39 (Pty) Ltd and Another (CC)* [2011] ZACC 33.

Liebenberg's the private-public distinction it is clear that it has been a hindrance in true realisation socioeconomic rights.

VI. THE REASONABLE REQUIREMENT VERSUS MINIMUM CORE DEBATE IN SOUTH AFRICA

The concept of minimum core means the minimum essential level of all socio-economic rights which are to be legally protected and guaranteed, which is based on the assumption that more rights can be realized by minimizing goals.[34] The Committee on Economic, Social and Cultural Rights in its General Comment 3 on the nature obligations of State Parties' stated in para 10: "*On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.*"[35] The South African Constitutional Court has however, instead of laying down or enforcing a minimum core of the rights have taken the approach of reasonableness which involves too much deference to government which has been criticised by many scholars. David Bilchitz[36] is one such scholar who has argued against reasonable requirement approach taken by the Constitutional Court as opposed to the minimum core approach in relation to protection of socioeconomic rights under Sec 26 of the South African Constitution in the context of the famous *Grootboom* case relating to access to housing. The case as has also been discussed

[34] Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content.* 33 YALE J. INT'L L. 113-175 (2008), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1920&context=lsfp

[35] Committee on Economic Social and Cultural Rights in General Comment No 3 on the nature of State Parties' Obligations at para 10.

[36] David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFRICAN L. J. 484 (2002).

above mainly involves a proceeding against the government demanding that the municipality make arrangement for basic minimum shelter for the respondents. Although the High Court granted relief under Sec 28(1)(c) to some but on appeal the Constitutional Court took a different approach. David mainly focuses on the reasoning given by Justice Yacoob, which is also concurred by other judges, on matters relating to Section 26 of the Constitution. In response to one of the arguments that the court takes the interpretation of the committee responsible for interpreting International Covenant on Economic Social and Cultural Rights in General Comments that involves recognition of a minimum core, the court rejected such an approach and instead took the position of identifying reasonableness of steps taken by government for the fulfillment of rights under Sec 26 of the Constitution. Such an approach doesn't go into the minute details of specific policies. Instead it tries find out whether the steps taken by the government are sufficient for progressive realisation of such rights. Based this approach Justice Yacoob found that although state policies involved medium to long term objectives but lacked any measures for those who are in desperate immediate need and therefore found that to be unreasonable.

It is in the light of this above position of Justice Yacoob that the David develops his refutation of the arguments as discussed above. He asserts that there are two interests that right protects. These are the realisation of basic needs and then the higher requirements of development of human potential and flourishing. Minimum core of rights fulfil the basic needs of people. He then identifies the specific reasons provided by the court against a minimum core. The first one is that the court doesn't have adequate information to identify what needs and opportunities constitute minimum core. The second reason according to the court is that the needs relating to housing are too diverse for the court to set a minimum core. Third is the problem with defining minimum core generally when there are specific group requirements. David criticizes the above reasoning by suggesting that the court confuses the universal general standards which are to be always met with that of the specific methods of

achieving them. The state may take particular measures but those measures could only be assessed in the light of the general principles. Which means that the state has diverse ways and means of achieving these standards but the state surely has to achieve those standards. Now in the light of this position David says that Justice Yacoob was wrong in believing that the court needs to have wide resources of information as that would be the case only if the court goes into the specificities of a case and not what the minimum general requirements of people are. Secondly, what is considered as minimum core is something that is shared by all in the human species and would vary from group to group. And thirdly, regarding the claim of diversity of needs David says that regardless of the differences we all share common needs and the minimum core approach will determine how much the state must do to bring everyone above that minimum level. So he suggests that specific requirement might vary but the basic minimum standard remains the same for everyone.

On the more specific question of interests in housing David distinguishes between minimum interest and maximal interest and thus suggesting two levels at which human lives can be improved. His point is that the minimum interest has some priority over the maximal interest as these are interests of the most vulnerable and the deprived and hence there is a moral urgency to redress them first. On the other hand, the maximal interests can be achieved in medium to the long run. Therefore, it is not possible to realize the maximal interests without fulfilment of the minimum interests first. In the light of this distinction David tries to reconcile section 26(1)[37] which talks about access to adequate housing with Sec 26(2)[38] that talks about progressive realisation of such interests. The problem, however, is with defining what constitutes adequate. It could

[37] Section 26 (1) of the Constitution of South Africa recognises everyone's right to have access to adequate housing.

[38] Sec 26 (2) of the Constitution of South Africa requires that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

mean fulfilment of the basic minimum requirements and it could also mean requirements for human flourishing which goes much beyond the minimum. Further the idea of adequacy also has the tendency to vary according to culture. Hence, according to the author there is a range of possibilities as to what constitutes as adequate between the minimum and the maximal interest. On the question of progressive realisation then it is the maximal interest which is to be progressively realized with the starting point being the fulfilment of the basic minimum interest. Thus, everyone is entitled to a basic minimum housing immediately which is to be progressively improved over time and therefore Justice Yacoob is wrong in assuming that only the basic needs are to be progressively realized.

Moreover, David also analyzes the meaning of reasonableness of measures as is there in section 26(2). He addresses the critique that courts efforts at determining what constitutes reasonable may mean intrusion into the functioning of another branch which goes against the doctrine of separation of power. So does reasonableness allow substantive judicial review of legislative and policy measures? According to David it is allowed if an outcome falls outside a possible margin of appreciation of the body taking such measures. With respect to the definition of reasonableness as developed by Justice Yacoob in which he says that governmental policies are unreasonable because they have not taken measures for the short run which will ultimately put pressure on the long run David says that short term measures are required as their nonfulfillment will inevitably affect the long term realisation. Hence, the test of reasonableness has to include the minimum core. Further the courts prioritization of some collective goals over realization of some basic minimum needs of the most vulnerable as these are weightier consideration than collective goals is also extremely problematic. Lastly, the lack of specificity in court's order, as David points out, is also problematic as that leaves a lot of room for the government to avoid responsibility and laying down a minimum core would have created a standard for the government to weigh its action. Thus, it can be observed that the Constitutional Courts

Reasonable requirement approach to realisation seems to be step backward in the realisation of socioeconomic rights in South Africa. An approach that involves immediate realisation of the minimum core of rights as has also been explained by CESCR in General Comment 3 will have better effect on the realisation of Socioeconomic rights which are also constitutionally entrenched in South Africa.

VII. THE DIALOGICAL APPROACH TO ENFORCEMENT OF SOCIOECONOMIC RIGHTS

A much weaker approach to enforcement of socioeconomic rights is the one in which the court in matters pertaining to positive socioeconomic rights instead directly enforcing rights requires the parties to engage in a dialogue. Rosalind Dixon[39] develops what she calls a theory of Constitutional dialogue that suggests that for judicial review to be considered fully legitimate it has to be weakened in matters relating to enforcement of socioeconomic rights. She however suggests that the court has a special role to counter "blind spots" and "legislative inertia".

The approaches to enforcing socioeconomic rights by the courts may range from weak protection to strong protection. *Government of the Republic of South Africa v Grootboom*[40] on enforcement of socioeconomic rights by the court has received much criticism for not changing much for the poor in terms of their right to shelter and therefore has been considered "weak" in rights protection. Rosalind raises certain questions with regard to the judgment. She asks how much stronger the judgment should have been; how much more concrete the definition of individual socioeconomic entitlements should be and how much stronger remedies could have been given. A dialogical model for cooperation between the court and the legislature is proposed by

[39] Rosalind Dixon, *Creating dialogue About socioeconomic Rights: Strong-form versus weak-form judicial review revisited*, 5, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, OXFORD JOURNALS, 391-418 (2007).
[40] *Supra* note 9.

her to answer these questions. The dialogue approach for her is the one in which courts define rights in broad terms and provide strong remedies along with due deference to the legislature to assert disagreement with such rulings. Whereas, in socioeconomic rights involving positive aspects this approach suggests adoption of either weak rights or weak remedies according to the requirement of cases.

In the *Grootboom* case judge Dennis Davis, while rejecting any right under Sec 26(2) held that Sec 28(1)(c) did impose positive obligation on the government. The High Court further issued declaratory relief along with the requirement of reporting back to the court. The Constitutional Court on appeal held that there's no minimum core rights under Sec 26(2) on the line of ICESCR suggesting problems with defining minimum core in the light of the diverse needs of citizens and hence took the much broader reasonable test in looking at government policies' violation of the said Section and thus restricted itself to granting only declaratory and not injunctive relief. Hence, this review has been considered as weak from both substance and remedy point of view.

Another important case by the name *Minister of Health v Treatment Action Campaign* (TAC)[41] that involved determining positive aspect of socioeconomic rights under section 26(2) and 27(2) of the South African Constitution relating to government's responsibility in making ARVs or Antiretroviral medication available to stop mother to child transmission (MTCT). The state's restrictions on the provision of anti-retroviral drugs to HIV positive pregnant women had caused many unnecessary infections and deaths and also resulted in violation of right to healthcare under Section 27(1) and 28(1)(c) of the Constitution. Judge Botha of the High Court had provided both declaratory and injunctive relief requiring the government to make such medicines available. On appeal the Constitutional Court had also affirmed the High Court judgment but granting only declaratory

[41] *Supra* note 11.

relief without providing any deadline for the fulfilment of the said right. Therefore, Rosalind considers even this case as the case of weak rights and weak remedies.

With respect to the important question as to why socioeconomic rights should be enforced, Rosalind identifies various reasons. One such reason is based on the originalist approach to interpretation which implies that it is the framers of the constitution who wanted such enforcement. This, however, raises concern about lack of agreement among them about division of interpretive and enforcement functions. A cooperative constitutionalist model on the other hand has to accept disagreement about priorities to be given to different generations of rights and also different rights within the same generation. Further, it also has to deal with questions relating to the relationships between different generations of rights in defining what constitutes core as opposed to non-core entitlements. Even the subject matter of rights can bring about disagreements among citizens. It is not denied that theoretically there isn't any morally or constitutionally right answer to these questions but at the level of practice with different personal experiences the citizens might come to different conclusions. So Rosalind suggests that such controversies are resolved through a more democratic deliberative process in the light of broader constitutional culture. Further, Legislative process could also suffer from blockages due to blind spots and inertia which clearly go against and beyond any reasonable and justifiable limitations on certain constitutionally guaranteed rights.

However, it is seen that some cooperative constitutional theories like departmentalism doesn't even accept courts role in fixing such blind spots or legislative inertia. Hence, Rosalind argues for a dialogical model that gives higher importance to the idea to constitutional legitimacy and so requires fixing of such blockages by other governmental organs including the court. It also justifies courts use of its coercive and communicative power to counter such blockages to the extent that the court failing in it makes it complicit with the state and is also blameworthy for

strengthening such blockages. However, Rosalind, from a dialogical perspective, argues against strong form of judicial action as courts are equally prone to error as the legislature and the executive are. Further, courts are not to interfere only in the case of error or irrationality. They are required to use means of coercion and communication to ensure accommodation diverse perspectives and fresh views. Such broad decisions should not however have finality as that will have the effect of bringing in reverse burdens of inertia. Hence, the need for further weakening of judicial review to enhance democratic responsiveness. In case of negative socioeconomic rights though, she suggests taking an intermediate approach involving broad definition of rights and strong remedies subject to deference to legislative sequels that involve opposite reasoning, a measure adopted in Canada and also where possible followed by a narrow reading post such legislative sequel. However, it is asserted that in cases of socioeconomic rights involving positive dimension the courts exercise a little more caution as the court is not well placed to have the relevant information to take appropriate decision. So the Rosalind suggests the adoption of a model stronger than *Grootboom* but weaker than the intermediate approach as discussed above with a choice between weak rights and weak remedies.

VIII. CONCLUSION

South African Constitution has been a pioneering document that has set the path of entrenching socio-economic rights by their incorporation in the Bill of Rights of the Constitution. It was necessary redress and remedy the inequities and injustices of the apartheid period and for the beginning of a truly equal and just society. Socioeconomic rights are necessary for the protection of freedoms and dignity. However, it has been argued by many that since socioeconomic rights are known for being difficult to enforce due to disagreements about its contents and also due to judicial reluctance and incapacity, they should not be made constitutionally enforceable. However, in this analysis it has been observed that the myth unenforceability of

socioeconomic rights is a myth. We have seen how concerted efforts on the parts of various representative groups and civil societies can play a crucial part in the realisation of socioeconomic rights. We have also seen that the courts reluctance and half-heartedness in the enforcement of socioeconomic rights is due to traditional non-interventionist and deferential approach which needs to be tackled using appropriate strategies by concerned parties and rights groups. It is also necessary to have a critical relook at the traditional private-public divide in law that then is used by the courts deny enforcement of socioeconomic rights in matters relating what is traditionally considered as private i.e. family, market etc. It is to be noted that many human rights violations happen within these domains. Further, with regard to how and to extent the socioeconomic rights are to be enforced, the courts should follow the model already laid down under the International Human Rights Laws and especially the requirement of immediate fulfilment of the minimum core as has been laid down the CESCR in General Comment 3. The reasonable approach and progressive realisation is to be applied over and above the basic minimum core entitlement. Lastly, the dialogical method also has the potential of making socioeconomic rights enforcement stronger. However, if the society is deeply unequal and unjust then expectation of a democratic dialogue could also be unrealistic due power differentials among different competing groups. In such situation judicial enforcement of socioeconomic rights could have the effect of enhancing democracy. Therefore, it is concluded that judicial reluctance in enforcing socioeconomic and existing ineffectiveness of such rights should not be the reason for abandoning these rights. As opposed to that such rights and entitlements should be recognized by the court and enforced according to the standards as has already been recognized under International Laws.

THE NON-BINDING NATURE OF THE BINDING MEDIATION

Akshay Verma[*]

ABSTRACT

One fine day, a student asked the teacher whether Mediation is binding on the parties and if not, then what is the need of doing the unnecessary exercise of Mediation? The answer was clear, or it seemed to be very easy but the student till date has not received the one. Though the answer was either 'Yes' or 'No' but the problem was: If it is 'Yes', then the purpose of Mediation will be defeated, and parties will be reluctant on agreeing for Mediation. However, if it is 'No', then what is the purpose of going for a Mediation if you end up with no result.

The author in this article has dealt with the subjectivity of this question and has tried to find out the most favorable solution. The suitability of a dispute for the reference to Mediation and its uniqueness from other forms of ADR processes has also been highlighted. Moreover, the author has also compared the position in India with that of other Asian countries in terms of application, finality and binding of a settlement in Mediation along with its approval by the court and the use of various Hybrid ADR processes.

I. INTRODUCTION

'Darkness cannot drive our darkness; only light can do that. Hate cannot drive our hate; only love can do that.'

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- Martin Luther King Jr.

Indian philosophy is rich in its contemplation of the idea of justice. The Vedas define justice as a means to attain ultimate happiness for all. The Vedas along with the Upanishads and the Bhagavat Gita all proclaim the idea of "Oneness of all". Ideas such as Vasudhaiva Kutumbakam (world is one family) and Sarvey Jana Sukhino Bhawantu (Prosperity for all) are considered extremely important ideas of Indian philosophy and traditions. Our sages since time immemorial have extolled the virtues of non-violence, tolerance, compassion, non-attachment, and renunciation. In lieu of this, it can be hardly doubted that mediation stands to be the best mechanism for access to justice as it imbibes these very ideals of Indian philosophy.

Mediation proceedings are in consonance with the concept of Social Engineering by Roscoe Pound. Balancing of interests lies at the very heart of the mediation process. It achieves this by facilitating an amicable resolution of disputes and by acting as a pacifier amongst the contending parties.

It is a folly to assume that winning a case means the same as seeking a solution. Mediation process involves the parties engaging amongst themselves not as enemies but as partners in finding solutions. Unlike judicial adjudication, mediation provides an opportunity for parties to reach a win-win solution. Thus, it provides a forum to preserve relationships between the parties and promotes peace and harmony in the society. Along with these merits, mediation can also help in reducing the burden of backlogs on the judiciary and plays a role in the economic and financial progress of the country.
[1]

Mediation refers to a dispute mechanism characterised by the presence of a neutral third party (i.e., Mediator) who assists and facilitates the disputing parties to resolve their disputes

[1] Justice A.K. Sikri Judge, Delhi High Court, *Mediation: Making Life Easier.*

amicably, via specialised negotiation and communication skills. It is an efficient, effective, speedy, convenient, and less expensive process to resolve a dispute with dignity, mutual respect, and civility. The mediator acts as a guide and assists each party by analysing the merits of claims or defences and assess possible outcomes of a trial. Neutrality is a fundamental principle possessed by the mediator and the mediator's personal preferences or perceptions should not interfere in the proceedings.[2]

Mediation is a voluntary process. Parties have the right to decide for themselves if they want to settle their dispute via mediation and if so what shall be the terms of such a settlement. Such settlements are creation of parties themselves and is therefore acceptable to them. Meaning thereby that parties can back-out from the mediation proceedings at any stage of the proceedings and need not provide a reason for the same.[3]

Mediation is a party centric process**.** Mediation is thus characterised by direct and active participation of the parties in resolving their disputes. The mediator only facilitates the disputing parties to arrive at a settlement. In no way can the mediator impose a settlement on the parties. Contending parties are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.[4]

Even though mediation is an informal process, it should not be confused with a casual process. Though mediation is not subjected to the rules of evidence and formal rigours of procedural laws, it is a structured process with clearly discernible stages having some degree of flexibility in its order.[5]

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[2] Supreme Court of India, Delhi, *Mediation Training Manual of India Chapter – III, Mediation Training Manual of India* (Mediation and Conciliation Project Committee).
[3] *Id.*
[4] *Id.*
[5] *Id.*

Mediation is fundamentally a process of negotiation addressing issues pertaining to facts and law along with the respective interests of the parties, which characterise the dispute. Mediation aims to reach a win-win settlement which is mutually acceptable to the parties and satisfies their respective interests.[6]

Confidentiality and privacy are hallmarks of the mediation process. Unlike litigation, mediation proceedings are not open to the public and statements made, or information disclosed during the proceedings are not disclosed in civil proceedings or elsewhere except with the written consent of the parties to the same. Moreover, information disclosed by one party to the mediator is not shared with the second party except with the consent of the first party. Records of mediation proceedings are not maintained.[7]

Settlements reached post mediation proceedings are recorded in writing and are signed by concerned parties. It is then filed in Court for the passing of an appropriate order. A pre-litigation settlement reached between parties is a binding and enforceable contract between parties. However, if the proceedings fail to reach a settlement, then the mediator records "not settled". Such a report does not provide for the reasons of the failure. The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.[8]

Mediation proceedings are not restricted to the specific dispute referred. It can go beyond and resolve all other incidental disputes connected to the main dispute.[9]

There are two types of mediation. The first is Court - referred mediation, which applies to cases pending before the

[6] *Id.*
[7] *Id.*
[8] *Supra* note 2.
[9] *Id.*

Court, which the Court refers to mediation under Sec. 89 of the Code of Civil Procedure, 1908.[10]
The second is Private mediation, which involves the provision of requisite services by qualified mediators on a private, fee-for-service for resolution of disputes via mediation. Private mediation can also be used with respect to disputes pending before the courts and in pre litigation disputes.[11]

II. SUITABILITY

In *Afcons Infrastructure Ltd.* v. *Cherian Verky Construction Company Pvt. Ltd.*,[12] the court examined in detail the scope of section 89 of the C.P.C which provides that if the court feels that a particular case before it has elements which make it possible for the case to be solved via a settlement then the court must direct the case to one of the mentioned ADR mechanisms. Making this reference to ADR mechanism is mandatory except in those cases which are not suitable for settlement. Cases suitable for settlement include cases which generally deal with trade, commerce, contracts, those arising from strained and soured relationships (e.g.- matrimonial dispute), cases where need for continuation of pre-existing relationships is expressed, and all cases relating to tortuous liability. These instances are not exhaustive. The court further made it clear that section 89 provides the court with the jurisdiction to refer the case to the listed ADR mechanisms and Order 10 rule 1A to 1C provide guidance as to exercise of power of section 89 CPC 1908.[13]

Order 10 Rule 1A provides that the court needs to give the option to the parties to choose one of the five ADR mechanisms mentioned in the section. However, both the parties must mutually accept that mechanism. When exercising the

[10] *Id.*
[11] *Id.*
[12] (2010) 8 SCC 24 (India).
[13] PROF. VED KUMARI, ET.AL., ALTERNATIVE DISPUTE RESOLUTION 19 (2018).

power of section 89, the court first offers the parties the option to go for arbitration. Arbitration is an ADR mechanism which involves resolution of disputes via private forums. Arbitral proceedings are governed by the provisions of the Arbitration and Conciliation Act of 1996.[14]

However, a court has no power to compel unwilling parties to enter into arbitration if there is an arbitration agreement between the parties. The arbitral award is binding on both the parties. The second process is that of Conciliation. Conciliation is a non-adjudicatory ADR process which is governed via the provisions of the Arbitration and Conciliation Act 1996. Conciliation is a process wherein both parties have negotiations facilitated by a neutral 3rd party or parties. Mutual consent of both the parties must be present before a case can be presented for conciliation. When a matter is settled through conciliation, the settlement agreement is enforced as a decree of a civil court having regard to section 74 read with section 30 of the Arbitration and Conciliation Act.[15]

If parties do not agree for either of the two above mentioned mechanisms, the court must then consider which of the other three mechanisms would be suitable to resolve the dispute. Referral to these mechanisms do not require the consent of the parties but does require the judge's discretion as to which mechanisms would be most suitable for the case.[16]

Mediation is preferred when suit is complicated and lengthy. The Court defined mediation as the dispute resolution mechanism wherein parties reach a negotiated settlement with the assistance of a neutral third party.[17] The mediation settlement is placed before the court for recording the settlement and its disposal as well.

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[14] *Id.* at 20.
[15] *Id.* at 30.
[16] *Id.* at 31.
[17] *Id.* at 32.

Lok Adalat is a suitable option where disputes are easily sortable or can be settled by applying clear-cut legal principles. The award of the Lok Adalat is also deemed to be a decree of the civil court and is executable under section 21 of the Legal Services Authorities Act.[18]

If a Court feels that a case can be solved via suggestion or guidance of a judge, then the court can refer the case to another judge to resolve the dispute. This process is called judicial settlement**.** The settlement agreement is placed before the referring court, which makes a decree based on the terms of the settlement.[19]

The Court further stated that the choices are presented to the parties when the pleadings are completed but before the framing of issues and the court fixes a preliminary hearing of appearance of the parties. The court should be fully acquainted with the facts of the case and the nature of dispute between the parties. The nature of the dispute, interests of the parties and speedy resolution of disputes provide a guiding light to the court in their exercise of discretion with respect to the choice of ADR mechanism. The Court must be vigilant that the progress of the ADR proceedings is not sluggish. It should not be misused by the litigants by dragging the proceedings endlessly.[20]

In *Dayawati* v. *Yogesh Kumar Gosain*[21], the appellant and the respondent entered into a contract wherein the former agreed to supply the latter with certain fire-fighting equipment at a certain price. The respondent issued two cheques of different sums each to pay the amount. However, both the cheques were dishonored due to insufficient funds in the respondent's account. The appellant thus filed a case under Section 138 of Negotiable Instruments Act against the respondent. However, during the court proceedings both parties expressed an intention to resolve

[18] *Supra* note 13.
[19] *Id.* at 30.
[20] *Id.* at 33.
[21] 2017.

the dispute amicably. The matter was thus referred to mediation under the aegis of Delhi High Court Mediation Centre. The parties reached a mutual settlement wherein the respondent agreed to pay the agreed amount in instalments as per the time-schedule prepared by the parties. The appellant agreed to withdraw the case on the payment of the agreed amount.[22]

However, the respondent defaulted on the very first instalment and appellant filed an appeal to enforce the settlement. The respondent argued in the court that the settlement was not binding between parties, that the amount in the settlement was exorbitant and that the agreement was arbitrary.[23]

The Hon'ble High Court thus decided as to which cases could fall under the ambit of mediation for their resolution. The court quoted the land-mark case of *Gian Singh* v. *State of Punjab*[24] wherein, the Hon'ble Apex Court had observed that those criminal cases which were of a predominantly civil nature especially issues involving, commercial, financial, mercantile, civil, partnership or similar transactions or the offences arising out of matrimonial relations or the family disputes where the wrong is private or personal in nature, could be quashed by High Courts under section 482 of Cr.P.C. in lieu of a compromise reached by the parties. The High Courts can exercise this power when they feel that continuation of a criminal case would constitute an abuse of process of law despite compromise arrived between the victim and accused.[25]

The Hon'ble Court further referred to *Parabatbhai Aahir @ Parbatbhai Bhimsinhabhai Karmur and Ors* v. *State of Gujarat and Anr*[26] wherein the Apex Court stated that the power under section 482 can be utilised to quash certain non-

[22] PROF. VED KUMARI ET. AL., ALTERNATIVE DISPUTE RESOLUTION 92-99 (2020).
[23] *Supra* note 22.
[24] (2012) 10 SCC 303(India).
[25] *Supra* note 22.
[26] 2017 (India).

compoundable proceedings if the same is warranted by the nature of offence and it conforms to the ends of justice and that the exercise of such power prevents the abuse of power of the courts. Thus, while exercising the powers conferred under section 482, Courts must pay due regard to the nature and gravity of the offence. Heinous and serious offences such as murder, rape and dacoity cannot be quashed even though the victim or the family of the victim have settled the dispute with the offenders. This is so because these offences are not private offences but rather have a great impact on the entire society. The decision to continue with the trial in such cases is based on safeguarding public interest in punishing persons for serious offences. Furthermore, economic offences involving the financial and economic wellbeing of the state have greater consequences which mandates their exclusion from the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in such activities.[27]

The Hon'ble Court further referred to *K. Srinivas Rao* v. *D.A. Deepa*[28], that in certain instances cases filed under section 498A of the IPC can also be quashed under Section 482 of the Cr.P.C. if parties reach a compromise. Thus, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation.[29]

III. MEDIATION: DIFFERENT FROM OTHER ADR PROCESSES

Mediation is different from conventional judicial process and other ADR mechanisms. Mediation is a negotiatory process and not an adjudicatory process like Arbitration or conventional court process. Even Lok Adalats organized under section 22B of the Legal Services Act, 1987, are adjudicatory in nature, making

[27] *Supra* note 22.
[28] (2013) 5 SCC 226 (India).
[29] *Supra* note 28.

them different from mediation. Furthermore, Mediation, unlike Arbitration, Conciliation and Lok Adalat, is unregulated by any statute.

In Mediation, unlike arbitration, conventional court processes, parties have a greater direct involvement in the process and parties have ample opportunities to talk to each other. In other words, Mediation is a participatory process wherein parties directly get involved in resolving their disputes and decide the terms of settlement. Mediation is a more party-centric process in comparison to Lok Adalat where the scope of negation is limited. The mediator in the mediation is a neutral third party, who plays a facilitative role whereas arbitrator and conventional judges play an adjudicatory role. In Lok Adalat, the judges play a more persuasive role and in conciliation, the conciliator plays an evaluative role.

The final settlement reached in the mediation process is not appealable, unlike conventional court decisions which are appealable and arbitral awards which are appealable though only on certain specific grounds. Moreover, mediation settlements are generally non-binding per se but can be made binding by referring them under Order 23 Rule 3 of the Code of Civil Procedure to court which then enforces them as an agreement. This is again different from Court decisions, arbitral awards, conciliation decree and even Lok Adalat Awards which are binding from the first instance under relevant statutory provisions.

IV. COMPARATIVE POSITIONS

A. Victim Offender Mediation

Victim-Offender Mediation is a concept primarily prevalent in the United States and Europe.

Generally, Victim-Offender Mediations comprise of a meeting between the victim and offender which is facilitated by a trained mediator who helps the two parties to resolve their conflicts and to chart their own course for achieving justice in the face of the crime. Both the victim and offender freely express their feelings towards the offence. This helps in resolving the misconceptions which parties have before entering into the mediation process. The aim of the meeting is to reach an agreement between the victim and offender wherein the offender agrees to repair the loss and harm caused to the victim.[30]

Victim- offender Mediation programs are useful as they support the healing process of victims, by providing with the opportunity to meet and interact with the offender in a safe and controlled setting, on a voluntary basis. It also provides an opportunity to the offender to learn about the impact of the crime on the victim and to take responsibility for his/her actions. Victim-Offender Mediation also presents an opportunity for the victim and offender to chart a mutually acceptable plan that addresses the harm caused by the crime.

Victim and offender participation is of a voluntary nature. The mediator plays a facilitative role between the parties and does not in any way impose a binding solution on the parties. It is the parties who play a pro-active role in reaching a mutual settlement and the mediator merely assists them in doing so.[31]

Mediation therefore plays its characteristic peace-making role and by amicably resolving the conflicts between the victims and offenders by empowering them to reach a settlement they feel is just without leaving the process totally in the hands of traditional criminal justice system.

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[30] Centre for Justice & Reconciliation: A program of prison fellowship International, *Victim Offender Mediation*, http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/victim-offender-mediation/#sthash.brdOzeUQ.EykTtauE.dpbs.

[31] *Id.*

Victim offender mediation in Europe and America generally involves 4 stages namely, (a) case referral and intake (b) preparation for mediation (c) the mediation itself and (d) any follow up necessary.[32]

Cases are generally referred to mediation post-conviction or formal admission of guilt. In some cases, however, the cases are diverted before conviction to avoid prosecution.[33]
In the second stage the mediator contacts the parties and tries to discern if both parties are 'appropriate' for undergoing mediation or not. This involves the mediator ensuring that both parties are psychologically able to make the mediation process a constructive one and that the victim would not be further harmed by the meeting with the offender. The mediator also makes sure that both parties are aware of the voluntary nature of their participation.[34]

The victim and offender then meet with the aim to identify the injustice, rectify the harm (to make things right or restore equity), and to establish payment/monitoring schedules. Both parties are provided with the opportunity to present their point of view of the events leading up to and the circumstances relating to the crime. The victim has a chance to express personal dimensions of victimization and loss, while the offender has a chance to express regret and to explain circumstances surrounding his/her behavior. Then the parties agree on the particular nature and extent of the harm caused by the crime in order to identify the acts necessary to repair the injury to the victim. The terms of the agreed reparation (e.g., restitution, in-kind services, etc.) are reduced to writing, along with payment and monitoring schedules.

[32] *Id.*
[33] *Id.*
[34] *Supra* note 30.

B. Plea Bargaining

Plea bargaining is an out of court alternate dispute settlement mechanism which is opted for in criminal cases. The advantage of this mechanism is attributed to its facilitation of swift disposal of criminal cases, thereby reducing the case load of the judicial system. It is used in the pre-trial stages and involves the prosecutor and the accused. It benefits the prosecutor by enabling him/her to secure a charge against the accused and benefits the accused by enabling him/her to obtain a lesser punishment.

Yet the plea bargain is not free from its weaknesses. The unassisted negotiatory process has been tainted due to its lack of transparency and proneness to deadlocks due to the conflicting interests of the prosecutor and the accused. The latter worries about safeguarding public interests as opposed to the former who is keen in obtaining a lesser offence and reduced punishment. Many scholars have also noted with concern that a mutual agreement is hard to come by during an unassisted plea-bargaining process. The accused who applies for plea-bargaining shows willingness to be inflicted with a lesser penalty. However, if the prosecutor and accused do not come to an agreement then the entire process fails. This means that the case would have to go for a trial and that the accused may not get any leniency in his/her sentence.[35]

Such drawbacks of unassisted plea bargaining prodded the thought of involving a neutral 3rd party mediator in the plea-bargaining proceedings. Proponents of this idea believe that the mediator would be able to help the two parties in identifying their needs and interests; narrow down their options; and provide ways to resolve the dispute via arriving at a mutually acceptable solution.[36]

[35] *Enhancing Plea Bargaining process through Mediation,* 3 IJASOS 7 (April 2017).
[36] *Supra* note 35.

The mediator may facilitate the parties in reaching a settlement wherein the interests of the accused may be achieved without jeopardizing public interests. The mediator only intervenes when parties fail to arrive at mutually agreed solution during the initial negotiatory stages. The mediator would assist the participants by analysing the facts and points of law of the case and determining the strengths and weaknesses of the case. They shall also be expected to protect the defendant from coercion and encourage the parties to reach a settlement. The mediator will also protect the integrity of the proceedings from being tarnished through immoral plea-bargains (i.e., ensuring that the process and the outcome is made in good faith without any coercion.)[37]

The mediator will ensure that, the accused pleads guilty voluntarily and understands the nature of the offence charged as well as the effect of the plea. The mediator may also permit the parties to give suggestions on sentences. The presence of a mediator would thus make the plea-bargaining process transparent. Moreover, as the agreement reached between the parties would be mutually acceptable one it would not lead to appeals. This means that there would be expeditious disposal of criminal cases thereby reducing the burden on the courts. On reaching a settlement, the case shall be disposed-off by the judge based on of the agreement between the accused and the prosecution.[38]

Mediation as a medium for disposal of criminal cases is practiced in Singapore. Such mediation in plea bargaining is known as criminal case resolution. The criminal case resolution was introduced in 2009 and fully implemented under the Registrar's Circular No. 4 of 2011. Since then, it has been a component of the criminal justice system of Singapore. It aims at the disposal of criminal cases at an early stage via mediation which is conducted by a senior judge (State Courts Annual

[37] *Id.*
[38] *Id.*

Report, 2012, 6). The mediation proceedings involve discussion between the accused and prosecution at an early stage on issues pertaining to the dispute. If the accused intends to plead guilty, then the mediator will suggest the sentence to the parties. If the same is mutually agreed, the accused is sentenced accordingly. If parties do not agree, then the case proceeds for trial.[39]

Mediation takes place only after the case has been subjected to the criminal case management system and then through the criminal case disclosure conference and at the pre-trial conference. It is applicable in all those stages where the negation process did not achieve success. Referral to mediation may be made by a pre-trial conference judge, a criminal case disclosure conference judge, or by the parties. If the mediation fails in bringing any settlement, then the case is referred to trial.[40]

V. BINDING VERSUS NON-BINDING

Section 30 increases the scope of ADR mechanism by recognising the amalgamation of arbitration, conciliation, and mediation. It does not provide for any fixed time period when either of the procedure can be initiated. The phrase "other procedure" in section 30(1) thus hints at the usage of unique ADR mechanisms in the future. Any settlement reached under this section would have the same status and effect as an arbitration award.

Section 30(1): "*It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.*" [41]

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[39] *Id.*
[40] *Supra* note 35.
[41] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

Section 30(2): "*If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.*"[42]

A. Hybrid Arbitration

In several foreign jurisdictions, mediation settlements have been made enforceable through the hybrid process of mixing Mediation and Arbitration to form the process known as Med-Arb and Arb-Med. The study of these mechanisms is pertinent as although mediation is not governed under any particular statute, section 30 of the Arbitration and Conciliation Act 1996, recognises mediation as mechanism for dispute resolution which can be used during the arbitral process.

The popularity of hybrid arbitration can be gauged from the findings of the International Arbitration survey of 2018 wherein 97% of the diverse respondent group chose arbitration as their preferred method of resolving cross-border disputes, either as a stand-alone method (48%) or together with ADR (i.e hybrid arbitration) (49%). These figures can be juxtaposed with the findings of a survey conducted in 2015 wherein an aggregate of 90% affirmed their preference for international arbitration; however, the breakdown for a stand- alone mechanism was 56%, while hybrid arbitration, was 34%. These figures clearly reveal a significant surge in the popularity of hybrid arbitration which has occurred in a short span of time. This assertion is further bolstered by the findings of the in-house counsel sub-group of the 2018 survey, wherein majority of the respondents preferred international arbitration together with ADR (60%) as opposed to international arbitration as a stand-alone method (32%).[43]

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[42] *Id.*

[43] NEIL KAPLAN ET. AL., INTERNATIONAL ARBITRATION: WHEN EAST MEETS WEST - LIBER AMICORUM MICHAEL MOSER 279 (Wolters Kluwer 2020).

1. Med-Arb

The pre-requisite to the Med-Arb process is an agreement between the parties to refer any dispute, left unresolved in mediation, to arbitration.

The origin of the process of Med-Arb is credited to Sam Kagel who merged the process of mediation and arbitration to create Med-Arb as a dispute resolution mechanism during the San Francisco Nurse Strike of the 1970's. The elimination of restarting the proceedings afresh with a new arbitrator post the failure of the mediation proceedings is the most important advantage of this mechanism. This is because the arbitrator does not have to be educated about the case from the scratch! The final award of the Med-Arb process is binding on the parties and thus is legally enforceable. This has led to Med-Arb being described as 'mediation with muscle'.[44]

In the Med-Arb process parties first undergo mediation proceedings wherein they aim to reach a mutually acceptable settlement in the presence of the neutral mediator. Once the settlement is reached, the mediator transforms into an arbitrator who converts the settlement into an arbitral award which is binding on both the parties. On the other hand, if mediation fails in producing a settlement then the parties enter into arbitration and the erstwhile mediator becomes the arbitrator.[45]

This process has been approved in multiple countries and their institutions such as Singapore, Japan, and China. However, the European countries have not been enthused towards this mechanism of dispute resolution.[46]

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[44] Shivam Goel, *"Med-Arb": A Novel ADR Approach.*
[45] Deekshitha Srikant and Arka Saha, *Amalgamating the Conciliatory and the Adjudicative: Hybrid Processes and Asian Arbitral Institutions* 3(1) Indian Journal of Arbitration Law.
[46] *Supra* note 43.

(i). Med-Arb (Pure): This process involves the Mediator transforming himself/ herself into the arbitrator i.e., the same person plays both the mediator and arbitrator. Parties first go through the mediation process followed by arbitration to settle disputes which remained unresolved in mediation. [47]

(ii). Med-Arb-Opt-Out: In this case, the mediator and arbitrator are two different persons. The parties first undergo the mediation process, post which either of the parties can request for a new arbitrator. Though this system is appealing as it ensures a greater level of neutrality, this benefit is neutralised by the additional costs and time which are incurred in appointing the new arbitrator and acquainting him/her with the case from a scratch.[48]

The nullity of arbitration clause becomes a possibility when the limitation laws do not provide for a fixed time for conciliation proceedings to end and proceedings breach the permissible limits of the limitation law. Thus, when proceedings for reference to arbitration are placed before the court, the right to arbitration may terminate on grounds of being beyond 3 years from the birth of disputes. This may lead to the petition being unsuccessful on breaching the permissible limits set by the limitation laws.[49]

Thus, the rights of dispute resolution via arbitration might get sacrificed at the altar of limitation laws if pre-condition of mutual discussion is to be mandatorily followed. Such a position is therefore unacceptable in the eyes of law.[50]

From the above discussion it can be concluded that Med-Arb provides a surety of resolution of disputes. If parties fail to reach a settlement during mediation, then they can reach the same

[47] *Id.*
[48] *Id.*
[49] *Supra* note 43.
[50] *Id.*

via arbitration. Cost-effectiveness and efficiency further add to the allure of Med-Arb[51] as an option for dispute resolution.

However, Med-Arb is not free from its demerits as well. Fears of Award contamination along with apprehensions of unfair use of information-revealed in private caucuses by the parties to the mediator- in arbitration phase, means that this system too is not untainted by skepticism.

Med-Arb-Opt-Out option as provided for in section 27D (4) of Commercial Arbitration Act 2010 of New South Wales, can provide some respite from this problem as it allows parties to "opt out" after an unsuccessful mediation session and enter into arbitration conducted by a person different than the neutral third party in the mediation session.[52]

(iii). Overlapping Med-Arb: In this avatar of Med-Arb two persons act as the mediator and arbitrator, respectively. However, the arbitrator is a silent observer of the mediation process wherein only mediator has the power to communicate privately with the parties. The arbitrator is an observer of the joint sessions and reviews the shared documents.

However**,** the presence of the arbitrator as a spectator to the mediation process, tends to make the mediator extra vigilant and the mediator may want to avoid confidential exchange of information lest it pollutes the award.[53]

(iv). Plenary Med-Arb: In this type of Med-Arb, a single person engages between the parties on the lines of the agreed Med-Arb processes. This disallowance prevents the award from being polluted from confidential information. However, this person cannot conduct private communication between parties.

[51] *Id.*
[52] *Id.*
[53] *Id.*

Plenary/formal communication and document exchange play as the major tools for reliance.

Honest and frank private communication are the hallmark of mediation process. They often play a key role in a successful mediation. Banning private communication strikes a major blow to this pertinent aspect of mediation jurisprudence.

(v). Braided Med-Arb: In this form of Med-Arb, a single person conducts both mediation and arbitration by switching roles, however, parties have the option to mediate amongst themselves and come to a voluntary settlement.

The drawback of this type of Med-Arb is the perceived heat of "Settlement Pressure" faced by parties from the Med-Arbitrator.[54]

(vi). Optional Withdrawal of Med-Arb: This specie of Med-Arb provides the parties with the choice of 'opting out' of the dispute resolution process post the mediation phase. This reflects the voluntary nature of participation in the dispute resolution process.

This process lacks the prudent merits associated with the Med-Arb process i.e., the guarantee of resolution of disputes.[55]

2. Arb-Med

This process is the reverse of Med-Arb, and as the name suggests parties first enter arbitral proceedings before going for mediation. Evidence is presented before the arbitrator who also hears the testimonies of the contending parties. The arbitrator decides on the merits of the disputes which is concealed from the parties. The arbitrator then dons the hat of the mediator and encourages the parties to settle their disputes amicable through a

[54] *Supra* note 43.
[55] *Id.*

mutually acceptable solution. If the mediation fails, then the decision of the arbitrator becomes binding on the parties.[56]

The questions of Arb-Med and procedural fairness were deliberated upon in *Gao Hai Yan & Another v Keeneye Holdings Ltd & Others* ('Wining and Dining Case'). The apprehension of biasness in Med-Arb process was prevalent in Hong Kong Court of First Instance as this process involved a single person performing the job of an arbitrator as well as the mediator.[57]

In Arb-Med, parties can resolve their disputes even if the mediation process is unable to do so. However, as none of the parties are privy to the sealed arbitral award, the sword of an unfavourable outcome keeps the parties motivated to resolve their disputes through mediation. Moreover, parties sometimes guess the contents of the concealed award through the behaviour of the mediator which further drives them to reach a settlement.

The apprehensions of bias, time-consumption, monetary encumbrances encountered in the arbitration process must be juxtaposed against the desire for a settlement, for a thorough analysis of the merits of the Arb-Med process.

B. Arb-Med, Med-Arb and Asian Arbitral Institutions

The Arbitration Ordinance of 2011 governs the Med-Arb process in Hong Kong. This Ordinance permits the mediator to act as an arbitrator post the failure of mediation process.
As per the Mediation Ordinance of 2013 leaves the mediation component of Med-Arb process under the ambit of Arbitration Ordinance of 2011. The Mediation Ordinance of 2013 deals with the issue of violation of natural justice, confidentiality and legal status which arise when a single person dons the hats of both the mediation and arbitrator in the Med-Arb process.

[56] *Id.*
[57] *Supra* note 44.

The mediation rules of Hong Kong International Arbitration Centre under the ambit of the Hong Kong Mediation Council (HMC), (in effect from August 1999) renounces any possibility of Med- Arb services being provided through the institution. Furthermore, Rule 14 categorically prohibits the appointment of the mediator in a mediation proceeding from being appointed as the arbitrator in subsequent arbitration arising out of the mediation, or any other dispute arising out of the same contract.[58]

The Hong Kong Arbitration Ordinance under Section 33 provides for a procedural framework which governs the proceedings of the Med-Arb mechanism, but they are dependent on explicit consent by the parties. The ordinance further mandates the disclosure by the mediator of confidential information which might be of significance in the arbitral process. This provision however has faced criticism as it is believed to hamper the possibility of candid discussions in the mediation process.[59]

In Singapore, the Med-Arb services are provided by the trio of Singapore International Arbitration Act, The Singapore Mediation Centre (SMC) and Singapore International Arbitration Centre (SIAC). Under this arrangement the parties aim to reach a settlement via mediation which is conducted by the SMC, post which (when mediation fails) parties enter into arbitration governed by SIAC rules. However, if the mediation process is successful then Rule 6(2) of the SMC Mediation Procedure permits the mediator to convert into an arbitrator to make the settlement binding on the parties as an arbitral award.

While the SIAC allows for Med-Arb processes and contains a separate set of procedural rules that apply to such processes (SMC-SIAC Med-Arb Procedure) their rules do not overtly provide for Arb-Med, although provisions of the

[58] *Id.*
[59] *Id.*

Singapore Arbitration Act are nearly identical to the Hong Kong Ordinance, which permit the same. SIAC however differs from the HKIAC, in its lack of explicit rules that disallow an arbitrator from conducting mediation, and vice versa.[60]

It pertinent to point out that Med-Arb is extremely prevalent in China wherein Med-Arb process has wide-spread popularity and usage and is most hassle free. In fact, the only leading Asian institution to have express provisions in their rules allowing for Arb-Med is the China International Economic and Trade Arbitration Commission (CIETAC). Article 40 of the CIETAC rules allows an arbitral tribunal to mediate the dispute between the parties, contingent to the parties' consent, in any manner the tribunal deems fit.

Despite their many advantages, Med-Arb and Arb-Med are not free from their share of concerns. The first amongst them is their compliance with the principles of natural justice. The major area of concern is the switching of roles by a single person from mediator to an arbitrator and vice- versa. There are 2 major apprehensions in this regard namely:
a) The element of bias,
b) The impact of the information divulged during the mediation process can have in influencing the arbitral award.

These apprehensions are reasonable as unlike traditional courts, no oath governs the quantity of information divulged under the Med-Arb and Arb-Med in private caucuses. Private caucuses provide the parties with the opportunity and freedom to pass personal comments, criticisms and divulge other information which may influence the judgement of the Med-Arbitrator in without the Med-Arbitrator even knowing about it. If a party can show that the arbitrators award was polluted by such information, such award is declared invalid for the information so obtained was outside the course of the arbitral proceedings.

[60] *Supra* note 44.

The principle of impartiality of the Med-Arbitrator was discussed in *Bowden v Weickert* wherein the court set aside the arbitral order and said that the Med-Arbitrator was duty-bound to be impartial and protect all confidential information revealed during the mediation process.
Thus, the Med-arbitrators must keep in mind that arbitral award must be in accordance with the information collected only during the arbitration phase otherwise the award can be liable to be set aside.

The observations of the Bowden case were reiterated in the *Town of Clinton* v. *Geological Services Corp.* case in which it was observed that waiver of mediation privileges must be explicit. Mere acceptance of Med-Arb process does not constitute as a waiver of Mediation Confidentiality.

Glencot Development & Design v. *Ben Barret*[61] reflects the European Attitude to this question. The Court's acknowledged that private caucuses could germinate inherent bias in the mediators.

The Singapore and Hong-Kong law provide for private caucuses; however, their law obligates the med-arbitrator to reveal all confidential information relevant to the case in case of failure of the mediation process.

The other fear is regarding the 'coercive' powers of the Med-Arbitrator. This apprehension is particularly in the mediation with respect to the power the Mediator to issue the arbitrator award which shall be binding on the parties. For example, a Med-Arbitrator may hint at a negative award to facilitate the parties in reaching a mutually acceptable settlement. However, as can be clearly seen. Parties in such cases are not reaching a settlement by their own free will but rather they are

[61] *Glencot Development & Design Ltd* v. *Ben Barrett & Son (Contractors) Ltd*, BLR 207; CILL 1721, 80 Con LR 14.

being ‘forced’ or ‘coerced’ to reach a settlement via the fear of a negative award.

This problem can be solved by empowering the parties with the choice to discontinue their participation in the arbitration process post the mediation phase if they suspect abuse of power by the Med-Arbitrator.

The third concern with the Med-Arb process is the wastage of resources especially in the Arbitration stage when the mediation is successful. There are problem of increased costs and time especially when two different people play the roles of the mediator and arbitrator, respectively.

But this problem must be juxtaposed with the advantages which Arb-Med process provides. As neither party can be sure how what the award will be, they have lower expectations of a favorable award and are motivated towards co-operating with each other in the mediation phase. This further ensures that business relations are not dampened because of the dispute.[62]

As seen above the concern of bias, be it actual or apparent has been a cause of worry for Med-Arb and Arb-Med. One solution suggested to deal with this problem is to prohibit private caucuses during mediation process. This however, risks in severely weaking the mediation process. One other solution is a legislation which bans the use of information revealed in private caucuses to be used in the arbitral proceedings. This suggestion seems to be the most plausible option for it does not violate the principles of natural justice and restricts the evil of bias as well.

However, some still fear that even this measure would not prove to be too effective in dealing with residual biases which linger on in the subconscious mind and are not weeded out by procedural safeguards. The judicial trend towards the test of apparent as opposed to real bias, as well as inclusion of a

[62] *Supra* note 44.

mechanism in the form of the second consent principle for the parties to object to the bias might, can provide the parties with an effective (if not fully perfect) means of objecting to residual bias.[63]

The second consent provision is provided for in Section 27D (4) of the Commercial Arbitration Law 2010 (NSW). This second consent enables the dispute to enter arbitration stage post the mediation phase. If such a consent is not obtained by the parties then, section 27D (6) provides for the option of appointing a new arbitrator. This ensures the party of an alternative to reduce any biases resulting from private caucuses from infiltrating the arbitration award.

It is undoubtedly true that Med-Arb is comparatively costlier and resource guzzling than the individual process of mediation and arbitration. However, it becomes a little less expensive if a single person conducts both the mediation and arbitration process. Moreover, looking at the clientele and the market which generally avails of the Med-Arb process, it can be stated that the initial expenditure would be compensated in the long run due to the continuance of business relationship between the parties.

The expeditious and consensual nature of Med-Arb and Arb-Med processes make them extremely attractive alternative dispute resolution mechanisms.

UNICTRAL Model Law also provides for a mechanism wherein the settlement agreement could be enforced as consensual arbitral awards provided that the concerned countries should operate within the framework as given in the Model law and conform with the rules of institution providing for such agreements to be enforced. The agreement can be enforced as a contract between two parties when those countries do not follow the Model law.

The issues surrounding the 'sealed envelope' model of Arb-Med such as the effect and enforceability of the sealed award can be

[63] *Id.*

effectively addressed by examining the finality of arbitral awards with the finality of judicial decisions. It is argued that an arbitrator is a quasi-judicial entity, and his/her roles is quite different from that of a judge. Since the sealed award is not enforced, it should not be recognised as a binding decree. Secondly, arguments for the finality of an arbitral award essentially arise from the mutual consent of the parties to be bound by the award. An appeal therefore disregards this mutual consent. In an Arb-Med process, however, the finality argument is rendered inapplicable when the parties consent to disregard the award when they reach a settlement via mediation.

VI. CONCLUSION

'Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expense and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.'

- Abraham Lincoln

The importance of mediation as an alternative dispute redressal mechanism can be gauged by the words of Senior Advocate Mr. Sriram Panchu who calls mediation as the flagship of ADR processes wherein ADR does not stand for Alternative Dispute Resolution mechanism but for Appropriate Dispute Resolution mechanism.[64]

The immense popularity of mediation stems from its emphasis on parties' needs and interests and provides full disclosure of competing interests. It provides parties great autonomy and thereby confers on them the right of self-determination. Parties themselves work out a settlement which is

[64] Sriram Panchu, *On The Mediation Process*, Law Commission of India on ADR/Mediation, New Delhi (2003).

mutually acceptable to both of them and takes all their interests into consideration. Furthermore, procedural flexibility and strict commitment towards privacy are also what make mediation an attractive dispute resolution mechanism over traditional litigation and arbitration.[65]

Mediation is one letter away from Meditation. The whole emphasis is on finding the peace i.e. finding the third side, in order to have a reconciliation between the disputants.

However, unlike an arbitration award, a mediation settlement is not binding per se. Moreover, there is no statute governing the enforcement of mediation settlement. However, in a court referred mediation, the mediation settlement is enforceable under Order 23 rule 3 as a compromise decree. The general philosophy behind this is that all matters on which a suit is filed in courts can be resolved by means of a compromise settlement. The essential requirements for this provision are that there must a written, lawful agreement, which is signed by both the parties. This agreement must be recorded by the court, based on which a consent decree is passed by the court.[66]

Another way of making mediation settlement binding is provided for in section 30 of the Arbitration and Conciliation Act of 1996. This section enables the arbitral tribunal to encourage parties to opt for a mediation settlement to resolve their disputes if the tribunal feels that the dispute can be resolved in such a manner. Such a settlement is then recorded by the arbitral tribunal and enforced as an arbitration award. This means that an award which contains a compromise between the parties themselves in not an invalid award provided the arbitrator is assured that the settlement is fair to all parties. If, however, the existence of compromise is contended, then the tribunal can go into the

[65] Justice Dr. DY Chandrachud, *Mediation – Realizing the Potential and Designing Implementation strategies.*

[66] C.K.TAKWANI, CIVIL PROCEDURE CODE 370 (Eastern Book Company 8th ed., 2019).

question and if the settlement is found to be valid then the tribunal can give the award in terms of the settlement.[67]

By enabling the arbitration tribunal to encourage the parties to undertake the path of settlements via mediation, the legislature might have also hinted at the adoption of the Med-Arb and Arb-Med processes wherein the mediation settlement is enforced by the med-arbitrator as an arbitration award, thereby making the settlement binding on both the parties.

However, it is pertinent to note that in majority of the cases, parties themselves comply with the terms and conditions of the mediation settlement. This has been vouched for by Mr. Sriram Panchu who in a webinar organized by the Youth Bar Association of India proudly declared that an overwhelming majority of mediation settlements do not generally go to the courts for enforcements. This is because in a mediation settlement both parties feel that they have signed an agreement which is in their best interest and thus they find no need for the interference of the courts and they go about enforcing it about themselves. It is only in rare cases that a mediation settlement undergoes the process of enforcement as one-party deviates from the terms of the settlement. He further adds that in his 30 years of mediation experience he has not had even one instance wherein the parties felt the need to seek the enforcement of the settlement. If ever enforcement has been opted for, it has been done only in those cases wherein one party found it difficult to fulfill their obligations due to change in their circumstances. However, even in such circumstances, parties prefer to come to the mediation table again to rework the settlement to meet their new needs. This shows that mediation settlements are generally adhered to due to the trust between the parties, both not wanting

[67] AVTAR SINGH, LAW OF ARBITRATION AND CONCILIATION 294 (Eastern Book Company 11th ed., 2021).

to ruin their relationship between each other by disobeying their obligations.[68]

However, some legal minds, though acknowledging the efficacy of the unenforced mediation settlements, the fact remains that when parties reach a mutually agreed settlement, majority of them prefer to have the same recorded as a consent decree or award before the court or tribunal, to provide it with recognition and consequent sanction under law.[69]

Not all disputes can be referred to mediation. Commercial disputes, matrimonial disputes, tortious liabilities and all those cases where parties wish to preserve pre-existing relationships can be referred to mediation. Criminal cases having an overwhelming element of civil dispute can also be referred to mediation.

However, criminal cases (except those mentioned above), representatives' suits, cases with serious allegations of fraud and impersonation, election disputes, cases involving protection of courts (e.g., claims against minors etc.) and cases involving grant of authority by the court (e.g.- grant of probate), are not to be referred for mediation. If such cases are so referred, the court would not enforce the settlement so reached by the parties.

'Impetus shall come from within. If induced, will not last for long.'[70]

[68] Sriram Panchu, *Singapore Convention: The Way Forward,* 10th SESSION OF THE VIRTUAL SUMMER SCHOOL, https://www.youtube.com/watch?v=7Kv6pLdzQk0.

[69] Sahil Kanuga and Raj Panchmatia, *Mediated Settlements: The Way Ahead for India,* Bar and Bench.

[70] Purnima.

FUNDAMENTAL RIGHTS & DYNAMICS OF STATE

Seema Singh[*]

ABSTRACT

Entire freedom struggle of colonial India was primarily for the Fundamental Rights which are guaranteed by the nature. In post independent India the constituent assembly gave prime importance to these rights which were put in part III in the form of Fundamental Rights. These Rights are guaranteed against the State, but in the era of globalization and neo liberalization being the part of the global world and World Trade Organization India has changed its economic policies in 1991 and moved towards privatization, disinvestment and public-private partnership. This diluted the concept of State as it is defined under art.12 and further explained by the judiciary.

In this paper the author is trying to explore the possible solution of this problem of inevitable privatization where most of the public functions are going to performed by the private players and state is shrinking it responsibility only as a regulator. This paper is an attempt to ignite the mind of judiciary and law makers regarding the protection of fundamental rights against the private entity. In this paper the author has also discussed the effect of technological globalization and suggested some ideas to protect the fundamental rights of users against big tech giants.

I. INTRODUCTION

In the Indian constitution fundamental rights are guaranteed against the State. These rights are basically natural

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rights and not the gift of the State. These natural rights have been acknowledged by different laws and conventions across the globe. Though they are natural rights but in most of the civilizations they have not been respected by the authorities in power being king, dictator or duly elected government. As Atkin says "Power corrupts and absolute power corrupts absolutely", so it is very much required to protect these fundamental rights against the power of the State. For this purpose, different mechanisms have been evolved in almost all the civilized nations in the form of constitutional, statutory or judicial remedies.

In the constitutional scheme of most of the democratic countries State plays the role of protector and provider both. But the faculty of the State does not deny the probability of being violator of the same rights. So, in the entire discussion of ''Rights & State", definition of State becomes very significant. In the entire history of human civilization, the idea of State has been discussed, though the definition kept changing in changing time and circumstances. 'State' as a term can be perceived differently in political science and law but their overlapping and bonding cannot be overlooked. For all time 'State' is a comparatively settled territory where residents have formed association with a purpose of establishing peace, law and order. In political science, State is a political organization of society. In different societies the definition of State was evolved according to their own societal dynamics. That's why we can see some distinctions between the 'Idea of State' of Bharat and West.

II. THE IDEA OF STATE

A. Theories of origin of State & western philosophy

The idea of State in the western world can be traced back to the theories of Plato and Aristotle. The political theories of both the philosophers closely ties to their ethical theories. According to this theory small State in Greece originated from the natural divisions like by mountains, rivers, sea or on the basis

of ethnic or cult division. The city-states were self-sufficient and was perceived by Aristotle as the means of developing morality among the individuals in the community [1].

The modern concept of State emerged in 16th Century in the theories of Machiavelli and Bodin[2]. Term 'State' in modern system was firstly used by Machiaveli , in his book "The Prince", which was published in 1523[3]. Machiavelli's concept of state was centered around the importance of the durability of government[4]. It arrogated moral considerations and focused completely over the strength of the ruler. However, Bodin believes that power alone is not sufficient to create a sovereign, but rules must be complied with morality to be long lasting, and need to be continuous[5].

Later on, "social contract" was picked up in a good pace to establish the definition of State. According to Locke, 'the state' in itself is a social contract between individuals whereby they agree not to infringe on each other's "natural rights" to life,

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[1] Richard Parry, Harald Thorsrud, *Ancient Ethical Theory*, Stanford Encyclopedia of Philosophy, First published Tue Aug 3, 2004, https://plato.stanford.edu/entries/ethics-ancient/.

[2] The Editors of Encyclopedia Britannica, *State sovereign political entity*, Britannica, https://www.britannica.com/topic/state-sovereign-political-entity.

[3] Melanie Hunt, B.A., *Machiavelli and Myth*, https://digital.library.unt.edu/ark:/67531/metadc663699/m2/1/high_res_d/1002773351-Hunt.pdf.

[4] POWER AND STATENICCOLO MACHIAVELLI (1469-1527), https://archive.mu.ac.in/myweb_test/TYBA%20study%20material/Politicals%20Sci.%20-%20V.pdf POWER AND STATENICCOLO MACHIAVELLI (1469-1527).

[5] Cherif Bassiouni, David Beetham, Justice M. Fathima Beevi (Ms.), Abd-El Kader Boye, Awad El Mor, Hieronim Kubiak, Victor Massuh, Cyril Ramaphosa, Juwono Sudarsono, Alain Touraine, Luis Villoro, DEMOCRACY: ITS PRINCIPLES AND ACHIEVEMENT, http://archive.ipu.org/pdf/publications/democracy_pr_e.pdf.

liberty, and property, in exchange for which each man secures his own "sphere of liberty[6]."

Rousseau's theory was a deviation from his predecessor whose theory revolved around monarchy. Rousseau recognized the State as the environment for the moral development of humanity. He proposed that the state owed its authority to the general will of the people. According to him, the nation is sovereign, and the law is the will of the people[7].

In the development of concept of State next was Hegel, who believed that the state was the highest form of social existence. According to him- "Legitimacy of the state comes from upholding common morals rather than particular interest of the individuals in a society"[8]. He believed in the power of national aspiration. He says that "Every man is subordinate to the state and if a state claims one's life, he must surrender it"[9]. This differed from his predecessor Immanuel Kant, who proposed the establishment of a league of nations to end conflict and to establish a "perpetual peace[10]."

In the 19th century Jeremy Bentham proposed a new idea of State. He considered State as- "An artificial means of producing a unity of interest and a device for maintaining stability"[11]. As per him, the role of the state was to ensure more

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[6] The Editors of Encyclopaedia Britannica, *State sovereign political entity*, Britannica, https://www.britannica.com/topic/state-sovereign-political-entity.

[7] Christopher Bertram, *Jean Jacques Rousseau*, Stanford Encyclopedia of Philosophy, First published Mon Sep 27, 2010; substantive revision Fri May 26, 2017, https://plato.stanford.edu/entries/rousseau/.

[8] David A. Duquette, *Hegel: Social and Political Thought*, Internet Encyclopaedia of Philosophy, https://iep.utm.edu/hegelsoc/.

[9] Institute of Legal and Management Studies, *WHAT IS A STATE?, What is the definition of a State?*, ILMS (Feb.16, 2019), https://www.ilms.academy/blog/what-is-the-defination-of-a-state-legally.

[10] Olivia B. Waxman, *5 Things to Know About the League of Nations*, TIME, Jan, 25th, 2019, https://time.com/5507628/league-of-nations-history-legacy.

[11] Editors of Encyclopaedia Britannica, *Hegel*, Britannica, https://www.britannica.com/topic/state-sovereign-political-entity/Hegel.

happiness and lack of pain in the individuals. This theory is known as the utilitarian theory[12].

In later times Karl Marx gave a very restrictive meaning of State. According to him- a state is nothing but an "apparatus of oppression", which is operated by the stronger class to ensure economic supremacy over the weaker class. He saw state as the product of class struggle between "haves" and "haves not[13]".

Later on Hans Kelsen came up with the theory which defined the State as simply a centralized legal order, with no more sovereign than the individual, in that it cannot be defined only by its own existence and experience. It must be seen in the context of its interaction with the rest of the world[14].

In modern times, though the concept of welfare state is universally accepted, but the definition of State is gradually changing. State has broad and restricted definition. Government is just a part of State but State in itself is much broader in its definition. States enjoys perpetuity but Governments keep changing. The meaning of 'State' comprised of a defined or "sovereign" territory with a population and also includes legislature, executive, bureaucracy, courts and other institutions to ensure rule of law. State also have authority to levy taxes and keep military and police forces to defend its citizens and territories. State has control over all resources and it keeps distributing and re-distributing the same. As per legal dictionary, in broad terms a State can be defined as "Groups of people which have acquired international recognition as an independent

[12] Stephen Nathanson, *Act and Rule Utilitarianism*, Internet Encyclopedia of Philosophy, https://iep.utm.edu/util-a-r/.

[13] Institute of Legal and Management Studies, *WHAT IS A STATE?, What is the definition of a State?*, ILMS, https://www.ilms.academy/blog/what-is-the-defination-of-a-state-legally.

[14] Kelsen Lives Alexander Somek, European Journal of International Law, Volume 18, Issue 3, June 2007, Pages 409–451, https://doi.org/10.1093/ejil/chm028 Published: 01 June 2007, https://academic.oup.com/ejil/article/18/3/409/363595.

country and which have a population, and a defined and distinct territory[15]."

B. Theories of origin of State in ancient India

The three theories of origin of state in ancient India are as follows: 1. Social Contract Theory 2. Divine Origin Theory 3. Organic Theory.

The core issues of Bhartiya political science is the study of origin, nature aim and functions of State. In ancient India the main duty of State was to ensure peace, prosperity, order and happiness. It was a social organization with centralized political power. Origin of State was the beginning of dawn of civilization. There is lack of unanimity among scholars about the origin of State in ancient India. A good number of scholars believe that there was a golden age in ancient Bharat where people were duty centric and used to enjoy a life of happiness, peace and self-discipline.

Ancient Vedic text Aitreya Brahmana provides an earliest record of origin of State and Kingship. According to this text State gradually evolved after the establishment of kingship[16]. The following is a brief explanation of each theory:

1. Social contract theory[17]:

The social contract theory, is one of the most celebrated and common theory about the origin of State. According to this theory State is a result of contract between king and his subjects.

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[15] The Editor of Encyclopaedia Britannica, *State sovereign political entity*, Britannica, https://www.britannica.com/topic/state-sovereign-political-entity.
[16] Puja Mondal, *3 Theories of Origin of State in Ancient India*, Your Article Library, https://www.yourarticlelibrary.com/political-science/3-theories-of-origin-of-state-in-ancient-india/40149/.
[17] IILS Blog, *Social Contract Theory (The origin of state)*, Indian Institute of Legal Studies, https://www.iilsindia.com/blogs/social-contract-theory-origin-state/.

In this contract the king is expected to save the state and the subjects from external aggression and internal disturbance and also to ensure order and security within the state. Though in earlies Vedic period there was no belief in Social Contract Theory, instead king used to be elected to wage a successful war against the demons.

2. Divine origin theory[18]:

According to 'Divine Origin Theory', king was subordinate to law, which was made by society on ethical norms. The governance was community driven and king was not the center of all powers. King was the father of his subjects and was supposed to act in a non-discriminatory manner, with utmost affection and kindness.

According to Manusamhita origin of State is divine. According to one excerpt from Manusamhita- 'the Lord created the king for the protection of his whole creation … even an infant king must not be despised (from an idea) that he is only a mortal, because he is a great deity in human form'[19].

It was also stated in Manusamhita that "When the world was not without a king and dispersed in fear in all directions, the lord created a king for the protection of all. And because, he's formed of fragments of all those gods, the king surpasses all other beings in splendor[20]".
'Ramayana', the great epic of India, also laid down that king was of the divine origin. This theory believes that men approached

[18] Political Science, *Divine Theory of Origin of State Political Theory*, May 6, 2019, https://www.politicalscienceview.com/divine-theory-of-origin-of-state/.
[19] George Buhler, *Manusmriti the Laws of Manu Part 2*, HINDUWEBSITE.COM, https://www.hinduwebsite.com/sacredscripts/hinduism/dharma/manusmriti_2.asp.
[20] Puja Mondal, *3 Theories of Origin of State in Ancient India*, YOUR ARTICLE LIBRARY, https://www.yourarticlelibrary.com/political-science/3-theories-of-origin-of-state-in-ancient-india/40149.

the creator- Brahma to provide them a king with divine qualities. Then all Gods spared a portion of their power in a human being who became the king. Thus, this theory believes in divinity and special abilities of the king[21].

Like Ramayana, Mahabharata, another great epic, also believes in the superior talent and caliber of the king on the earth. Similarly, Puranas also describe the divine origin of the king and the state. The Agni Purana states that the kings were embodiments or forms of Lord Vishnu (the god who sustains the earth)[22]. It is also interesting to note that some kings had titles like Chakravarthi— universal emperor, while some of the Mauryan emperors conferred titles like Devanam Priya, beloved of Gods, upon them[23].

3. Organic theory:

This theory holds the view that state is like an organism and that each organ has a specific function to perform. The theory believes that the healthy functioning of the whole organism depends upon the healthy conditions of each part of the body or organism and its efficient functioning[24].

The seven parts of the body of state are -1.the king or the sovereign, 2.the minister 3. the territory and population 4. the fortified city or the capital 5.the treasury 6. the army 7. the friends and the allies. Among all the seven elements or parts, it is the king who is most important[25].

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[21] *Id.*

[22] *Vishnu*, New World Encyclopaedia, https://www.newworldencyclopedia.org/entry/Vishnu.

[23] *Theme Two- Kings, Farmers and Towns*, NCERT, https://ncert.nic.in/textbook/pdf/lehs102.pdf/.

[24] Dr. Rita Chaudhari, *Indian Culture*, Pathshala MHRD, http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000829IC/P001771/M027444/ET/1519189771P10-M03-TheoriesofState-ET.pdf.

[25] THE SAPTANGA THEORY: ELEMENTS OF STATE, www.iilsindia.com/study-material/516108_1606765387.pdf/.

According to Matsya Purana the king was the root and the subjects were the trees, while, Sukra Neetisaara, compares the state with that of human body. According to Sukracharya- "The king is the head, the ministers the eyes, the treasurer the mouth, the army the heart, the fort the hands, and the territory the feet". Mahabharata also supports this theory and believes that every element or the limbs are important for the proper functioning of the state[26].

According to modern International Law, the definition of state is- "An independent legal entity occupying a defined territory, the members are which are united together for the purpose of resisting external force and preserving internal order"[27].

Thus, on the basis of abovementioned discussions it is clear that from ancient to modern time welfare of people and protection of territories against external aggression or internal disturbance was the prime responsibility of State.

III. STATE AND INDIAN CONSTITUTION

As an independent, democratic country term "India" in itself confines a deep sense of constructive meaning and responsibility. According to the definition of political science India that is Bharat shall be a Union of States[28] and for the purpose of part III and IV definition of State is prescribed under art.12 of the Indian Constitution. Part III of the Indian

[26] Dharmendra Kumar, Pravin Kumar, *The Geographical and the Historical Aspect of Evolution of State in Ancient India*, 10 CASIRJ (2019), http://www.casirj.com/article_pdf?id=8440.pdf/ INTERNATIONAL RESEARCH JOURNAL OF
COMMERCE, ARTS AND SCIENCE / Shri Param Hans Education & Research Foundation Trust : ISSN 2319 – 9202.

[27] Shree Krishna Singh, *Economic Justice*, Journal Of Legal Studies And Research Mar 14, 2019, https://thelawbrigade.com/tax-laws/economic-justice/Economic Justice/.

[28] Article 1 of the Indian Constitution.

Constitution deals with fundamental rights and part IV deals with Directive Principle of State Policy. Position of article 12 in the Constitution of India is quite unique. Part III deals with fundamental rights but instead of defining rights, it defines State first. The unique position of definition of State is self-explanatory in two ways. First it proves that these rights are available against the state and second it is the responsibility of the state to protect these rights. Just because of this article we can claim our fundamental and constitutional rights against State or its instrumentality, before the Supreme Court of India or High Court of any State. The statement of the Article, as enshrined in the Constitution, goes as follows:

"Definition in this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

Thus, under art.12, the definition of State is illustrative and includes Central government and Parliament and State Government and State Legislature. The meaning of both can be easily understood. Difficulty arises in defining the meaning of local and other authorities. In both the categories term 'authority' is common. According to Webster's Dictionary; "Authority" means- "A person or body exercising power to command. When read under Article 12, the word authority means the power to make laws (or orders, regulations, bye-laws, notification etc.) which have the force of law. It also includes the power to enforce those laws."

"Local Authority" is defined under section 3(31) of the General Clauses Act, 1897. According to this definition-

"Local Authority shall mean a municipal committee, district board, body of commissioner or other authority legally entitled to or entrusted by the Government within the control or management of a municipal or local fund."

In case of *Mohammad Yasin* v. *Town Area Committee*[29], the Supreme Court further clarified the meaning of 'local authority.' Local authorities also have power to raise funds for the furtherance of its activities and fulfilment of its objectives by levying taxes, rates, charges or fees[30].

A. Other authorities?

As we have seen earlier that term 'Local Authority' is defined under the General Clauses Act, 1897, but term "Other Authorities" are not defined anywhere. Some courts applied the principle of "*ejusdem generis*" and no distinction was made between State maintained and State aided or private institutions[31]. Later it was held that the expression includes constitutional and statutory authorities[32] and a distinction was made between authorities constituted by an Act and those constituted under an Act of the Legislature.[33] An earlier restrictive interpretation was given to the term, 'other authority' which received more clear and broader interpretation in the case of *R.D Shetty* v. *International Airport Authority of India.*[34] In this case Justice P.N Bhagwati propounded 5 Point test to determine

[29] AIR 1952 SC 115. According to Supreme Court Local authority has following characteristics-
1.Have a separate legal existence as a corporate body. 2.Not be a mere government agency but must be legally an independent entity. 3.Function in a defined area. 4.Be wholly or partly, directly or indirectly, elected by the inhabitants of the area. 5.Enjoy a certain degree of autonomy (complete or partial).6. Be entrusted by statute with such governmental functions and duties as are usually entrusted to locally (like health, education, water, town planning, markets, transportation, etc.)"

[30] Diganth Raj Sehgal, *'State' under Article 12 of the Constitution of India*, Ipleaders, https://blog.ipleaders.in/state-article-12-constitution-india/.

[31] *University of Madras* v. *Shanta Bai* (A.I.R.1954 Mad.67) (India).

[32] *Ujjambai* v. *State of U.P*. (1963)1 S.C.C. 778 (India).

[33] *Sabhajit Tewary* v. *Union of India* (A.I.R.1975 S.C.1329) (India).

[34] AIR 1979 SC 1628 (India).

that whether a particular body is an agency or instrumentality of the state or not and it goes as follows –

1. "Financial resources of the State, where State is the chief funding source i.e. the entire share capital is held by the government.
2. Deep and pervasive control of the State.
3. The functional character being Governmental in its essence, meaning thereby that its functions have public importance or are of a governmental character.
4. A department of Government transferred to a corporation.
5. Enjoys "monopoly status" which State conferred or is protected by it".

This was also elucidated by the Supreme Court that the Five Point Test is only illustrative and not conclusive in its nature and should be further expanded with great care and caution.

Relying on these tests Supreme Court in many judgments declared companies registered under the Companies Act, 1956[35] or societies registered under the Societies Registration Act, 1860[36], as the instrumentality of State and thus "other authority" under Art.12.

B. Liberalization of economy and State-

In post independent India the approach of constitution was in the favor of welfare-socialist state and it can be easily understood from the Preamble and Directive Principles of State Policy. Perhaps constituent assemble never thought about free economic model. The role of welfare state was not limited to health, education or housing but it strives for securing social, economic and political justice as enshrined in the Preamble of the Indian Constitution and similarly placed under art. 38 (1) of Indian Constitution which says- "The State shall strive to promote the

[35] AIR 1981 SC 212 (India).

[36] *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology* (2002)5SCC111 & *State of U.P.* v. *Radhey Shyam Rai* 2009(3) SCALE 754 (India).

welfare of the people by securing and protecting as effectively as it may social order in which justice, social, economic and political, shall inform all the institutions of the national life."

Effectively, the idea of justice is inter-spread among different provisions of the Indian Constitution especially in DPSPs. The purpose of these provisions is to minimize inequality in all respect by State efforts. Though these directives are not enforceable by court but the principles are fundamental for governance and can't be ignored by any government in the welfare State[37].

Since the adoption of New Economic Policy (NEP)in the year 1991, after being the member of World Trade Organization India started opening up its market by removing and relaxing Tariff and Non-Tariff Barriers and thus started moving towards privatization and disinvestment. As we are aware that for the successful implementation of FRs and DPSPs state control and regulation is important, but under the NEP state started losing its grip over economy. Slowly private sectors started growing and disinvestment, PPP Model, private financial initiatives and contractual activities started rising. Government/s started selling their stakes in many PSUs and other government companies. After considerable disinvestment such companies lost the control of the government and thus lost the status of government instrumentalities and State. In this second phase of liberalization which is also known as neo-liberalization redistribution capacity of the State is limiting. So, this is a unique paradox of modern liberalization where institutions are talking about institutional democracy but not implementing the same in economic affairs.

Although in this new world order, where every country is competing with rest of the world in terms of GDP growth this

[37] KLE Law Journal 90 PRIVATIZATION AND PUBLIC WELFARE: CONSTITUTIONAL IMPERATIVES
DR. P. Puneeth, http://docs.manupatra.in/newsline/articles/Upload/82667634-4CA1-4467-9A0C-01A3BF3661B9.pdf.

NEP is a necessary evil and cannot be considered as unconstitutional per se, but in touching the pre- condition of free economy India is bound to move for more privatization and foreign direct investment which is resulting into compromise with DPSPs and narrowing down the scope of term State.

Realizing the present-day problem Justice V. R. Krishna Iyer, expressed his concerns over such affair of State and said[38]-

"We have a new democracy run from afar be strong capitalist proprietors influencing the political process and humoring the glitterati and wining parties Right, Left and Centre through a monoculture of globalization, liberalization, marketization and privatization plus anti-socialism … Herein lies the contradiction between the Constitution and the elections held under the Constitution."

In this context, Prof. Upendra Baxi also observed at several places that, DPSPs are imperative and cannot be compromised without changing the text of Art.38,39 or 43A[39].

In reality these raised concerns of all these legal luminaries are not baseless. It is a reality that increasing privatization is creating a new kind of challenges. In this new liberalization scheme State is distancing itself from different commercial activities and focusing primarily on governance. For most of the commercial activities State is just a regulator. But in reality, this neo-liberalization is adversely affecting the interest of the citizens. An employee in a private employment cannot claim any fundamental right against his employer, and thus bound to be exploited without appropriate remedy. This shows

[38]V.R.Krishna Iyer, *Rhetoric Versus Reality: Essays on Human Rights, Justice, Democratic Values* 51 (2004).

[39] KLE Law Journal 90 PRIVATIZATION AND PUBLIC WELFARE: CONSTITUTIONAL IMPERATIVES DR. P. Puneeth, http://docs.manupatra.in/newsline/articles/Upload/82667634-4CA1-4467-9A0C-01A3BF3661B9.pdf.

the dilution of concept of State and defeats the purpose of part three up to a greater extent.

C. Protections against State in the constitutional scheme

As we know that under the constitutional scheme the most important part of Indian constitution is the 'Right to Constitutional Remedies' which is prescribed under art. 32. This right comes with certain restrictions and pre-conditions and two most important among them are- the violator should be State and the right which has been violated should be the fundamental right. As the rights are available against the State it is always in the interest of the petitioner to prove that the violator is State. So here it becomes pertinent to discuss what those benefits are which can be claimed against the State. The first benefit is the protection of Art.14[40] and 16[41]. Both prohibits employer to exercise his powers arbitrarily and protects constitutional right of employee of equal opportunity guaranteed in the constitution. These rights cannot be claimed against the private employer. Another benefit which an employee receives against the state employer is such state instrumentalities comes under the discipline of administrative law. Such authorities or employers also come under the writ jurisdiction of the Supreme court and High court and they cannot ask petitioner to exhaust his alternative remedy first. So, in this way access to remedy becomes much quicker and easier and probability of protection of fundamental rights rises manifold.

IV. NEW APPROACH OF JUDICIARY, LAW COMMISSION AND FEW LANDMARK CASES

Privatization has made a private employer or service provider much powerful in terms of bargaining and in a way

[40] Art.14-Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

[41] Article 16 - Equality of opportunity in matters of public employment.

given them a license to play with fundamental rights of their employees. Such violations primarily include right to retrenchment, right to deny equality or equal opportunity to employees. In many such cases of disinvestment the affected parties moved to Supreme court for the protection of their fundamental right to life which was under threat due to forced retirement or retrenchment but rejected by Supreme Court many times in the name of prerogative of government over economic policy issues ,such in the case of BALCO[42] .

So, in these changing circumstances, where the fundamental rights of the citizens are under threat due to privatization, the role of the Supreme court, who is the protector of fundamental rights becomes extremely crucial. Globalization and privatization in this present-day world cannot be restricted by any means but as the savior of constitution honorable Supreme court bound to evolve some new approaches to protect the fundamental rights of the citizens. In this regard citing certain judgments is imperative.

1. Cricket control board of India (BCCI) Case

First important case related with BCCI was Zee Telefilms Ltd. v. Union of India[43]. BCCI is one of the riches Cricket Board of the world. BCCI is registered society under Tamil Nadu Societies Registration Act. It is a non-profit making organization. BCCI is creating Team India which participates in different International Cricket tournaments. Win and Loss of this team is considered as win and loss of India. Once BCCI invited bidding to sell telecasting rights for five years. Zee Telefilm was the highest bidder so contract was given to Zee and Zee also transferred the initial token amount to the bank account of BCCI. But subsequently without mentioning proper reason BCCI cancelled this contract and then Zee telefilm filed a writ petition before the SC to issue a writ of mandamus to BCCI.

[42] AIR 2002 SC 350 (India).
[43] (2005) 4 SCC 649 (India).

In this case BCCI opposed the petition on the ground that BCCI is not a state, so writ petition is not maintainable. In the support of its arguments BCCI put the key ground of being an independent non-profit making registered society, which is not receiving any fund from the government and working independently without any control of the government. Monopoly of BCCI over the cricket is not State conferred nor it is created by BCCI. BCCI organizes international cricket tournament as the part of International Cricket Council.

After listening arguments from both the parties and applying the cumulative effect theory evolved by SC in International Airport Authority Case, SC held that BCCI is not a State. While deciding this matter SC also shown its concern that if BCCI is declared as State 64 other sports federations will also have to be declared as State. Thus the judiciary will be over flooded from such cases. Hence SC directed petitioner to approach HC under art.226 to seek appropriate remedy.

After few years another case brought BCCI into lime light and that was the case of match fixing. In the case of BCCI v Cricket Association of Bihar[44], honorable SC shown its special interest in cleaning of BCCI and constituted a committee under the chairmanship of Justice Lodha. This committee was constituted to investigate the allegation of corruption in BCCI and to suggest possible reforms in Cricket governance in India. Committee was also asked to submit its report to Honorable Supreme Court.

In this case honorable Supreme Court opined that as the BCCI is taking tax exemptions form the government over its income and also receiving land to build stadium to promote Cricket, so BCCI may be declared as State but refrained itself from declaring the same. In this case, the Supreme Court ruled that BCCI was not amenable to writ in infringement of

[44] (2015) 3 SCC 251 (India).

fundamental rights under Article 32, but jurisdiction of art. 226 could be successfully applied. Through this judgement, SC clearly indicated that the limitless and massive powers, which is hold by BCCI in the field of cricket and the function which is performed by them is primarily a public function.

The Law Commission of India, that works as an advisory body to the Ministry of Law & Justice, in its 275th report also suggested the Government to treat BCCI as an agency of the state under Article 12 of the Indian Constitution. Commission further added that –'BCCI controls the policy formulation and implementation related to cricket, affecting the country at large, which commission believes to be a State function[45].

Moreover, in October 2018, the Central Information Commission, the top appellate body in RTI matters, went through the law, orders of the Supreme Court and the recommendations of Law Commission of India report, submissions of the Central Public Information Officer in the Ministry of Youth Affairs and Sports and concluded that- "the status, nature and functional characteristics of the BCCI requires fulfilment of the conditions of Section 2(h) of the RTI Act 2005[46]. Section 2(h) of the Act defines criteria under which a body can be declared as public authority under the RTI Act[47]. As per this Section- "Public authority includes anybody or institution controlled or substantially financed, either directly or indirectly by the Government". CIC order says- "Though there is no direct financial assistance to BCCI by the Central Government, but it has been granting concessions in Income tax, customs, etc. to BCCI. Even land is provided at highly discounted rates or nominal value by the Centre and State for the construction of

[45] Saba, *Law Commission's 275th report on Legal Framework: BCCI vis-à-vis Rights to information Act, 2005* SCC ONLINE, https://www.scconline.com/blog/post/2018/05/02/law-commissions-275th-report-on-legal-framework-bcci-vis-a-vis-right-to-information-act-2005/.
[46] Definition of Public Authority under RTI Act, 2005.
[47] *Smt. Geeta Rani* v. *CPIO, M/o Youth Affairs & Sports*, CIC/ MOYAS/A/2018/123236, https://indiankanoon.org/doc/144876151/.

cricket stadiums. These concessions amount to thousands of crores of rupees. This qualifies as indirect funding by the Government. Given all these reasons, one may infer that that the BCCI carries out public functions and also receives governmental exemptions"[48].

2.Jatya Pal Singh v. Union of India[49].

In this case the engineers and technical staff were originally working in the Department of Overseas Communications, which was the department of the Government of India. Later it was converted into Videsh Sanchar Nigam Ltd. (VSNL) and the government divested a portion of its shareholding in VSNL and it became a Tata Communications Ltd. a Tata group company. Earlier there was a condition that the employees would not be retrenched, but subsequently, 20 managers were terminated. These terminated employees moved to the Delhi and Bombay high courts against this action, but both the high courts rejected their petitions as the company was no longer a state enterprise. Their appeals were dismissed by the Supreme Court also which stated that they could seek redress through the ordinary forums like the industrial courts.

In this case the Supreme Court ruled that- "Tata Communications, the successor of VSNL, was providing commercial service for profit considerations and it is not performing public functions". Therefore, employees who were terminated cannot move high courts through writ petitions, the court said while upholding the judgments of the Bombay and Delhi high courts. So, this is the case where ill effect of disinvestment can be easily seen. Here due to retrenchment several employees lost their jobs and thus their Right to Life faced a severe setback. SC as a protector of the fundamental rights need to evolve some mechanism to protect the same.

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[48] Tanya Singh, *Public Authority*, Competition Commission of India, https://cic.gov.in/sites/default/files/Tanya%20Singh.pdf.
[49] (2013) 6SCC 452 (India).

3.Social media/ internet service providers cases

Presently so many cases are pending against private entities who are basically performing public functions. In every such case the issue is related with maintainability of the petition. More recent ones are the cases against social media platforms like Facebook, twitter and WhatsApp. Though they all are social media platform but they are gathering huge amount of personal data of the users which is directly related with their right to privacy. Facebook and twitter are also controlling the right to freedom of speech and expression of the users by flagging their messages or blocking their accounts. They do not have any clear policy but they are constantly violating the law of the land in India. But, in all these cases which have been filed against these social media platforms they are raising the issue of maintainability of writ petition as they claim that being a private entity they do not come under the purview of writ jurisdiction of SC and H.Cs.

Now the most relevant question is such social networking sites, which are collecting valuable personal data of millions of Indians can shed off their responsibility on the ground that they are not state? And if so then what about the fundamental right to privacy which was declared by SC in the case of *Justice K.S.Puttaswamy* v. *Union of India*.[50] In the recent case of *Karamanya Singh Sareen* v. *Union of India & Another*[51] Delhi High Court has given an unprecedented decision where the petition filed against Facebook was rejected on the want of jurisdiction, but at the same time partial relief was granted to the petitioner. Currently matter is pending before the SC. The case first came up in the Delhi High Court over privacy concerns with a WhatsApp data sharing with Facebook, which had acquired the messaging app. The HC questioned the effectiveness of the consent given by WhatsApp users while signing up for the

[50] (2017) 10 SCC 1 (India).
[51] W.P.(C) 7663/2016 & C.M.No.31553/2016 (directions) (India).

services. Although the court highlighted the lack of a data privacy policy and commented on the need for a comprehensive law on the subject, it finally took a 'take-it-or-leave-it' approach on the matter. However, the court directed WhatsApp not to share any data collected before September 25, 2016, the date the data sharing policy came into force.

This case shows another challenge for the judiciary in the era of technological globalization, where SC declared Right to Privacy as a fundamental right but still there is no corresponding legislation dealing with right to privacy. In absentia of law these giant tech companies are openly flaunting norms in the name of private entities. Besides this in this era of technology driven society Internet Service Providers (ISPs) or social networking sites and OTT platforms are creating a new challenge before art.19 (1)(a), 19(1)(g) and the restrictions of art.19(2). Now, in this era of 'Internet Economy', where citizens can utilize the service offered by an ISP, and exercise their fundamental right to freedom of trade, such ISPs are always in the position to restrict someone's trade right and thus can effectively regulate a citizen's fundamental right to practice any trade or profession. Seeing the gravity of the matter it is imperative to review the decision of Delhi High Court.

Therefore, the phrase 'other authorities' should be liberally interpreted to include private Internet Service Providers and social networking sites within its ambit. This is necessary in order to prevent Internet Service Providers and social media sites from violating fundamental rights of the citizens.

3.Dr. Janet Jeyapaul v. *SRM University*[52]

The appellant, Dr. Janet Jeyapaul, was a Senior Lecturer in the Department of Biotechnology at SRM University (respondent), which is a deemed university. A series of memos and counter-replies was in motion as the respondents alleged that

[52] AIR 2016 SC 73 (India).

the appellant had failed to take classes for two batches. Later on, the respondent constituted an Enquiry Committee that communicated that the action was based on several complaints made against her by her students. However, the appellant was not given a reference to any of those documents or complaints. She was subsequently received notice of removal.

To challenge this notice she filed a writ petition before Madras High Court under Article 226 before a Single Judge, where high court quashed the termination notice and directed employer to re-instate her. Then University filed a letter patent appeal before a Division Bench. The division bench reversed the order citing reason that the respondent was not a State under Article 12, and thus could not be subject to writ jurisdiction under Article 226.

The present case before the Supreme Court was a Special Leave Petition against the decision of the Division bench that viewed the University to not be a State for the purpose of Article 12. Honorable court appointed Mr. Harish Salve, as amicus curie to assist the court. As the matter involved a legal question Mr. Salve opined through his submission, that first test to decide maintainability under art.226 is the object of the institution and the activities it performs in furtherance of that object. Not only statutory body or instrumentality of State but anybody performing public function should be the key factor to decide maintainability under art.226.

It was highlighted that the phrase "any person or authority" under Article 226 was broad enough to encompass any person or a body performing a public function or a duty. The emphasis would thus lay on the nature of duty performed by that authority and not its form per se. Here university is imparting education which is a public function and is Deemed University under sec.3 of UGC Act. Thus, when a private body exercise its public function, then aggrieved party has remedy not only under ordinary law but also under art.226.

The judgment also added that the term "authority" under Article 226 would have to be construed liberally as compared to the term under Article 12 as it entailed both fundamental and non-fundamental rights. This judgment is very instrumental in protecting the rights of those who are working in so called private sectors but such sectors are imparting public functions.

4.Mr Subhash Chandra Agarwal v. CPIO Supreme Court of India[53]

An RTI activist Shri. Subhash Chandra Agrawal, filed an RTI to the Chief Justice of India office to get the copy of the declaration of the High Court and Supreme Court judges in which they have made declaration of their assets to the Chief Justice of India. The CPIO office of Chief Justice of India, denied granting information on this ground that CJI's Office does not come under the purview of Right to Information Act.

Against the order of CPIO, Subhash Chandra Agrawal filed an appeal before the office of Chief Information Commissioner. CIC held that the office of CJI is a public authority, and thus comes under the purview of Right to Information Act. Against the order of CIC the CPIO office of CJI filed an appeal before the Delhi High Court. Delhi High Court upheld the order of CIC and reiterated that the office of CJI is a public office, so comes under the purview of Right to Information Act. Now against this order of Delhi High Court, CPIO Office of SC filed an appeal before the Supreme Court of India.

In this case, ultimately the Supreme Court has decided that the office of CJI is a public office and it comes under the purview of Right to Information Act. Judgement was put on by justice Gogoi, as the Chief Justice of India who ultimately clarified that the office of CJI is covered under the Right to Information Act, 2005. In this case Supreme Court has also clarified that- "Information not presently available to the public

[53] CIVIL APPEAL NO. 10044 OF 2010 (India).

authority but which can be accessed by the same authority from a private body under any other law for the time being in force is also a public information." Thus, all such private organizations whose information can be accessed by some public authority would be covered under the Right to Information Act, 2005.
Thus, such public authorities which comes under the purview of RTI would be subject to writ jurisdiction of High Court/s under art.226.

5.Venkatachaliah committee recommendation & expansion of the term 'State'

The earlier NDA Government, then Prime Minister Shri. Atal Bihari Vajpayee ji had appointed a commission in February 2000 under the chairmanship of Manepalli Narayana Rao Venkatachalaiah, to review the working of the Constitution. This commission is known as – "The National Commission to Review the Working of the Constitution (NCRWC)". This commission had to suggest the possible amendments to the Constitution of India in this era of privatization and liberalization. In its 2000 pages report which was submitted on 31st March, 2002 this commission proposed some changes in art.12and stated that,

"In Article 12 of the Constitution, the following Explanation should be added:
Explanation – In this Article, the expression 'other authorities' shall include any person in relation to such of its functions which are of a public nature".
This recommendation, though not complete in itself or fully analytical of the situation, was at least an attempt to further widen the import of the term "State" as envisaged in Art. 12 of the Indian Constitution.

V. CONCLUSION

Now on the basis of above discussions it is clear that in the era of Global world almost all the countries are facing almost same kind of challenges to keep their economy and development

align with rest of the developed world. To speed up the process of development and remove the hurdles of red tapism public sectors are sieging in its size across the globe. Obviously, globalization has risen the standard of living and provided more opportunities but simultaneously rising power of capitalists and industrialists created more conflicts across the globe.

In any democratic set up it is the responsibility of the state to protect weaker and redistribute the prosperity and justice. But the erosion of State can be easily seen in the form of cut in public sector jobs and diversion of resources to private sectors.
This is disturbing the balance of power and making State less powerful and less responsible. A weak State can never keep the terms of social contract. This is diluting the dream of fundamental rights of citizens. So, in such circumstances a way out from this crisis is urgently required.

On the basis of abovementioned judgments, it is very clear that judiciary has more ways to protect the rights of the citizens and they should try to establish more clarity over it. Thus, even though the definition of 'other authority' cannot be expanded the term "Public Authority" should be definitely redefined to include all those within its purview who are performing public functions, irrespective of their private nature. If it happens then many such private organizations may come under the purview of Right to Information Act and thus under the purview of Art.226. This approach which has been recently adopted by judiciary is also in conformity with the recommendations of the National Commission to Review the Working of the Constitution (NCRWC) under the Chairmanship of Justice Venkatachaliah.

Thus, if the Central Legislature is not in a mood to listen to the popular opinions, rather, it is gradually diminishing the space for the same, it is high time for the Supreme Court to come up with its solemn duty of protecting the Constitution by every means. Expanding the definition of State in the name of public function is a welcoming step but such more actions are expected

from the judiciary to protect the fundamental rights of the citizens in this era of technological globalization.

MANDATORY VERSUS VOLUNTARY CORPORATE SOCIAL RESPONSIBILITY: A COMPARATIVE ANALYSIS OF CSR REGIME IN INDIA AND SINGAPORE

Vidhushi Puri[*]

ABSTRACT

Corporate Social Responsibility is a business practice that helps a corporate to regulate itself by being socially accountable to itself, its stakeholders and the public at large. Social responsibility by its bare meaning points towards a philosophy that seems to be voluntary in nature as the vigour to do social work should come from within and cannot be imposed. On one hand, it is very important for a corporate to be socially responsible and do sustainable business but on the other hand, making expenditure on social causes mandatory poses extra financial burden which may be undesirable for growing economies and mushrooming corporates. At the same time, it becomes important to ensure that the profit-making zeal of the corporates does not surpass its requirement to be socially responsible and financially sustainable. India has been the forerunner in mandating CSR in the year 2013 and improvising an altogether new legal regime which needs to be complied by the corporates. Singapore, on the other hand, has been a jurisdiction which motivates the corporates to invest in CSR rather than making it mandatory for them. This paper aims to compare and contrast the existing CSR regimes in both India and Singapore. The researcher has critically analysed the current

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trends of CSR practices in India and Singapore and the impact mandatory CSR has had on Indian corporates. In the end, certain suggestions have been made as to which model of CSR is more beneficial for growing economies- Mandatory or Voluntary, in view of the analysis done in this paper.

I. CSR AND CORPORATE SUSTAINABILITY

"*A good company offers excellent products and services. A great company also offers excellent products and services but also strives to make the world a better place*."- Philip Kotler.

Sustainable and balanced development has emerged to present itself as a vital component of global expansion. The existence of international standards and jurisdictions governing key social and environmental values has become crucial considering the needs of present generations as well as posterity. In light of the aforementioned argument, the role of various sectors of the economy such as businesses and industries in working towards a sustainable future has intensified. Being a critical part of society, it is in business' interest to recognize and contribute towards the achievement of this goal. From a strategic viewpoint, businesses can thrive only when they operate within a healthy environment and ecosystem.

The terms Corporate Social Responsibility (CSR) and Corporate Sustainability are often referred to in a synonymous way and used interchangeably. Though both the terms actually aid the corporates in attaining the same end of Sustainable Development, the means and the approach taken by both of them is indeed different. Both the terms are extremely in vogue and no study of corporate governance is ever complete without placing reliance on these terms. None of them has a clear-cut definition and we may find multi-faceted definitions of both of them. In this paper, we shall take into account some of the most prominent and commonly used definitions of these terms.

United Nations Industrial Development Organisation defines CSR as "a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders."
[1] CSR is commonly conceived as being the process through which a company achieves a balance of economic, environmental and social objectives, while at the same time fulfilling the expectations of all its stakeholders. The driving force to pursue CSR is generally to maintain a good reputation in the market and with time it has increasingly been seen as ways to primarily fulfil compliances. CSR as a concept is comprehended as having a short term bent and has undertones of philanthropy as corporates have to expend a certain share of their profits to ensure compliance and also in a way give back to the society. This philanthropic aspect of CSR makes it more often than not undesirable for growing economies and mushrooming corporates as they tend to look at it as an extra financial burden to spend their monies on social causes. The trends studied in various jurisdictions show that the zeal to provide for the betterment of society and in turn achieve or at least aim to achieve sustainability goes missing even though CSR as a concept is intended to be broader than mere philanthropy or social work.

On the other hand, Corporate Sustainability is not just a broader concept than CSR but also has a different way of attaining the goal of sustainable development. UN Global Compact defines Corporate Sustainability as "imperative for business today –essential to long-term corporate success and for ensuring that markets deliver value across society. To be sustainable, companies must do five things: Foremost, they must operate responsibly in alignment with universal principles and take actions that support the society around them. Then, to push sustainability deep into the corporate DNA, companies must

[1] *UNIDO, What is CSR?* https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr#:~:text=Corporate%20Social%20Responsibility%20is%20a,and%20interactions%20with%20their%20stakeholders.

commit at the highest level, report annually on their efforts, and engage locally where they have a presence."[2] This aids the company in attaining the objectives of triple bottom approach i.e. focus equally on people, planet and profit.[3]

Sustainability as a concept apparently voices for a long-term approach and something that the corporates are undertaking not just as good samaritans, but as something which all corporates should undertake in order to ensure advantages in the long term and to ensure that they can pursue their primary goal of shareholder wealth maximisation in the times to come. The ambits of sustainability are nowhere restricted to mere philanthropy but go way beyond that. A robust sustainability regime is not just focused on giving back to society but is also aimed at ensuring that the corporation flourishes along with the society they function in. The propagators of Corporate Sustainability strongly advocate that for a business to thrive, the communities they operate in must also thrive.[4]

II. CSR: INDIAN PERSPECTIVE

The concept of good governance is deep-rooted in the Indian system dating back to the times of Kautilya (3rd century BCE) who laid down the basic facets of governance in his much-lauded work, Arthashastra. Despite this, the concept of corporate governance, as such, has been comparatively new to India having evolved only in the early 1990s with the advent of economic liberalisation. Ever since then, India has been trying to grow in terms of governance aspects and CSR is one of them.

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[2] United Nations Global Impact, *Guide to Corporate Sustainability*, https://d306pr3pise04h.cloudfront.net/docs/publications%2FUN_Global_Compact_Guide_to_Corporate_Sustainability.pdf.

[3] "Triple bottom line", coined in the 1990s by John Elkington, founder of British Consultancy Sustainability. The first bottom line is the traditional profit and loss account, the second a measure of how socially responsible a company's operations are, and the third measures environmental responsibility.

[4] Thusita De Silva, *CSR in Singapore*, https://singaporemagazine.sif.org.sg/csr-in-singapore.

Some companies in India like the Tata group etc. have always adopted a voluntary CSR approach but largely a concept like CSR or sustainability reporting was never existent in India before the year 2009 when the Ministry of Corporate Affairs introduced Voluntary Guidelines on CSR. Before this, the businesses in India always had a shareholder-based approach and this was for the first time that drift was seen towards the stakeholder-based approach. Under these guidelines, each company was suggested to formulate a CSR policy which would provide a blueprint of all the CSR activities planned to be undertaken by the company.[5] This policy was restructured in the year 2011 to give rise to National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (NVG). This time the guidelines provided for 9 basic principles which were to be the backbone of NVG. This was a first measure directed towards Long Term Share Value (LTSV) but was still voluntary in nature. Also, this measure had very little impact on any kind of CSR spends by the companies as there was almost no encouragement to that end.

Since these guidelines were proving to be toothless legislation and since there weren't a lot of companies adhering to these guidelines, in 2012, Securities and Exchange Board of India (SEBI) released a circular mandating Business Responsibility Reports (BRR). To give effect to the same, clause 55 of the Listing Agreement was amended. The mandate was only applicable to the top 100 listed companies based on market capitalisation at NSE and BSE as on March 31, 2012.[6] These reports had to be in line with the principles enshrined under the NVG. Eventually, SEBI came out with the Listing Obligations

[5] Ministry of Corporate Affairs, Government of India, *Corporate Social Responsibility Voluntary Guidelines*, https://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

[6] Securities and Exchange Board of India, Government of India, *Business Responsibility Reports*, https://www.sebi.gov.in/sebi_data/attachdocs/1344915990072.pdf.

and Disclosure Requirements (LODR) Regulations, 2015, Reg. 34(2)(f), which states that the annual report submitted by the companies shall contain a business responsibility report describing the initiatives taken by the listed companies from an environmental, social and governance perspective, in the format prescribed by the Board.[7] This mandate is currently for the top 1000 listed companies based on their market capitalisation as on 31st March each year. Even the remaining listed companies can furnish these reports voluntarily.[8] Presently, the LODR Regulations, primarily govern the aspect of sustainability reporting in India.

Various studies claimed that the adoption of voluntary guidelines given in India was not up to the mark and therefore a need for a more stringed regime was felt. There were a lot of debates to have a law which mandates CSR expenditure by companies. Also, the talks to revamp Companies Act, 1956 were also ongoing. It was almost at the same time that the corporate governance regime in India was jolted by the Satyam scam. It was in the aftermath of this, that a lot of Companies Amendment Bills were placed before the parliament. Eventually, after a lot of debates and discussions, the Companies Act 2013 was enacted. In a landmark move, the Companies Act, 2013 mandated the undertaking of Corporate Social Responsibility for Indian based as well as foreign-based companies operating within the boundaries of the nation. The ratification of the Companies Act, 2013 made India a forerunner to obligate spending on CSR activities via a statutory provision. As stated earlier, while CSR has been taken up voluntarily by several corporate houses traditionally, the new provisions put formal and larger responsibility upon companies operating within the country to set

[7] Securities and Exchange Board of India, Government of India, *Format for Business Responsibility Report (BRR)*, https://www.sebi.gov.in/legal/circulars/nov-2015/format-for-business-responsibility-report-brr-_30954.html.

[8] Securities and Exchange Board of India, Government of India, *Listing Obligations and Disclosure Requirements Regulations*, https://www.sebi.gov.in/sebi_data/attachdocs/1441284401427.pdf.

out a more transparent framework so as to warrant a stricter acquiescence. Presently, what the Companies Act does is to bring along additional organizations into the fold and exponentialize the total expenditure on CSR.

The law dictating the terms of CSR is mentioned within Section 135 of the Companies Act, 2013 which is to be conjointly read along with Schedule VII of the Act and the Companies (Corporate Social Responsibility Policy) Rules, 2014. Section 135 mandates the formation of a CSR committee and apparently, CSR expenditure for organizations crossing the benchmark as is mentioned in the same. The companies crossing the benchmark are under an obligation to spend 2% of their average net profits in the preceding three financial years towards CSR. Schedule VII of the Companies Act of 2013 lays down a list of various activities that can be performed as a part of CSR initiative. Several activities such as engagement in education, poverty alleviation, female empowerment or contributions towards renowned funds such as the Prime Minister's National Relief Fund are covered as a part of CSR initiatives.[9]

One can make out a huge difference in the intention and implementation while giving the provision a thoughtful read. On an apparent reading of the section, one may feel that spending on CSR is mandatory but a careful reading would explain that the approach is way lax than what it seems. It is restricted at being the "comply or explain" approach and it is actually the disclosures of the CSR expenditures in the reports and the setting up of CSR committee that is mandatory and attracts a penalty.[10] "Comply or explain" means the companies must undertake the expenditure or explain the failure to do so. Even though there is a spike in the CSR expenditures, since the enactment of Companies Act 2013, India is still far from achieving its real vision and mission beneath implementing the provision. Since

[9] The Companies Act, No. 18 of 2013, Acts of Parliament, 2013 (India).
[10] Umakanth Varottil ET AL, *Analysing the CSR Spending Requirements under Indian Company Law*, (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173945.

the provision is restricted to "comply or explain" mandate and the penalty imposed is arguably less, most companies are not taking it very seriously and have shown a very laid-back attitude in even disclosing or reporting the reasons for their inability to spend the stated amount. Enforcement of laws has always been a tricky issue in India. Hence, this provision merely boils down to be just being legal compliance and is far for its primary objective of achieving sustainability.

More recently, Sec. 135 was amended vide the Companies (Amendment) Act, 2019 inter-alia requiring the provisions to change from "comply or explain" to "comply or suffer" by introducing a penal provision for non-compliance. The amendment further provided for marking the unspent amount of money of ongoing projects in a separate account and any other unspent amount to Clean Ganga Fund or PMNRF or like. Amidst the decriminalisation (of offences under Companies Act) spree by the government, the introduction of imprisonment, in the CSR provisions has surely not been welcomed by the corporates and have created a sense of panic amongst them. Though the provisions in the Companies (Amendment) Act, 2019 with respect to CSR have been put on hold, the government is in the mode of amending CSR Rules 2014 to bring them in line with the said amendment in the Act and in order to ensure smooth implementation of the amendment in the Companies Act.

A high-level committee has been set up under the chairmanship of Mr. Injeti Srinivas which has also given its suggestions to making the CSR regime in the country more efficient and robust. Some of these suggestions are to make CSR expenditures tax-deductible, violation of CSR compliance to be made a civil offence, carry forward unspent CSR balance for three to five years, etc. The Committee stressed upon advocacy and sensitization to achieve the overall objective of CSR.[11]

[11] Ministry of Corporate Affairs, Government of India, *Report of the High Level Committee on Corporate Social Responsibility*, (2019), https://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.pdf.

Hence, one can make out that the past decade has seen a lot of changes being made in the CSR regime in India where we can see the drift from voluntary to pseudo-mandatory to mandatory to such an extent so as to make the defaulters pay hefty penalty as well as face imprisonment. It can be said without a doubt that the government is trying extremely hard to streamline the regime and ensure effective implementation. But, as of now, the CSR policy in India is too much compliance-based rather than sustainability based. The focus on compliances has increased so much that we seldom see the word sustainability being used with CSR which in itself is the defeat of the concept. As discussed earlier also, the nature of CSR in India is such that this concept is almost understood the same as Corporate Philanthropy and thus, the real intent takes a back seat.

III. CSR: SINGAPOREAN PERSPECTIVE

Singapore is a unique nation owing to the fact that it has gained independence relatively very recently and in such a short span of time, it has developed its economy exponentially. Even though the economy is small at a global level, it is comparatively very rich, having one of the highest per capita income in Asia. The rapid financial growth that Singapore has seen also boasts of environmental-friendly and sustainable economic development. The Singaporean government has given paramount importance to sustainable practices all across the nation, ever since its inception. The country has always been well-known for its green city programs and the government has taken considerable efforts to embed sustainable practices throughout majority of sectors in the nation. The policymakers in Singapore have seemingly attained success in enforcing a social contract between the stakeholders and the corporations.[12]

[12] Hu Yuen Ping, *Corporate Social Responsibility in Singapore: Institutions, Framework and Practice*, (2005) http://publications.apec.org/-/media/APEC/Publications/2005/12/Corporate-Social-Responsiblity-in-the-APEC-Region-Current-Status-and-Implications-December-2005/TOC/Singapore.pdf.

CSR as a concept of voluntary contribution towards the general upliftment of society has been deep-rooted in Singapore. The culture there is such that the corporates seem to be automatically focused on sustainable growth and believe that economic development is not at odds with environmental protection.[13] There is no provision in Singapore for "mandatory CSR" as such even though they have a tradition and statutory requirements of Sustainability Reporting by the corporates. As a concept, CSR is not understood as standalone and is more often than not, referred along with, Corporate Sustainability. Therefore, even though there is no formal statutory requirement for CSR, the corporates in Singapore have been undertaking CSR expenditures as their normal business method. The fundamental of corporates in Singapore has always been transparency and ethics.

To formalise CSR issues, the National Tripartite Initiative on CSR was established in May 2004 which involved having a tripartite approach including representatives from government, industry and unions.[14] The government at its own behest has tried to address maximum issues pertaining to CSR even though they emphasise primarily on voluntary action. On the legislative front, the basis for socially responsible behaviour in Singapore dates back to 2001 when the Corporate Governance Committee, laid down the Code of Corporate Governance for the first time. The most recent amendment to the said document was carried out in 2018 by the Monetary Authority of Singapore.[15] It lays down a certain set of principles and provisions and it is mandatory for all

[13] Mauraqz, *How Singapore became Asia's Greenest City*, https://qz.com/921517/how-singapore-became-asias-greenest-city/.

[14] Thomas Thomas, *CSR Singapore Style*, https://ink.library.smu.edu.sg/lien_research/21/.

[15] Monetary Authority of Singapore, Government of Singapore, *Code of Corporate Governance*, https://www.mas.gov.sg/-/media/MAS/Regulations-and-Financial-Stability/Regulatory-and-Supervisory-Framework/Corporate-Governance-of-Listed-Companies/Code-of-Corporate-Governance-6-Aug-2018.pdf.

the listed companies to abide by them. The companies are under a 'comply or explain' obligation and all the requirements are to be met by the company and have to be stated in the company's annual reports. The listed companies are required to address issues of board independence and diversity of thought and background, division of responsibilities between the leadership of the board and the company management, transparency of the appointment of directors, assessment of the board's effectiveness, remuneration policies, risk management and internal controls, audit, shareholder rights, engagement with shareholders and interests of other stakeholders.[16]

The Singapore Exchange (SGX) is another pivotal body to ensure compliance with sustainability in Singapore. With the global push for Sustainability Reporting and the benefits that Sustainability Reporting brings to both investors and companies, SGX introduced Guide to Sustainability Reporting for listed companies in the year 2011 though this guide provided for voluntary reporting of sustainability practices by the listed companies.[17] In order to make the mechanism more robust, in 2016, SGX came up with a new listing rule which mandated the listed companies to issue annual sustainability reports on 'comply or explain' basis. An option was given to issue standalone sustainability reports or the same could be incorporated well within the annual reports submitted by the companies. These requirements were further elaborated upon by SGX-ST Listing Rule 711B. This rule listed down the main components which should be there in sustainability reports. They are:[18]

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[16] Piotr Zembrowski ET AL, *ESG Disclosures in Asia Pacific*, https://www.cfainstitute.org/en/advocacy/policy-positions/esg-disclosures-apac.

[17] Lawrence Loh & Michael Tang, *Sustainability Reporting- Progress and Challenges*, https://bschool.nus.edu.sg/cgio/wp-content/uploads/sites/7/2019/12/SGX-CGIO-Sustainability-Reporting-Progress-and-Challenges-Report-2019.pdf.

[18] *Id.*

1. Material ESG factors (where ESG stands for Environmental, Social and Governance)
2. Policies, practices and performance
3. Targets
4. Sustainability reporting frameworks
5. Board statement

The Monetary Authority of Singapore and the SGX can be seen hand in hand in working towards making the sustainability regime in Singapore more and more effective.[19] Along with them being the flag bearers of corporate sustainability regime in Singapore, there are various other authorities also in place to protect the environment and uplift the society like Ministry of Sustainability and Environment- MSE (erstwhile The Ministry of the Environment and Water Resources), National Environment Agency, Council for Corporate Disclosures and Governance (CCDG) etc. The MSE is committed to providing the Singaporeans a clean and green environment, clean and safe water and food. The CCDG, on the other hand, lays down accounting standards for companies in Singapore and reviews the corporate governance and disclosure practices regularly.[20]In furtherance of the world's largest corporate sustainability initiative i.e. The UN Global Compact, Singapore launched the Global Compact Network Singapore in 2005. Eventually, Singapore Compact for CSR was also launched and it primarily seeks to foster collaboration and dialogue amongst various CSR stakeholders.

IV. GLOBAL TRENDS

Understanding the concept of CSR is incomplete without studying the famous article by Milton Friedman titled "The Social Responsibility of Business is to Increase its Profits". This paper portrayed a pure shareholder centric approach. Milton

[19] PWC, SGX Sustainability Reporting Guide, (2017).
[20] Ministry of Finance, Government of Singapore, Press Release, Aug. 16, 2002.

Friedman is often cited as the father of shareholder theory of corporate governance which identifies the shareholders as the only group, a company is responsible or accountable towards. He always stated that the sole and primary responsibility or purpose of business is to maximise the wealth of its shareholders. He also said that CSR is a "fundamentally subversive doctrine in a free society"[21]. For the most part of the last century, we saw businesses being governed by this ideology. Even though we saw corporates flourishing but it was also seen that such an ideology gave rise to huge scams and frauds being committed in the companies. The profit-making zeal surpassed all ethical and sustainable vigour in the company. Companies were said to be prospering at the expense of the larger community. A lot of social and environmental challenges were being faced across the globe. That was the time when people started talking about the aspects of social responsibility and sustainability of the businesses.

The last decade across the globe has seen excessive importance being given to sustainability and social responsibility. A paradigm shift can be observed in Michael Porter and Mark Kramer's article titled "Creating Shared Value" which observes that the businesses need to change their approach and methods of doing business and redefine their purpose. It states that businesses should aim to 'create shared value' and 'responsible profits.'[22] They further argued that a business should, while remaining competitive, also focus on the economic and social advancement of the society in which it operates.[23] Creating shared value should be the basic ethos doing business

[21] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, THE NEW YORK TIMES, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

[22] Michael E Porter & Mark R. Kramer, *Creating Shared Value*, Harv. Bus. Rev., https://sharedvalue.org.au/wp-content/uploads/2015/12/Harvard-Business-Review-Creating-Shared-Value.pdf.

[23] Janos Takacs, *CSR and Sustainability- from Milton Friedman to Michael Porter and beyond*, http://www.eoq.hu/iaq/wqf2/papers/c2-3_takacs.pdf.

and it was to be understood as a concept which will benefit the company itself in the longer run.

Adding to this paradigm shift, the International Organisation for Standardisation, came up with ISO 26000 in the year 2010. It provides international standards and guidance on social responsibility. Its primary objective is to contribute to sustainable development across the globe by encouraging and motivating the businesses and other organisations to practice social responsibility and to improve their impact on their natural environments, their workers and the communities in which they function. It helps establish the concept of social responsibility, helps businesses and organizations manifest principles into effective actions and shares best practices relating to social responsibility, globally. It is aimed at all types of organizations regardless of their activity, size or location.[24]

In furtherance of the same, the United Nations also came up with the Sustainable Development Goals (SDG) or the Global Goals in the year 2015 which were adopted by all the member states. The focus of SDG is on an "action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030."[25] It lists down 17 goals which are all correlated to each other and aspire to balance economic, social, and environmental sustainability. Each goal has some targets allocated to them and in total, we have 169 targets. Even though these goals are not legally binding on nations, all the member states are determined in their pursuit of the same. There are a few scholars who claim that the SDGs are utopian in nature but still most people believe that even trying to achieve them will improve the quality of life

[24] International Organization for Standardization, *ISO 26000 Social Responsibility*, https://www.iso.org/iso-26000-social-responsibility.html.

[25] United Nations Development Program, *What are the Sustainable Developmental Goals?*, (2015), https://www.undp.org/content/undp/en/home/sustainable-development-goals.html.

of all and save the planet as well. Both India and Singapore are pursuing the SDGs.

Other than this, countries like the Nordic group of nations, the USA are leading the world in CSR initiatives and are emphasising more and more on the importance of sustainability. Some of the biggest companies in the world with the best CSR and sustainability ratings are from these nations, for example, Lego, Microsoft, IKEA, Apple, Amazon, Novo Nordisk etc. Apart from them, countries like Australia, New Zealand, Canada etc., and are treating CSR and Corporate Sustainability as a high priority issue and working hard to come up to the global standards of sustainability.

In the light of all these stated developments across the globe, various organisations came up with a global sustainability reporting standard and framework like the Global Reporting Initiative (GRI), Sustainability Accounting Standards Boards (SASB) etc. The most prominent of them all is the GRI which is largely being adopted by a lot of nations to fulfil their requirements of filing sustainable reports. GRI is an international independent standards organization that helps businesses, governments and other organizations understand and communicate their impacts on issues such as climate change, human rights and corruption. The GRI Standards are the first global standards for sustainability reporting. They feature a modular, interrelated structure, and represent the global best practice for reporting on a range of economic, environmental and social impacts. Since most of the nations in the world do not prescribe a set format for sustainability reporting, this serves a huge purpose of providing the basic format from the same which can be followed by all nations.

V. FINDINGS AND RECOMMENDATIONS

The Brundtland Commission report defined sustainable development as “development which meets the needs of current generations without compromising the ability of future

generations to meet their own needs". This is one of the most acceptable definition of all definitions of sustainable development in the world. This definition in itself makes the agenda of sustainable development extremely clear. It makes it clear that our activities should not only be focused on a bright day today but we also have to ensure that we have brighter days in the times to come.

CSR and Corporate Sustainability, as we have understood in the course of the paper, are not the same concepts at all, though both of them are means to attain the end of sustainable development. Even though CSR aids in achieving the latter, the role of CSR is actually way more than that. A properly implemented CSR concept can bring along a variety of competitive advantages for the company, such as enhanced access to capital and markets, increased sales and profits, operational cost savings, improved productivity and quality, efficient human resource base, improved brand image and reputation, enhanced customer loyalty, better decision making and risk management processes. Hence, the ultimate objective of CSR is not just to make the world a better place to live in but also make the corporations sustainable and to bring them in a position to pursue their profit-making objectives for a longer period of time.

In order to ensure that we have the best set of policies to implement and reach global standards, a comparative analysis is extremely important. It has been said that to know just one country is to know no countries or to know just one culture is to know no cultures. We learn best about the culture in which we live when we make a comparison with other cultures. Keeping the same in mind, the paper tries to compare and contrast the regime in India and Singapore. Singapore consistently outperforms India as far as sustainability indices are concerned. In a sustainability-minded ranking, which is backed by jurists like Michael Porter, the Social Progress Index (Social Progress Imperative 2019), Singapore ranks 27 while India ranks 102. This index aims at measuring ''the capacity of a society to meet

the basic human needs of its citizens, establish the building blocks that allow citizens and communities to enhance and sustain the quality of their lives, and create the conditions for all individuals to reach their full potential". Also, in the Global Sustainable Competitiveness Index 2019, Singapore ranks 41 and India ranks 130. This index measures the "competitiveness of countries in an integrated way." Although none of these rankings should be individually relied upon, a cumulative understanding of them depicts that India can learn and grow a lot with its deeper understanding of sustainability concepts, practices and measures in Singapore.

Primarily, the very basic difference that we can make out in the course of this paper is the difference in approach towards the concept of CSR in the two nations. While Singaporean corporates look at CSR more from a sustainability-oriented mindset, the approach in India is deeply philanthropic in nature. The corporates in India have been mostly observed to have a very negative kind of an approach upwards the concept of CSR and tend to mostly see it as a burden. A burden, which forces them to divulge a share of their profits, fruits of their labour, for the betterment of someone else. CSR expenditure is, most often than not, thought of as an added tax on the corporates. There are constant debates around the issue that CSR as a concept is inherently voluntary and nobody can be forced to do social service. The impetus of social work should always come from within and can never be forced. The aspect of sustainability tends to always take a back seat around such discussions.

Secondly, In India, excessive dependence is seen on just ensuring compliance. A lot of it is owed to the nature and language of our statute also. India is the only country in the world to direct its corporates, how much to spend, where to spend etc. Schedule VII of Companies Act, 2013 sets boundaries for what can come under the purview of CSR expenditure. The burden of compliances has been made such that the aspect of sustainability again goes missing. A result of this is that most corporates are spending money just to avoid legal soups and are spending

money, not on a need basis but just to fulfil the legal formalities. As a result, the quality of reporting in India is also not up to the mark and is very superficial with no detailing being done. Moreover, there are no such criteria to judge the appropriateness of the reports.[26]

Even though it is a stated fact, that the CSR expenditure in India has greatly increased after the enactment of Sec. 135,[27] but it is still way behind what it should have actually achieved. Most problems are due to the fact that India is still a developing economy and enforcement, as pointed earlier, has always been a tricky issue for India. To overcome the issues, a lot of steps are being taken by the Indian government to strengthen their legal framework as much as possible. A lot of deliberations and discussions are done aimed at redressing the same but a lot more can be done to address the issue of sustainability.

If we look at the Singaporean regime, it does not have a legal mandate of undertaking CSR expenditures typically, though it has the mandatory sustainability reporting requirements. The corporates themselves set their ESG goals in the light of SDGs. The government empowers the corporates with the importance of sustainability and for the corporates based in Singapore, sustainability can be understood as a way of doing business. It forms a part of their basic business ethos and the corporates seem to have a ubiquitous culture of sustainability. The government also promotes the expenditures towards social causes by corporates by giving them tax breaks on such expenditures. Also, the sustainability practices have grown manifold in the past two decades owing to such practices.[28] It is not that the Singaporean

[26] *Supra* note 10 at 4.

[27] KPMG, *India's CSR Reporting Survey 2018*, https://assets.kpmg/content/dam/kpmg/in/pdf/2019/01/India_CSR_Reporting_Survey_2018.pdf.

[28] Diligent Boards, *Two Decade of Progress: Singapore's Good Governance Pays off*, CEO MAGAZINE, (2020), https://www.theceomagazine.com/business/sponsored-content/two-decades-of-progress-singapores-good-governance-pays-off/.

system is unblemished or flawless but with a positive mindset towards sustainability and confabulations aimed at creating a better society, they are firmly moving towards their goal.

Indian corporates need to be explained that sustainability initiatives will increasingly serve to help protect companies' license to operate, save costs, recruit and retain talent, drive innovation and open up new markets. By actively addressing sustainability issues, companies will better manage their risks and drive long term growth. It is crucial for the listed companies to understand that the process of implementing Sustainability Reporting includes more than just the Sustainability Report. The real importance of Sustainability Reporting lies in how businesses are able to successfully integrate sustainability within their business strategies, operations and processes. Sustainability or CSR should not just be restricted to legal compliance but the deep-rooted intent behind the concept should be clearly understood. Therefore, it is very important for them to come to terms with the differences between the concept of CSR and social philanthropy. They should be promoted to make sustainability a way of doing business and their basic ethos of functioning in the market.

Also, a more robust and elaborate scheme of sustainability reporting should be introduced which is in line with the SDGs. Only then, it will be possible to reach out to the global levels of sustainable practices and disclosures. The disclosures should be comprehensive and as detailed as possible so as to clearly demarcate which practice will be or has been undertaken and in what time frame. They should focus more on the reporting schemes given by organisations like GRI as it will help them to attain the ends of standardisation and make a global presence.

To conclude, simply by making a practice legally mandatory, it is very difficult to achieve the desired result. Looking at the reports laid down by KPMG, it is clear as a bell that we, as a nation, are definitely growing in our pursuit to

achieve suitable development.[29] Even though a lot has already been done, and a lot still needs to be focused to achieve the desired results. There is quite a hope that in order to keep itself up to the mark globally and to meet the standards of good governance, India will adopt sustainability, both in letter and in spirit.

[29] *Supra* note 27 at 10.

DATA PROTECTION AND THE RIGHT TO PRIVACY

Chintu Jain[*]

ABSTRACT

This modern age of technology, aided by the Internet, is witnessing the storage and organisation of personal and sensitive data at a never before scale. Data subjects are fast losing control over their data. More often than not, it is being collected, used, stored, harnessed, analysed, or processed without their knowledge or consent. Not only that, their data is now easily accessible to a lot of third-parties that share no relationship with data subjects and hence are exempt from many obligations. This has ramifications on not only an individual's right to privacy, but it also potentially compromises their well-being and security. In light of this, it is exigent that there be a cogent legal framework in place that safeguards the privacy and autonomy of data subjects. Much progress, albeit slow and steady, is underway both internationally and domestically. However, there continues to be a need for private law remedies that particularly address the unique challenges posed by the explosion of data mining. Through this article, the various answer related to whys, how's, and what's of Data Protection and Data Privacy, through the lens of legal frameworks in India and around the world will be find and there will be focus on the study on what 'data protection' and 'data privacy' are and how they secure the rights of individuals. An important aspect of this paper will be the examination of the different kinds of data protection mechanisms around the world and the various approaches that have been adopted in foreign jurisdictions. Founded upon that, this study

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will analyse India's proposed data protection law by tracing the evolution of data autonomy in the country.

"A child born today will grow up with no conception of privacy at all—they'll never know what it means to have a private moment to themselves; an unrecorded, unanalysed thought. And that's a problem because privacy matters, privacy is what allows us to determine who we are and who we want to be."

–Edward Snowden

I. INTRODUCTION

Cyber dependency is at an all-time high. In today's digital, internet age, it is difficult to think of activities that do not depend on the internet. More and more of our routine transactions—banking, shopping, communication, academic, entertainment, etc.—now happen online. These services are easily available, convenient to use, and usually inexpensive or free of cost. Instead of money, most of these public and consumer transactions require personal data in exchange for services. This is not an issue in itself. Sharing personal information about ourselves often enhances our online experience. It makes the use of technology much more convenient, transparent, and personalised. However, individuals today have to reveal a great deal about themselves in order to access services that are mostly essential. As the internet continues to mediate more aspects of our lives, the processing of personal data finds itself inevitably linked with privacy concerns. Individuals—or 'data subjects'—are increasingly losing control over their data. They do not have any say over the kind of data that is shared, with whom it is shared, and for what purpose it is shared. More often than not, it is collected without consent or knowledge, and is shared with third-parties that do not have a direct relationship with, or obligation towards, data subjects. Users often do not have control over the information that they generate and the distinction between what information is private and what is public is blurry. This unsolicited and unregulated collection, storage, usage,

sharing, and processing of data personal data, especially that which is sensitive in nature, has the potential of compromising our privacy, and in turn, our safety and well-being.

Indeed, privacy concerns arising out of the unethical or illegal collection, storage, and processing of individual data have been dominating recent headlines, whether it is the Cambridge Analytica Scandal or concerns surrounding the Aadhar card in India. In order to keep a check on the adverse consequences of technological advancements, policies securing data protection and the right to privacy have become the need of the hour. Without these, individuals cannot have sufficient control over their data and achieve 'data autonomy'. It is not easy to secure the personal data of users—a balance has to be struck between the benefits of processing personal data with the threat to an individual's right to privacy. To achieve this balance, policy makers are now looking into the two-pronged aspect of achieving data autonomy—'data protection' and 'data privacy'.

II. THE SCOPE OF DATA PROTECTION

'Data protection' laws are designed to protect personal information which is collected, processed, and stored automated.[1]

They are essential in protecting individuals from abuses and in enabling them to trust organisations and governments with their personal data. Data protection enables an individual to gather information about how their data is being collected, protected, and transmitted. It thus creates restrictions on how public and private entities use the personal data of individuals.

At their core, the principles of data protection are based on the notion that individuals have the right to exert control over

[1] Privacy International, "*101: Data Protection*", *available at*: https://privacyinternational.org/explainer/41/101-data-protection.

not just their identity, but also their interactions.[2] For example, the seven principles of data protection that the European Union's General Data Protection Regulation is founded upon are lawfulness, fairness, and transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality (security); and accountability.[3]

The principles of data protection are thus not limited to the values or privacy only. Data protection is in itself an independent value. Besides protecting the privacy of users, these policies enable individuals to exercise some degree of autonomy over their personal data.

III. THE ESSENCE OF DATA PRIVACY

Privacy is a means to secure and protect the identity, dignity, sense of self, and autonomy of individuals. It posits the idea that a person is entitled to a private space in furtherance of their autonomy.[4] It aids individuals in determining when, how, and how much information about them is communicated to third-parties.[5] It protects them from state interference, it provides them liberty, and gives them the freedom to separate their private and public lives. In a modern state, privacy is at the core of liberty. It aids in the well-being of individuals and enables them to have autonomy over their private spaces and morals.[6]

In his review essay of Jeffrey Rosen's book 'The Unwanted Gaze', Robert Post expanded upon the three concepts of privacy.[7] According to Post, the three concepts that privacy is

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[2] University College London, "*Data Protection Overview*", https://www.ucl.ac.uk/data-protection/data-protection-overview/understanding-data-protection-ucl.

[3] Lexis PSL Information Law Team (ed.), *An Introduction to Data Protection Law* 13 (LexisNexis Butterworths, India, 2019).

[4] *Justice KS Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

[5] ALAN WESTIN, PRIVACY AND FREEDOM (Atheneum Publishers, 1967).

[6] *Her Majesty, The Queen* v. *Brandon Roy Dyment*, (1988) 2 SCR 417.

[7] Robert C. Post, *Three Concepts of Privacy* 89 *GEO. L.J.* 2087 (2001).

connected with are, *firstly*, to the creation of knowledge; *secondly*, to dignity; and *thirdly*, to freedom. Post argued that the connection of privacy with knowledge should not, however, be understood as a question of privacy at all. On the other hand, connecting privacy with dignity had more merit and could be helpful in apprehending privacy. Post linked the third connection—of privacy with freedom—to the concept of limiting government regulation and state interference.

These modern concepts and notions of privacy usually recognise four different categories of privacy rights.[8] These are privacy of:

a) the home, or domestic privacy;
b) information, or data privacy;
c) the body, or physical privacy; and
d) Communication.

Informational privacy, or data privacy, is thus a facet of privacy. It is built upon the foundational belief that individuals must be able to legitimately claim data about themselves. Data privacy places limitations on many parties which can access an individual's data. Further, even when parties have such access, data privacy ensures that the individual has some degree of influence over how the entities handle their data.[9]

In this manner, data privacy dictates how the personal data of individuals is processed and handled by entities that collect it. Data privacy policies concern themselves with questions about the kind of data that will be collected, how it will be collected and used, the period during which the data will be retained, who may be granted access to it, what role third-parties will play, etc.[10]

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[8] Agnidipto Tarafder, *Surveillance, Privacy and Technology: A Comparative Critique of the Laws of USA and India* 57 *JILI* 550-578 (2015).

[9] NANDAN KAMATH, LAWS RELATING TO COMPUTERS, INTERNET & E-COMMERCE 305 (Universal Law Publishing, India, 2017).

[10] Karen D. Schwartz, *Data Privacy and Data Security: What's the Difference*?, https://www.itprotoday.com/security/data-privacy-and-data-security-what-s-difference.

The distinction between data privacy and protection is that while 'data privacy' lay down the rules relating to the collection, use, and retention of data for those entities that have lawfully collected data, 'data protection' concerns itself with safeguarding data from unlawful access and unauthorised persons.[11]Thus, the former consists of regulations or policies that govern data sharing, while the latter is the mechanism—the tools and procedures—of enforcing these policies and regulations, including the prevention of unauthorised access.[12]

IV. CONCEPTUALISING DATA AUTONOMY

'Autonomy', in its reductive form, is the right of self-government—it is an individual's capacity for self-determination.[13] It is the ability of persons to define their selves by defining their identity.[14] For Rawls, autonomy conferred upon individuals the ability to decide, revise, and pursue what they conceive as good.[15] In *Morality of Freedom*, Joseph Raz conceptualised personal autonomy as the capability of an individual to control, to some degree, their own destiny. He argued that the freedom to be autonomous was not a concept adverse to the authority of the State. In fact, he states, this freedom looks up to the government—it is the government that takes positive action to develop this freedom of autonomy.[16]

Autonomy shares a close relationship with the concept of 'privacy'—the former is attained by securing the latter. In their

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[11] Forbes Technology Council, *Data Privacy vs. Data Protection: Understanding The Distinction In Defending Your*, https://www.forbes.com/sites/forbestechcouncil/2018/12/19/data-privacy-vs-data-protection-understanding-the-distinction-in-defending-your-data.

[12] *Id*.

[13] BRYAN A. GARNER (ED.), BLACK'S LAW DICTIONARY 154 (West Publishing Company, USA, 9th Ed., 2009).

[14] *Supra* note 8.

[15] SAMUEL FREEMAN (ED.), COLLECTED PAPERS OF JOHN RAWLS 365 (Harvard University Press, USA, 1999).

[16] JOSEPH RAZ, THE MORALITY OF FREEDOM 427 (Clarendon Press, Oxford, 1986).

article on 'privacy' as an 'enabling right', Oostveen and Irion established that since the rights to data privacy and data protection are not ends in themselves, they are, in a sense, 'enabling rights' that help in securing various other rights and freedoms of an individual.[17]

Autonomy, thus, is the opportunity of having meaningful choices and the freedom to pursue them.[18] 'Data autonomy', then, simply means the capacity of an individual to determine or govern how their data is collected, stored, used, shared, and processed. When an individual has control over their data and has the freedom of choosing how much and what kind of data they share, it may be said that they have data autonomy. Data autonomy rests on the twin pillars of data protection and privacy. Data privacy and protection are the two-pronged avenues of achieving data autonomy. To provide individuals with the capability of exercising autonomy over their data, it is essential to formulate policies that secure the two important data rights of data protection and privacy.

V. THE RELEVANCE OF DATA AUTONOMY

In light of how rampant data privacy breaches are becoming, the idea of 'data autonomy' is more relevant than ever before. In their report titled "A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians", the Committee of Experts under the Chairmanship of Justice B.N. Srikrishna[19] discussed a number of cases that demonstrated how vulnerable

[17] MOR BAKHOUM, BEATRIZ CONDE GALLEGO, ET AL. (EDS.), PERSONAL DATA IN COMPETITION, CONSUMER PROTECTION, AND INTELLECTUAL PROPERTY LAW: TOWARDS A HOLISTIC APPROACH*?* 9 (Springer, Germany, 2018).

[18] PAUL BERNAL, INTERNET PRIVACY RIGHTS: RIGHTS TO PROTECT AUTONOMY 25 (Cambridge University Press, 2014).

[19] COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE B.N. SRIKRISHNA, REPORT ON PERSONAL DATA PROTECTION BILL 2018: A FREE AND FAIR DIGITAL ECONOMY - PROTECTING PRIVACY, EMPOWERING INDIANS (July, 2018).

user data has become, and how little control individuals exercise over their personal data.

VI. PRIVACY BREACHES AROUND THE WORLD

For instance, in what came to be known as the 'Cambridge-Analytica Scandal', it was found that Facebook had shared the data of more than eighty-five million users—of which five lakh were Indian—with Cambridge Analytica, who was a third-party. These users did not have any direct dealing with Cambridge Analytica, and their personal data was extracted only through Facebook. This data was later used for targeted political advertisements during the 2016 US elections.[20]

Another breach surfaced during July 2017, wherein it was found that the sensitive personal data of about forty-eight million American citizens, such as information pertaining to their SSN, residential address, driver's license, financial accounts, etc. was compromised.[21] In November the same year, it was found that the personal data of about fifty-seven million people who had used the services of Uber had been stolen from the company's network late in 2016. The personal information of six million people attached to Uber as drivers was also stolen.[22] In 2018, the nutrition app, 'MyFitnessPal', suffered a data breach that affected the personal details of about a hundred and fifty million users.[23]

Data privacy breaches have also arisen out of the misuse of user consent. Often, firms in the online market use personal

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[20] *Id*. at 6.

[21] "*Equifax's Massive 2017 Data Breach Keeps Getting Worse*" THE WASHINGTON POST, Mar. 1, 2018.

[22] Andy Greenberg, *Hack Brief: Uber Paid Off Hackers to Hide a 57-Million User Data Breach* WIRED, Nov. 21, 2017, https://www.wired.com/story/uber-paid-off-hackers-to-hide-a-57-million-user-data-breach.

[23] Lily Hay Newman, *The Under Armour Hack Was Even Worse Than It Had To Be,* WIRED, Mar. 30, 2018, https://www.wired.com/story/under-armour-myfitnesspal-hack-password-hashing.

data for purposes that are different than those which users consented to. They transfer or sell the data of users to third-parties without the knowledge of the user. In a research conducted by Privacy International, it was found that over 60% of Android apps, such as Spotify, Duolingo, Trip Advisor, Period Tracker Clue, etc., shared data with Facebook. In these cases, the data was being shared irrespective of whether the user had created an account Facebook.[24] Similarly, Bounty, a well-known provider of pregnancy and parenting packages, sold data of 34.4 million users to a third-party firm, Equifax, without informing its customers.[25]

VII. PRIVACY BREACHES IN INDIA

India is not alien to privacy breaches either. In fact, in the 14th edition of its Global Risks Report, the World Economic Forum discussed data privacy breaches that occurred in 2018 and noted that the largest breach had occurred in India, where the 'Aadhar' database suffered multiple breaches, potentially compromising the data of more than one billion citizens. Personal information was being sold for rates as low as rupees 500, and later the same year a state-owned company enabled anyone to download names and ID numbers from the leaked database.[26]

Further, during the Cambridge Analytica scandal, the whistleblower alleged that the parent company of Cambridge Analytica—Strategic Communications Limited—had utilised personal data of voters during 2003 to 2012 to conduct

[24] Lorraine, *Investigating Apps that share personal data to Facebook without user content* (July 7th, 2019), https://responsibledata.io/2019/07/16/investigating-apps-that-share-personal-data-to-facebook-without-user-consent.

[25] Ben Wolford, *Data Sharing and GDPR Compliance: Bounty UK shows what not to do*, https://gdpr.eu/data-sharing-bounty-fine.

[26] WORLD ECONOMIC FORUM, THE GLOBAL RISKS REPORT, 14th Edition (2019).

behavioural research for elections in India. [27] In 2017, the data of 17 million users registered on the popular food-delivery app, 'Zomato', was stolen.[28] In the same year, it was reported that personal user data was leaked from the delivery application of McDonald due to insufficient measures of cyber security.[29]

VIII. IMPACT OF UNREGULATED PROCESSING OF DATA

Besides the obvious issues of privacy and security that emerge from data breaches, unregulated processing of data also often feeds social inequality. In his article about how artificial intelligence is capable of generating unfair and unequal responses,[30] Laurens Naudts discussed how data is collected to strengthen machine learning, which in turn is used to provide a 'data-driven' rational and statistical basis upon which individuals or groups can be distinguished.

He noted that the patterns that emerge from the categorisation, filtering, and classification of data by machines are used as the basis of differentiation among individuals or groups. This differentiation in turn allows the entity in question to take decisions regarding such individuals or groups. He argues that due to the increased use of the machine learning process, there is an increased risk that the results may be used to unfairly determine processes of allocation of burdens, benefits, treatments, or opportunities.[31]

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[27] Vidhi Doshi and Annie Gowen, *Whistleblower claims Cambridge Analytica's partners in India worked on elections, raising privacy fears* THE WASHINGTON POST, Mar. 29, 2018.

[28] Anu Thomas, *Zomato hacked: Security breach results in 17 million user data stolen* THE ECONOMIC TIMES, May 19, 2017.

[29] "*McDonald's India delivery app leaks users data*" BBC NEWS, Mar. 20, 2017.

[30] R. LEENES, R. VAN BRAKEL, ET AL. (EDS.), DATA PROTECTION AND PRIVACY: THE INTERNET OF BODIES 71-92 (Hart Publishing, Oxford, 2019).

[31] *Id*. at 74.

Thus, as concerns arising out of data processing become more pressing and urgent, there is a need to adopt watertight solutions that help secure data autonomy and ensure the protection of personal data from unintended recipients and State interference. It has become indispensable to demarcate privacy requirements and obligations through legislative and policy actions.

IX. DATA AUTONOMY IN LEGAL SYSTEMS

Undoubtedly, there is a need to arrest the occurrence of breaches such as those discussed, and to address the need for data autonomy. To do this, two policy approaches are usually adopted—*firstly*, the creation of safeguards that protect the data of users within the organisations that collect it, i.e. 'data protection' laws, and *secondly*, enacting policies that empower users to control their data and thus manage the kind of vulnerabilities that are exposed to, i.e. 'data privacy' laws.

The 'privacy principles' that guide the legislations and policies dealing with data protection, privacy, and autonomy include notice, consent, collection limitation, use limitation, access and corrections, security and safeguards, anonymity and pseudonymity, and openness.[32] At present, over a hundred countries around the world have enacted comprehensive data protection legislations while numerous others are in the process of doing so.[33]

X. DATA PROTECTION AROUND THE WORLD

Perhaps the most remarkable of these has been the European Union's General Data Protection Regulation

[32] RISHIKA TANEJA AND SIDHANT KUMAR, PRIVACY LAW: PRINCIPLES, INJUNCTIONS AND COMPENSATION (Eastern Book Company, Lucknow, 2014).
[33] *Supra* note 2.

("GDPR"). Under Chapter 3 of the GDPR, data subjects have been provided with new and extended rights, [34] including the:

a) right to be informed,
b) right to access,
c) right to rectification,
d) right to erasure or the right to be forgotten,
e) right to restrict processing,
f) right to data portability,
g) right to object, and
h) right to not be subject to automated decision making and profiling.

'Accountability' is a concept that runs throughout the Regulation—the GDPR requires that data 'controllers' comply with the principles of privacy embodied in the document and process data in a manner that is lawful, fair, and transparent.[35]

In terms of cross-border agreements, the United States of America ("USA") and European Union ("EU") entered into a data transfer framework agreement in 2016, called the 'Privacy Shield'. It provides a compliance mechanism for the cross-border transfer of personal data from Europe to the United States of America.[36] It places data protection obligations on companies that receive personal data from the EU, regulates access of the USA government to personal data, and creates a mechanism for redressal.[37]

[34] *Supra* note 4 at 10.
[35] *Supra* note 4 at 21.
[36] International Trade Administration, *Welcome to the Privacy Shield*, *available at*: https://www.privacyshield.gov/welcome.
[37] European Commission, *EU-US data transfers: How personal data transferred between the EU and US is protected*, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/eu-us-data-transfers_en.

XI. DATA PROTECTION IN INDIA

As far as India is concerned, the Information Technology Act, 2000 is the primary legislation dealing with the protection of electronic data. It was enacted to legally recognise electronic commerce so that individuals in the country are protected from the potential misuse of their online data. Under the Act, civil prosecution is provided for cyber contraventions and criminal punishment for cyber offences. However, there are no provisions that specifically or expressly deal with data protection or data privacy.

To remedy this, India passed its first comprehensive framework on data protection—the Personal Data Protection Bill—in December 2019. It is designed to protect individual personal data by creating restrictions on how corporations collect and use personal information of individuals. It sets up user 'consent' as the central requirement for data sharing.

Under the Bill, data subjects will have the rights to obtain, erase, update, or prevent the disclosure of their data. It also sets up a 'Data Protection Authority' entrusted with the task of protecting individual interest by preventing misuse of personal data. Moreover, corporations will be punished for processing or transferring personal data in violation of the Bill. While the Bill claims to be inspired by the GDPR, since it restricts the activities of corporations, it has been widely criticised for providing carte blanche data access to the government.[38]

Another notable leap was made when the honourable Supreme Court of India declared the 'Right to Privacy' as a part of the Fundamental Rights guaranteed by the Constitution of India in the case of *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*.[39]

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[38] Vindu Goel, *On Data Privacy, India Charts Its Own Path*, NEW YORK TIMES, Dec. 10, 2019.
[39] *Supra* note 5.

Quoting Justice Louis Brandeis of the Supreme Court of United States, the then Chief Justice of India, Justice Khehar, equated privacy with the right to be 'let alone'. The right to be let alone, he observed, is a part of the right to enjoy life, which in turn is a part of the fundamental right to life guaranteed under Article 21 of the Constitution of India.[40] In furtherance of this spirit, the Court recognised certain data protection principles, such as data minimization, purpose limitation, data retention, and data security. It is against these principles that legislations would be tested to determine their validity. We are amidst the fourth industrial revolution—and data is fuelling it. In today's information age, more and more essential services are being rendered in exchange for personal data. Nearly all kinds of applications that we use—from smart interconnected devices to smart mobility—hinge on data. This has given companies across the world access to large volumes of unstructured data comprising of the personal information of individuals. Parallel to this, the world has witnessed ground breaking innovations in technology, such as machine learning and sophisticated analytics. This large volume of unstructured data—known as big data—, coupled with complex analytical technologies—called big data analytics—, has transformed how individuals around the world navigate the cyberspace.

Big data and big data analytics have empowered companies with the ability to make quicker decisions in real-time. This has helped increase revenue, reduce costs, and stimulate growth. Companies with access to these technologies have a competitive edge and are able to target their services faster and better to consumers. Big data technologies are revolutionising all kinds of sectors, from healthcare, education, and welfare to commerce, manufacturing, and transportation.

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[40] Julie McCarthy, *Indian Supreme Court Declares Privacy A Fundamental Right*, (June 8th, 2017) https://www.npr.org/sections/thetwo-way/2017/08/24/545963181/indian-supreme-court-declares-privacy-a-fundamental-right.

It helps consumers too—they now have access to better user experience and are able to avail services that are customised for them. They are better protected from crime, can easily avail welfare schemes, and are able to work in cyberspace that saves them time and effort. Just like businesses, users around the world have been exposed to a new world with seamless possibilities.

But things are not as rosy and simple as they seem or have the potential of being. When individuals actually avail online services, they more often than not end up compromising their privacy and cybersecurity. A lot of times individuals unwittingly share their data with companies. Even when they do know, they are not empowered to dictate the terms of how their data will be stored or processed. This gives undue advantage to businesses and creates an imbalance of power between the 'data subject' who is sharing data and the 'data controllers' who are collecting it. This imbalance, and the dangers inherent in it, were brought to light during the Cambridge Analytica scandal, where it was found that Facebook had shared data of more than eighty-five million users—of which five-lakh were Indian—with a third-party, Cambridge Analytica. These users did not have any direct dealing with Cambridge Analytical, and their personal data was extracted only through Facebook. Besides exposing the obvious threats of unregulated data processing, the scandal also revealed that this incident was only the tip of the iceberg. Thousands of such violations were happening, and individuals across the world remained largely unprotected. What individuals are losing as a result of the unregulated processing of their personal data is their 'data autonomy'. When individuals are unable to exert control over the collection, storage, use, retention, processing, etc. of their data, they lost their right to determine what happens with their personal information.

Data autonomy rests on the twin pillars of data privacy and data protection. Data privacy and protection are two-pronged avenues for achieving data autonomy. While data privacy dictates how entities that have lawfully collected data may use it and what control data subjects may have over the custody and use

of their data, data protection concerns itself with safeguarding data from unlawful access and unauthorised persons. The former consists of regulations or policies that govern data sharing, while the latter is the mechanism—the tools and procedures—of enforcing these policies and regulations, including the prevention of unauthorised access.

Recognising the need for, and the importance of, ensuring that data subjects have the power to determine what happens with their data, international organisations and countries around the world started enacting data protection frameworks. This process is not recent, and in fact, goes back to the 1980s when the OECD and Council of Europe formulated guidelines for the flow of personal data. The United Nations, too, took many initiatives over the years for safeguarding the right to privacy and recognising the need for data protection.

At the time of writing, 107 countries around the world have enacted legislation for data protection and privacy. Of all the frameworks and guidelines pertaining to data autonomy, the European Union's General Data Protection Regulation ("GDPR") is the most remarkable. It creates a strong framework that protects the rights and interests of the data subjects and strongly regulates the activities of data controllers and processors. It is serving as the doctrinal basis for a number of data protection frameworks across the world.

The other notable and distinct approach is that of China, which focuses on the 'collective'. The data protection framework in China strides towards building the trust of consumers in the digital economy without curtailing the state's capacity of surveillance and control. It conceptualises cyber-security largely as a component of national security. There is thus a dichotomy between privacy from private actors and privacy from the state—while individuals can bring action against the former, they are not empowered to any remedy in case the State infringes their privacy.

However, rather, unfortunately, there is no universal international instrument for data protection. Most instruments have been enacted individually by either regions or countries. This may go on to pose issues if the data protection values of one country come in conflict with another's. It is important for the international community to work together towards an international agreement for the protection of data autonomy.

At present, India is working on its own comprehensive data protection framework—the Personal Data Protection Bill, 2019. In many ways, the Bill blends the approaches adopted by the European Union and China.

The Bill extends considerable data rights to data subjects to counter the overarching activities of private entities. It operates on the principles of purpose, collection, and retention limitation, and prohibits the processing of personal data unless the data principal has consented to it when the processing commenced. As a general rule, the Bill limits the processing of personal data, except for any specific, clear, or lawful purpose. By inculcating these values, the Bill tries to emulate the GDPR.

At the same time, it also gives a lot of control to the State, which is a growing matter of concern. It introduces the concepts of data localisation and data sovereignty and authorises the State to exempt any of its agencies from the obligations under the Bill. For the State, these are measures of data sovereignty that will help in fighting the colonisation of data and ensuring that the first entity to benefit from the data of Indian citizens is the State. In this manner, it adopts an approach similar to that of China.

India suffers from a lack of many cyber safeguards as a result of the non-existence of a data protection framework that is comprehensive and binding. It does, however, have the Information Technology Act, 2000, which provides considerable protection to user data and security on the internet. At its core, the Act seeks to provide legal recognition to electronic transactions in e-commerce. It focuses on electronic governance,

the recognition of electronic records and signatures, creates certifying authorities and adjudicating tribunals, lays down duties of subscribers, and spells out penalties and compensation.

However, over the years, the Act has been amended so as to ensure that some semblance of data protection exists in the country's legal system. Unfortunately, these provisions are inadequate, poorly drafted, and ambiguous. They do not reflect the spirit of data protection, a natural result of the fact that the Act does not intend to be a data protection framework.

To fill the absence of data protection, the Government of India tried to introduce Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules under the Act in 2011. These Rules, however, not only go beyond their mandate but also create more confusion. Just like their mother legislation is struggling with incorporate provisions for data protection, they too are ambiguous and ineffective.

Not all hope is lost, though. India witnessed a monumental verdict by the Supreme Court of India in 2017 which declared privacy as a fundamental right. This fundamental right, in the opinion of the Court, included the right to informational, or data privacy. This is both, remarkable and heartening.

While it is true that a data protection framework is in the pipeline, it cannot be said when it will be enacted as a law. This becomes a matter of concern, especially in light of how many attempts at data legislations have been made in the past, all of which were unsuccessful. Further, even if the proposed framework is enacted, the shape in which it exists as of now is a matter of concern. Even though the framework introduces some measure of data protection, it does so at the cost of providing overarching powers to the State. The framework is thus a matter of concern. It is important that the concerns surrounding it are addressed in a timely and effective manner.

This is what makes the Supreme Court's verdict more relevant and important—it provides a mechanism in the absence of one. Even though it is true that the verdict comes in the absence of any applicability, and that we do not really know how a right to privacy will be enforced or made applicable to various sectors, the fact that such a right is recognised is in itself a welcome reassurance.

All said and done, achieving data autonomy is no longer a distant dream for Indian citizens. While the contours and methods of achieving data autonomy may be debated, the fact that we are moving towards data autonomy cannot be discounted. To ensure that we keep moving forward, and become a data democracy, we must have an all-inclusive data protection framework that regulates the actions of private entities as well as the State. We need to have a robust system in place that boosts innovations but also demands transparency and accountability. Personal data rightfully belongs to data subjects—it is important that we redefine the ownership of data. Not only will this enhance freedom and choice, which are the hallmarks of a democracy, but it will also make us better prepared for the age of the internet. We must carve out data protection and privacy and alleviate them to the status of inalienable and non-negotiable facets of the digital world. Only then can we truly achieve data autonomy.

XII. CONCLUSION

"Data is empowering when it is in the hands of the people. We must invert the data, thus ensuring freedom and choice. That is Data Democracy."

–Nandan Nilekani

We are amidst the fourth industrial revolution—and data is fuelling it. In today's information age, more and more essential services are being rendered in exchange for personal data. Nearly all kinds of applications that we use—from smart interconnected devices to smart mobility—hinge on data. This has given

companies across the world access to large volumes of unstructured data comprising of the personal information of individuals. Parallel to this, the world has witnessed ground breaking innovations in technology, such as machine learning and sophisticated analytics. This large volume of unstructured data—known as big data—, coupled with complex analytical technologies—called big data analytics—, has transformed how individuals around the world navigate the cyberspace. Big data and big data analytics have empowered companies with the ability to make quicker decisions in real-time. This has helped increase revenue, reduce costs, and stimulate growth. Companies with access to these technologies have a competitive edge and are able to target their services faster and better to consumers. Big data technologies are revolutionising all kinds of sectors, from healthcare, education, and welfare to commerce, manufacturing, and transportation. It helps consumers too—they now have access to better user experience and are able to avail services that are customised for them. They are better protected from crime, can easily avail welfare schemes, and are able to work in cyberspace that saves their time and effort. Just like businesses, users around the world have been exposed to a new world with seamless possibilities. But things are not as rosy and simple as they seem or have the potential of being. When individuals actually avail online services, they more often than not end up compromising their privacy and cyber security. A lot of times individuals unwittingly share their data with companies. Even when they do know, they are not empowered to dictate the terms of how their data will be stored or processed. This gives undue advantage to businesses and creates an imbalance of power between the 'data subject' who is sharing data and the 'data controllers' who are collecting it. This imbalance, and the dangers inherent in it, were brought to light during the Cambridge Analytica scandal, where it was found that Facebook had shared data of more than eighty-five million users—of which five-lakh were Indian—with a third party, Cambridge Analytica. These users did not have any direct dealing with Cambridge Analytica, and their personal data was extracted only through Facebook. Besides exposing the obvious threats of unregulated data

processing, the scandal also revealed that this incident was only the tip of the iceberg. Thousands of such violations were happening, and individuals across the world remained largely unprotected. What individuals are losing as a result of the unregulated processing of their personal data is their 'data autonomy'. There is thus a dichotomy between privacy from private actors and privacy from the state—while individuals can bring action against the former, they are not empowered to any remedy in case the State infringes their privacy. However, rather, unfortunately, there is no universal international instrument for data protection. Most instruments have been enacted individually by either regions or countries. This may go on to pose issues if the data protection values of one country come in conflict with another's. It is important for the international community to work together towards an international agreement for the protection of data autonomy. At present, India is working on its own comprehensive data protection framework—the Personal Data Protection Bill, 2019. In many ways, the Bill blends the approaches adopted by the European Union and China. The Bill extends considerable data rights to data subjects to counter the overarching activities of private entities. It operates on the principles of purpose, collection, and 100 retention limitations, and prohibits the processing of personal data unless the data principal has consented to it when the processing commenced. As a general rule, the Bill limits the processing of personal data, except for any specific, clear, or lawful purpose. By inculcating India suffers from a lack of many cyber safeguards as a result of the non-existence of a data protection framework that is comprehensive and binding. It does, however, have the Information Technology Act, 2000, which provides considerable protection to user data and security on the internet. At its core, the Act seeks to provide legal recognition to electronic transactions in e-commerce. It focuses on electronic governance, the recognition of electronic records and signatures, creates certifying authorities and adjudicating tribunals, lays down duties of subscribers, and spells out penalties and compensation. However, over the years, the Act has been amended so as to ensure that some semblance of data protection exists in the

country's legal system. Unfortunately, these provisions are inadequate, poorly drafted, and ambiguous. They do not reflect the spirit of data protection, a natural result of the fact that the Act does not intend to be a data protection framework. To fill the absence of data protection, the Government of India tried to introduce Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules under the Act in 2011. These Rules, however, not only go beyond their mandate but also create more confusion. Just like their mother legislation is struggling with incorporate provisions for data protection, they too are ambiguous and ineffective. Not all hope is lost, though. India witnessed a monumental verdict by the Supreme Court of India in 2017 which declared privacy as a fundamental right.

BOOK REVIEW

THE DESTRUCTION OF HYDERABAD BY A. G. NOORANI, LONDON, HURST & COMPANY, 2014, PP. 384, ISBN 978-1-84904-439-4

Mayengbam Nandakishwor Singh[*]

The formation of Indian state had been rather a chequered trajectory post the British rule. The nature of integration of some princely states into the newly created dominion of India following the instrument of accession has been one of the most controversial political exercises. Many of the contentions pertaining to the accession of these states to Indian union do not cease to die down till today. One such classic case is the integration of Hyderabad state into the Indian union. The present book under review is one unique endeavour which strives to present a different historical narrative about how Hyderabad state became part of Indian state. Hordes of literatures are afloat that shed variant lights on the circumstances that led to the integration of Hyderabad state to Indian union. *The Destruction of Hyderabad* by A. G. Noorani is one audacious endeavour that dissects a catalytic point on the question of Hyderabad's accession to India.

In the popular narratives, the joining of Hyderabad state into India has been presented in a plain fashion. It is widely narrated that Nizam was indecisive about Hyderabad state's joining India during the partition of India. There were widespread communal riots in Hyderabad state under Nizam. The government of India was compelled to invoke 'police action' to

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ensure the security of the people. As the outcome of the police action, Nizam agreed to the accession of Hyderabad state to India. According to A. G. Noorani, this historical narrative is not accurate and such narratives are fashioned by nationalistic historians or 'court historians.' The exact historical background is brutally suppressed and it is not the subject of mainstream discourse. The author tries to excavate the facts and incidents that catapulted Hyderabad state to join Indian state.

Hyderabad under focus in this book does refer to the Hyderabad state of yore, much beyond the present Hyderabad city in the Indian state of Telangana, which was bigger than many European countries once. 'It was sultan Qutb Shah who founded Qutb Shah Dynasty in Golconda after the disintegration of Bahmani kingdom. The Qutb Shah dynasty ruled Golconda kingdom independently. Mohammad Quli Qutb Shah, the fourth Qutb Shahi king, founded Hyderabad as a planned city. Then the mighty Mughal emperor Aurangazeb conquered the kingdom after months of military campaign and annexed it to the Mughal Empire. Aurangazeb sent his governor to rule Golconda. Asaf Jah, styled as Nizam, administered Golconda under the Mughal. When the Mughal power declined in Delhi, Nizam continued to rule independently without declaring its independence' (p. 18). And during the British paramountcy, Hyderabad became a princely state. When India got independence from the British reign, Hyderabad became a part of Indian union. And, the rule of Nizam was completely ended. But how Hyderabad state came into being as a part of the present Indian union is the crux of the matter.

A. G. Noorani's book is not a regular historical glimpse of Hyderabad. This book is a fresh account of the intriguing circumstances that propelled Hyderabad state's fateful accession to Indian union in 1948. What the author draws our attention through this book is the fact that Hyderabad state, unlike other princely states, did not become a part of Indian union through the instrument of accession. It was during the last Nizam Mir Osman Ali Khan that Hyderabad state was annexed to India through a military invasion. The main argument of the author is that

Hyderabad was annexed through 'military invasion' by the India. It was not a mere police action as presented popularly. By the time India got independence, Hyderabad state was overwhelmingly Hindu majority and yet it was under a Muslim ruler. During the partition of India, Nizam, having explored all possible options for the future, ultimately wanted the independence of Hyderabad.

The fundamental question raised by the author in the book is why military action was taken to integrate Hyderabad when conditions were all in India's favour. Though the partition of India was based on 'two nation theory', Pakistan was not economically and military strong to support Hyderabad. On the contrary, India was both militarily and geographically advantageous to integrate Hyderabad. Even Hyderabad was not in the positon to defend itself in the case of military aggression by India. India had viable options for peaceful negotiations with Nizam about the integration of Hyderabad. The popular belief is that India was forced to deploy police action in order to protect the common people against the heinous atrocities committed by Razarkars supported by Nizam. In consequence of that event, the integration of Hyderabad to Indian Union became inevitable.

But A. G. Noorani's bold argument is that it was a deliberate military invasion by India to take over Hyderabad. The military invasion was pre-planned under the spearhead of Sardar Patel. It was Sardar Patel, the first Home Minister of independent India who was responsible for the gratuitous military invasion. The deliberate military invasion caused the large scale massacre of Muslims in Hyderabad. According to the author, Patel was a staunch Hindu nationalist who distrusted Muslims of India. Patel was alien to the composite 'Ganga-Jamuna Tehzeeb' and so he was inclined to dismantle the 'composite culture' of Hyderabad. For Patel, an independent Hyderabad would be an ulcer in the heart of India (p, 220). It became indispensable for India to annexe Hyderabad at any costs. Moreover, the distinct point that the author strives to drive home is that integration of Hyderabad was not just an outcome of political expediency. The integration

of Hyderabad had a clear communal tinge. Citing the 'Pandit Sunderlal Committee Report,' Noorani tries to vindicate the point that it was a military invasion, not police action that massacred several thousands of Muslims.

What A. G. Noorani emphatically argues in the book is that the military invasion by Indian forces was not only a criminal act, but also nothing less than a tragedy. The military action carried under the codename 'operation polo' destroyed the composite culture of Hyderabad. The author also contends that both Nizam and M. A. Jinnah were equally responsible for the destruction of Hyderabad. The miserable destruction of Hyderabad could have been avoided had Nizam and M. A. Jinnah dealt with the case of Hyderabad sagaciously. At the height of the partition of India, Nizam was obstinately indecisive about the future status of Hyderabad. Driven by the selfish motive, Nizam stood against people's will and refused to establish a democratic government. Nizam nurtured the dream of an independent Hyderabad though Nizam was never an independent ruler throughout. Nizam did not possess the sagacity to bargain for a peaceful settlement. Indeed, Nizam's wishful pursuit went up to the extent of buying Goa (p, 277). As for Jinnah, his equation with Nizam on the question of Hyderabad was ambivalent. Jinnah constantly instigated Nizam not to accede Hyderabad to India. Jinnah never gave any assurance of help to Nizam in the case of any dreadful eventualities. Moreover, Jinnah rebuffed the proposal offered by Lord Mountbatten in 1947 (Lahore) of bringing a solution to the status of Hyderabad through plebiscite.

The book, however, is not devoid of certain lapses as some of the viewpoints advanced by the author are no less than far-fetched theses. The author emphasises a very provocative point that the so called 'court historians' never bother to dig out the actual root causes of the Hyderabad's merger into Indian union. But no specific historian and no history book worth is mentioned in the book. The author has not ventured to dissect exactly as to how court historians distort the historical facts. The answer to the question as to who the 'court historians' are, as the

author refers to, is not supplied. In fact, writing Indian history is always embroiled in controversies since independence. Besides, many sensitive files related to Hyderabad's accession to India is not in the public domain. Government of India has suppressed such files because of their ultra-sensitive nature. Without a thorough study of such important files, A. G. Noorani's grand claims about the historical backdrop which led to the destruction of Hyderabad still stand somewhat skew.

One of the emphatic claims by Noorani in the book is that the advent of Arya Samaj and RSS in Hyderabad not only injected communal flare, but also exacerbated the military action. But this claim is not supported by any well-balanced insights. No well-founded facts and evidences are presented to validate this point. It is a fact that communal tensions are so rampant since the medieval ages in India irrespective of who instigated whom. The influence of RSS and Arya Samaj were not so formidable those days in the southern parts of India. There are no authentic facts to corroborate the view that RSS played a major role in the military action in Hyderabad. In this sense, the author does not take into account other factors that pushed India to resort to military action against Hyderabad.

In the heightened atmosphere of partition, Nizam's indecisive attitude and the sporadic threats to side with Pakistan is also held responsible for the destruction of Hyderabad. However, the popular will of the people about the future status of Hyderabad is not astutely deliberated in the book. History is riddled with the sufficient records that there were popular uprisings against the Nizam. It is a clearly established fact that Nizam's rule was unpopular, and there were communist uprisings against it. There were parallel governments operating in the rural areas. More importantly, the fanaticism of Majlis-e-Ittehad-ul-Muslimeen and Razakars are conveniently overleaped in the book. The communal role of Majlis-e-Ittehad-ul-Muslimeen in Hyderabad is largely side-lined. The ugly acts of Razakars in inciting communal flare in Hyderabad is not diligently examined. K M Munshi's memoir recounting the reign of terror unleashed

by ruthless Razarkars against other religious community could have been countervailed for a resounding discourse. In this context, such pivotal internal factors which impelled India to integrate Hyderabad are conveniently omitted.

Further, the external factors which compelled India to resort to police action is not addressed sufficiently. There were reports about arms imported to Hyderabad from Pakistan and east Europe to use against India. It is also believed that the conservative party in Britain was sympathetic to Nizam's stand for independence. It is difficult to infer as to whether Indian military action against Hyderabad was a deliberate design or an accident. Could it be that military action was the result of the combination of both the factors? But Noorani certainly tries to assert that it was a deliberate military plan by India to annex Hyderabad. That explains why the truculent role of Qasim Razvi is not as astringently highlighted as that of Sardar Patel.

Any drastic redrawing of political map in history is concomitant with bloodshed. When partition of India took place, all communities, irrespective of any religion and creed, had undergone terrible hardships. But the author underscores a conservative view which stresses the wounds and traumas suffered by Muslims in Hyderabad. In the military action, all communities had experienced insurmountable plights. As a matter of fact, equal emphasis is not allotted about the sufferance endured by all communities. The author tries to highlight the affliction suffered by one particular religious group throughout the book. In the book, it sounds as if only Muslims were the victims. For the author, Muslim victims deserve some sort of apology or compensation from the Indian government.

Nevertheless, this book is richly written and rigorously researched. This book definitely provides an alternative perspective to Hyderabad's accession to India. Several documents, files, reports, letters and correspondences, which are largely forgotten, are cited to provide validation to author's arguments. Scores of unpublished reports, diplomatic exchanges, and rare photos appended in the book certainly makes it an

interesting read. For a catholic understanding of the political background of Hyderabad's integration to Indian union, this book is a must read. This book without doubt provides a grand scholarship which delves into the historical backdrop about Hyderabad's accession to Indian union.

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