EDITORIAL NOTE

"The secret of getting ahead is getting started."

- Mark Twain

Academic undertakings have the power to connect theory to practise, often with far-reaching implications and results. It was in this spirit that the GNLU Student Law Review (**Law Review**) was initiated in 2019, with the first volume released in 2020, aiming to combine core academic research with real world outcomes and issues under one umbrella. The underlying effort was to make this endeavour a flagship student-run journal, primarily for student research. We also sought to balance the drive and zeal of student authors with the experience and gravity of senior academic researchers.

The Law Review has strived to maintain the highest academic publishing standards. Being an annual publication, a strict double-blind peer review process is followed to filter out and ultimately present the most relevant research in the current Volume III. The preparation of the volume was undertaken in the shadow of the prolonged effect of the pandemic, with the Editorial Board working with dedication and diligence.

A sharp-eyed reader would also notice the trend of articles selected for this Volume, which cover under-researched and novel areas through deep legal analysis and interdisciplinary assessment by authors. The pieces in the present Volume encompass diverse topics, including among others, bankruptcy law, competition law enforcement, digital rights of children, an analysis of criminal provisions, copyright law application to fanfiction, a unique concept as disaster capitalism, and investment arbitration.

In the first Article of Volume III titled **Commitments in Indian Competition Enforcement and Lessons to be Learnt from Foreign Jurisdictions**, Aaditya Ranbir Sahgal presents a relevant analysis of the 'commitments' framework in India, which aims at the resolution of competition law concerns through negotiated remedies. The author argues that the basis of the commitments framework remedy is founded on the common ground of competition law i.e., economic theories of competition. This has led many jurisdictions to adopt this framework as an

alternative to adversarial processes. Through an investigation of the Competition (Amendment) Bill, 2020, the author delves into competition enforcement in India and foreign jurisprudence, constructing a remarkable comparison and concluding with suggestions.

Avani Laad in her Article **Fan Fiction: Expression or Transgression? Comparative Perspectives on the Legality of Fanfiction Under the Copyright Laws of the US and India,** throws light on the unique and under-researched facet of fanfiction through the lens of copyright law. Fanfiction is described as literary works inspired from existing media. The legal position of fanfiction lacks clarity, and the author undertakes a comparative analysis of the copyright law regime of India and the U.S. to fill this gap. Further, an effort is also made to scrutinise fanfiction through concepts such as fair use, fair dealings, derivative works and moral rights. The author concludes with a proposal to evolve copyright law in India to incorporate legality of fanfiction as original pieces of literature.

Dispute settlement in investor-State disputes has been a topic of immense scrutiny. Mahith Vidyasagar in his Article titled **The Landscape of ISDS and the Way Forward** provides an extensive investigation of the reform of the investor-State dispute settlement (ISDS) system. The UNCITRAL constituted its Working Group III to study the ways of reforming the ISDS, however the author contends that graver problems plague the framework, beyond the issue of ensuing litigation after dispute settlement due to the toughness of the ISDS mechanism. The author provides a comprehensive outlook of the impact of ISDS cases in various geographical regions, arguing both the positives and negatives and concluding with a plan for expansive reform of the ISDS system by the Working Group III.

India's bankruptcy law system has seen many crests and troughs, with the enactment of the Insolvency and Bankruptcy Code, 2016 being a watershed moment. Divesh Sawhney and Sanyam Aggarwal argue in their Article titled **Curiouser and Curiouser: The Preternatural Path for the Operational Creditors** that the IBC does not adequately represent the rights of Operational Creditors, leading to grim consequences. The authors provide a succinct analysis of the resolution procedures for various classes of creditors, highlighting that the rights of operational creditors are more evident on paper rather than in practise. Through a sound legal inspection of the provisions of the IBC, a fruitful attempt to navigate the constitution and powers of the Committee of Creditors is made. In conclusion, the authors put forth their argument for rights of operational creditors, and their crucial importance to the commercial sector.

In her Article titled **Disaster Capitalism: An Offence or a Slant Toward Economic Uplift,** Sulagna Dutta lays down critical observations on the changing world order, which is deteriorating economically and ecologically. The rise of a VUCA (Volatile, Uncertain, Complex, Ambiguous) world has precipitated multiple crises across the globe, especially putting developing and under-developed economies at risk. These disasters have served as a medium of enormous profits for governments and the global elite, while the lower strata has suffered immeasurably. Through the example of the COVID-19 pandemic, the author argues that such super-profits during a crisis or disaster have given rise to 'disaster capitalism', which has now become entrenched in the global economic system. The author puts forward explanations to study the linkages between disasters and super-profits, offering suggestions through legal mechanisms to rein in such profiteering.

The digital world has influenced our lives in every sphere, having wide-ranging ramifications. In such a scenario, an entire gamut of rights has come into being in the digital world. Anushka Mehta and Cheshta Tater in their Article titled **Digital Rights of Children: A Fight Against the Disregard** study the rights of children in the online realm. The child's right to informational privacy and digital consent is analysed keeping the Indian jurisdiction in mind, providing a deep understanding of these concepts at the intersection of law and technology. The authors argue that children can weigh the risk in privacy and consent options offered by online providers, putting forth the suggestion to reduce the age of consent in the Personal Data Protection Bill, 2019. Crucially, the authors also discuss the pitfalls of over-sharing of information by parents about their children, and how a legal threshold must be enacted to protect the future prospects of children.

Vikrant Dere and Sridattha Charan in their Legislative Comment titled **A Dilemma of Discretion: Revisiting Section 376 (2) of the Indian Penal Code, 1860** study the concept of judicial discretion within the Indian criminal law framework. Through the Criminal Law (Amendment) Act, 2013, the judicial discretion under Section 376(2) of the Indian Penal Code, 1860, to impose a sentence of imprisonment for less than ten years was deleted. The authors argue for the importance of judicial discretion, analysing the method of use of such discretion by the Supreme Court of India. In conclusion, the authors call for restoring judicial discretion to empower judges to exact swift justice.

The Case Note by Neha Maria Antony titled **The Right to Privacy: The Chaos in Virendra Khanna v. State of Karnataka** is an analysis of the recent *Virendra Khanna v. State of Karnataka* decision, in which the court provided an interpretation of the right to privacy,

particularly in light of the government's ability to demand the password to specific accounts in connection with an ongoing investigation. In attempt to show how the Court in the aforementioned case deviates from the privacy considerations that were addressed and recognized previously, a parallel is drawn between the standards and criteria outlined in *Selvi v. State of Karnataka* and the seminal ruling in Justice K.S. Puttaswamy v. Union of India. The paper deliberates upon concerns like misuse of such data by the authorities, breach of individual rights, ethics of hacking by a third party in certain situations, the right to be forgotten, and their overall impact on a person's privacy. It concludes by underpinning the premise that the existing legal precedent and State action favor the State's authoritarian approach to issues of personal privacy.

In their Article titled **Mobile Phone and Fingerprints: Dissecting The Dilemma Under Article 20(3) Of The Constitution**, Sumedha Tewari and Krisha Meswani analyse the admissibility of evidence through electronic devices, which possess significant amounts of personal and professional information about individuals. When authorities seek to overreach their power and obtain such information, there is a potential conflict with the right to privacy vis-a-vis electronic devices. Another dilemma that arises here is whether the right against self-incrimination guaranteed by Article 20(3) of the Constitution of India applies to the accused in a scenario where they are required to provide alphanumeric passwords and biometrics, including fingerprints and facial recognition. The paper analyses the position of law concerning compelling an accused person to provide the password or biometrics to the State to unlock his electronic devices in India. The jurisdictions of the US and UK that adopt contrasting views on self-incrimination and privacy are also analysed. The paper concludes by observing that India needs a law that protects the privacy and right against self-incrimination of an accused while simultaneously balancing national interests by not making these rights absolute.

Avantika Tewari in her Book Review titled **The Dichotomy of Adversarial and Inquisitorial Systems vis-à-vis Civil Litigation: Damaska versus the Traditionalist View** presents a unique take on Professor Mirjan Damaska's ground-breaking book 'The Faces of Justice and State Authority: A Comparative Approach to the Legal Process'. Justice systems have been usually classified as either adversarial or inquisitorial, being differentiated on the basis of nature of inquiry and evidence-collection mechanisms. A growing dichotomy has been observed between these two legal systems. The author analyses Prof. Damaska's argument that this dichotomy has been stretched too far, holding that an absolute characterisation of a legal system is faulty. The author

analyses Indian adjudicatory mechanisms and case laws to conclude that India's legal system is in the nature of a reactive state, operating primarily for dispute resolution.

The Law Review has been grateful in receiving the continued support and guidance of our Faculty Advisors – Prof. (Dr.) Ranita Nagar, Dr. William Nunes, Dr. Marisport A., Ms. Garima Goswami, and Dr. Niyati Pandey – who have constantly attempted to push the bounds of the Law Review into new spheres. The Editorial Board expresses its deep gratitude to Prof. (Dr.) S. Shanthakumar, Director, GNLU Gandhinagar for the institutional support and direction. We also thank Dr. A N Rao, Dean, Research & Publications Division, and Mr. Tarun Singh, Assistant Professor (Research) for their valuable contribution and involvement.

We recognise the immense hard work, efforts and spirit of the entire Editorial Board in working determinedly towards the publication of Volume III. Putting their best foot forward, even during the most difficult and challenging times, the Editorial Board has strived to maintain the high academic standards and student accessibility, enabling the Law Review to emerge as a primary platform for legal discussion.

We hope that you find the pieces in Volume III thought-provoking, well-researched and legally astute.

"Well done is better than well said."

-Benjamin Franklin

Rishab Aggarwal

Editor-in-Chief

and

The Editorial Board

GNLU Student Law Review

ARTICLE

COMMITMENTS IN INDIAN COMPETITION ENFORCEMENT AND LESSONS TO BE LEARNT FROM FOREIGN JURISDICTIONS

*-Aaditya Ranbir Sahgal**

ABSTRACT

The Competition Law Review Committee was set up to look into the state of competition regulation in India and recommend required changes and additions to the competition law framework in India. One of the key recommendations of the Committee was the introduction of the 'commitments' framework in India i.e., resolution of concerns by negotiated remedies instead of adversarial proceedings. This is a key recommendation as such tools can aid competition regulators to conduct their mandate more effectively by providing them with more avenues to remedy competition concerns, if the situation calls for a non-traditional approach to enforcement. This is a well-established mechanism in certain jurisdictions, and considering the common ground of competition laws i.e., economic theories of competition, an examination of the functioning of such mechanisms in such foreign jurisdictions can help understand the optimal approach to commitment mechanisms. In addition to the previously mentioned common ground of competition laws which was recognized by the Supreme Court, the Delhi High Court has on previous occasion commented that adjudicatory forums in India have drawn from foreign jurisprudence while adjudicating upon disputes of competition law to understand the approach that may be adopted in the absence of Indian jurisprudence on the issue. In light of such common grounding and judicial approach, an examination of the use of commitment mechanisms may be useful to understand approaches that may be taken and those that ought to be avoided. This would be helpful while examining the Competition (Amendment) Bill, 2020 which seeks the introduction of a commitments mechanism under a proposed Section 48B. Therefore, this paper attempts to analyse the commitments mechanism in foreign jurisdictions from the point of view of (i) procedural economies, the key motivation behind such mechanisms, (ii) determining the sufficiency of the measures proposed, (iii) ensuring that the 'commitment' is complied with, and (iv) the effect such actions may have on the rights of third parties viz. private damages actions.

Keywords: Competition Law, Commitments framework, theories of competition, comparative analysis.

* Fifth Year Student, National Law University, Jodhpur.

I. INTRODUCTION

Pursuant to the report of the Competition Law Review Committee ['CLRC'], the Competition (Amendment) Bill, 2020 has been proposed which seeks to incorporate various recommendations of the CLRC into the Indian competition law framework. One of the most important recommendations of the CLRC was the introduction of the commitments and settlements mechanism -which are prevalent in most developed jurisdictions, with respect to cases concerning abuse of dominance and anti-competitive vertical agreements. Such a mechanism envisages the resolution of a case not by judicial adjudication but by "negotiated remedies".[1] The committing/settling enterprise offers to alter its conduct, with the additional requirement of paying a fine in the case of settlements.[2] In foreign jurisdictions, settlement entails an admission of contravention of the law, while a commitment doesn't require any admission of contravention and doesn't establish an infringement by the committing enterprise.[3]

Such negotiated remedies offer various advantages to competition regulators such as reducing the requirement of entering into long-drawn investigations, the report of which must be defended before an adjudicatory tribunal if an infringement is *prima facie* found to exist. Furthermore, in the event an infringement decision is appealed, the competition regulator would be required to divert resources to defend its decision and the rationale therein. A consent based negotiated remedy does away with these resource intensive actions while the desired end result i.e., to remedy anti-competitive conduct, remains the same. Such "*procedural economies and efficiency of enforcement actions*" were acknowledged to be an important purpose behind such negotiated remedies by the CLRC.[4]

Indian competition enforcement would benefit from such supplemental modes of enforcement which are less resource intensive, as multiple cases have been investigated and completed, however, realization of fines is few and far in between thus, calling into question the deterrent

[1] Ministry of Corporate Affairs Government of India, *Report of the Competition Law Review Committee*, July 2019, 42 (2019), http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.
[2] Competition (Amendment) Bill, 2020, proposed § 48A(3).
[3] CLRC Report, s*upra* note 1 at 41.; Council Regulation (EC) No. 1/2003 of 16 December 2002, Article 7 & Article 9.
[4] *Id,* at 42.

effect fines are supposed to have. As of March 2019, the Competition Commission of India ['CCI'] had ordered investigations into 422 cases and completed investigations in 335, ultimately with penalties imposed amounting to Rs. 13,882 crores, however, only Rs. 127 crores (0.9% of total) have been realised.[5] This is on account of most of the orders passed penalizing opposite parties being under appeal either before the National Company Law Appellate Tribunal or under challenge before various High Courts or the Supreme Court.[6]

This is in addition to a series of complex cases being investigated and adjudicated upon at the level of the CCI with such actions requiring a large amount of resources. The CCI has taken an average of 4 years to reach its final decision in finding an infringement and handing out its penalty, and cases such as *East India Petroleum Pvt. Ltd. v. South Asia LPG Co. Pvt. Ltd.* have taken up to 7 years.[7] In this regard, the CCI's Annual Report for the year 2016-17 very pertinently highlighted that "*It is observed that the investigations are taking increasingly more time for completion. This partly reflects inadequate staff strength in the office of the DG and partly reflects increasing complexity of cases being referred to the DG by the Commission.*".[8] These call into question the effectiveness of the resources employed and the results achieved, and whether supplemental mechanisms may help the CCI with respect to better utilization of resources.

Therefore, the author seeks to examine how negotiated remedies can be employed effectively to bolster the efficacy of competition regulation in India. However, it must be noted that for the purposes of this paper, 'negotiated remedies' refers to commitment mechanisms. The Competition (Amendment) Bill, 2020 leaves many fundamental questions unanswered with respect to settlements, such as whether a settling enterprise would be required to admit to a contravention of the law.

Furthermore, the distinction between settlements and commitments as per the Bill seems to be the different stages at which negotiated remedies may be offered i.e. negotiated remedies offered after the receipt of the Director General's [DG] report would come under the purview of

[5] Competition Commission of India, *Annual Report (2018-19)*, 23 (2019), https://www.cci.gov.in/sites/default/files/annual%20reports/ENGANNUALREPORTCCI.pdf.
[6] *Id.*
[7] *The need for settlements and commitments under the Competition Act*, AZB PARTNERS, (Apr. 1, 2019), https://www.azbpartners.com/bank/the-need-for-settlements-and-commitments-under-the-competition-act/
[8] Competition Commission of India, *Annual Report (2016-17)*, 15 (2017), https://www.cci.gov.in/sites/default/files/annual%20reports/CCI_AR-2016-17_English.pdf.

'settlements',[9] whereas, negotiated remedies offered prior to receipt of the DG's report would come under the purview of 'commitments'.[10] While this may signal to requirements of admission of guilt on account of the enterprise being made aware of the case against them, in the absence of clarity on many points with respect to 'settlements', this paper shall restrict itself to commitments as negotiated remedies.

II. UNDERSTANDING COMMITMENT MECHANISMS AND THE NEED THEREOF

At the outset, it must be noted that the reference to 'commitments' in competition enforcement by the researcher is not in the context of commitments that a competition regulator may require in merger control cases to remedy any potential Appreciable Adverse Effects on Competition ['AAEC'], but in the context of remedies that may be required in relation to actions already undertaken which have raised concerns from a competitive standpoint.

Commitment decisions have been described as "*permit[ting] market interventions on an ad hoc basis against specific companies as and when the [competition regulator] sees fit, regardless of the legal originality or strength of its concerns. This is undoubtedly an effective means to achieve its policy aims, freed from the administrative rigidity and restraint of applying pre-existing legal norms to the ordinary evidential standard.*"[11]

Commitment decisions entail an agreement between the competition regulator and an enterprise to cease and desist from a course of action that raises competitive concerns and possibly commit to certain future actions in the form of remedial measures, however, the enterprise does not admit to any wrongdoing and neither is a case substantiating any violations of the law built by the competition regulator.[12]

This is advantageous for the regulator as well as the enterprises in question. Regulators are able to remedy competitive concerns using innovative measures as opposed to having to expend resources

[9] Competition (Amendment) Bill, 2020, proposed § 48A.
[10] Competition (Amendment) Bill, 2020, proposed § 48B.
[11] Ryan Stones, *Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law*, 38 YEARBOOK OF EUROPEAN LAW 361, 366 (2019) [hereinafter 'R. Stones'].
[12] CLRC Report, s*upra* note 3.

in ensuring that high evidentiary standards are met,[13] on account of willing participation of the enterprise whose conduct is in question. This may help to free up resources which may be diverted to more egregious violations of the law which are unsuitable to be remedied by such negotiated remedies. The same was echoed by the CLRC which stated that

> "*Such mechanisms are likely to help the CCI to resolve antitrust cases faster and consequently, also free up its scarce resources. Further, businesses can avoid long investigations and uncertainty. Such negotiated remedies also enable authorities to impose innovative deterrents upon respondents while ensuring equitable remedies for victims. Therefore, the Committee agreed that such a mechanism should be introduced in India.*"[14]

Furthermore, as commitments may entail ongoing monitoring if the commitments are behavioural in nature, to ensure the objective of the commitment decision is achieved, regulators are able to ascertain the efficacy of a particular kind of remedial action within a relevant market. This is especially important for fast moving markets with ever changing market dynamics. The Organization for Economic Cooperation and Development ['OECD'] noted the following, in this regard:

> *"this is especially advantageous in fast-moving industries (such as the digital and IT sectors) where traditional enforcement may not be fast enough to reflect quick changes in the industry thus making the final decision obsolete or potentially redundant. Commitment decisions are significantly more flexible than infringement decisions. They can be adopted for a specified period of time at the end of which the agency may re-assess the competitive situation and decide if to renew the commitments, amend them in light of the new market context or terminate them. They may also be reviewed upon request of the parties or on the initiative of the agency when there has been a material change in the facts on which the decision was based*"[15]

However, the benefits accrued from entering into commitment mechanisms are not limited only to regulatory bodies but to business as well. The absence of comprehensive investigations spanning long periods of time enables enterprises to not be constrained to spend resources over a prolonged period of time. Furthermore, commitment decisions do not require an admission of guilt by the enterprise under investigation.[16] This has certain follow on benefits with respect to private damages

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[13] R. Stones, *supra* note. 11.
[14] CLRC Report, *supra* note 1.
[15] Organisation for Economic Co-operation and Development, *Commitment Decisions in Antitrust Cases*, DAF/COMP (2016) 7, at 27. [hereinafter 'Commitments – Note by OECD Secretariat'], https://one.oecd.org/document/DAF/COMP(2016)7/en/pdf.
[16] CLRC Report, s*upra* note 1 at 41; *id.*

awarded to any consumers who may have been affected. Private damages claims refer to an action for damages that may be brought by a consumer who has adversely been affected by anti-competitive conduct of an enterprise. Such an action can be brought under Section 53N of the Competition Act, 2002, in India. Since there is neither any comprehensive investigations which establish the contravention of competition laws, nor is the enterprise required to admit any wrong-doing, commitment decisions cannot be the basis for bringing any private damages claims.[17] This acts as an incentive for an errant enterprise to enter into a commitment decision and cease any activity that may have anti-competitive effects.

Therefore, as is evident, commitment procedures offer significant benefits to both the regulator and concerned enterprises while ensuring a more efficient degree of regulatory action leading to market benefits. However, commitment decisions should not be viewed as a one-stop solution to all non-merger cases. Heavy reliance on commitments, especially if done in a haphazard manner, may have the opposite effect that is sought to be achieved,[18] which shall be enumerated upon in the subsequent section.

III. IMPLEMENTATION OF COMMITMENT MECHANISMS IN FOREIGN JURISDICTIONS AND LESSONS FOR INDIA

This section seeks to examine key issues concerning commitment mechanisms and its success thereof, drawing upon the experiences of foreign jurisdictions.

(A) DRAWING FROM FOREIGN JURISPRUDENCE: AN ESTABLISHED PRACTICE

It must be noted that while an exercise of comparative analysis must have due regard to the degree of similarity between competition law legislations of such jurisdictions and the Competition Act, 2002, there is a noted common basis of such laws i.e. competition law enforcement is grounded

[17] K. REITER, MARKET DESIGN POWERS OF THE EUROPEAN COMMISSION? 16 (Springer-Verlag Berlin Heidelberg 2020); Melchior Wathelet, *Commitment Decisions and the Paucity of Precedent,* 6 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 553 (2015).

[18] *See generally* D.H. Ginsburg & J.D. Wright, *Antitrust Settlements: The Culture of Consent*, in W.E. Kovacic: An Antitrust Tribute – Liber Amicorum Vol. I(2013), https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf [hereinafter 'THE CULTURE OF CONSENT']; *See generally* Damien Geradin & Evi Mattioli, *The Transactionalization of EU Competition Law: A Positive Development?*, 8 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 634, 634 (2017).

in economic theory.[19] The Supreme Court noting this fact, in *Shivshakti Sugar Mills v. Renuka Sugars,* observed;

> "*India is on the road of economic growth. It has been a developing economy for number of decades and all efforts are made, at all levels, to ensure that it becomes a fully developed economy. Various measures are taken in this behalf by the policy makers. The judicial wing, while undertaking the task of performing its judicial function, is also required to perform its role in this direction. It calls for an economic analysis of law approach, most commonly referred to as 'Law and Economics'. In fact, in certain branches of law there is a direct impact of economics and economic considerations play predominant role, which are even recognised as legal principles. Monopoly laws (popularly known as 'Antitrust Laws' in USA) have been transformed by economics. The issues arising in competition laws are decided primarily on economic analysis of various provisions of the Competition Act. Similar approach is to be necessarily adopted while interpreting bankruptcy laws or even matters relating to corporate finance, etc. The impress of economics is strong while examining various facets of the issues arising under the aforesaid laws"*[20](emphasis supplied)

In light of this fact regarding the interrelation of economics and competition law, Indian forums adjudicating upon issues of competition law have often sought to understand the various stances that may be taken on a particular issue using foreign jurisprudence on the subject. The Delhi HC in *CCI v. Oriental Rubber Industries* observed that "*Since competition law in our country is in a nascent stage, the Competition Commission, COMPAT and the Supreme Court have often relied on foreign jurisprudence and the position of EU antitrust laws and US in order to interpret the provisions of the Competition Act.*"[21] An indicative list of such use can be found in:

i. Nature of orders to initiate investigation and follow-on rights: In *CCI v. SAIL,*[22] the Supreme Court placed reliance on European Court of Justice judgments in order to determine the right of parties against whom an order for investigation was passed to appeal such an order,[23] and

[19] I. Lianos, '*"Judging" Economists: Economic Expertise in Competition Law Litigation'* in I. Kokkoris and I. Lianos (eds), The Reform of EC Competition Law: New Challenges (Kluwer 2010) pgs. 187, 188.
[20] Shivashakti Sugars Ltd. v. Shree Renuka Sugars Ltd., (2017) 7 SCC 729, ¶43.
[21] Competition Commission of India v. Oriental Rubber Industries Pvt. Ltd.,(2018) 251 DLT 137, ¶ 22 [hereinafter 'CCI v. Oriental Rubbers'].
[22] Competition Commission of India v. Steel Authority of India Ltd. & Anr., (2010) 10 SCC 744 [hereinafter 'CCI v. SAIL'].
[23]Automec Srl v. Commission of the European Communities, (1990) ECR II 00367; IBM v. Commission [1981] ECR 2639; Bossi v. Commission [1989] ECR 303; cited in *id* ¶ 28, 29.

whether the principle of *audi alteram partem* would be applicable before passing such order.[24]The SC held that Sec. 26(1) orders are administrative orders and the rights of parties must be determined accordingly. The position enumerated in *CCI v. SAIL* has become exposition of the law with respect to Section 26(1) orders with reliance on this decision being placed in multiple instances including by subsequent Supreme Court benches.[25]

ii. Parallelisms: The oft cited *Dyestuffs*[26] case, which has been analysed[27] and used by the Supreme Court to settle the law,[28] in its deliberation upon the issue of parallel conduct and the requirement for 'plus factors' in order to demonstrate co-ordinated anti-competitive conduct. This was in addition to several decisions from the USA to approach the issue in a well thought out holistic manner.[29]

iii. Jurisdictional Conflicts: In the landmark *CCI v. Bharti Airtel* judgment on the jurisdiction of the CCI with respect to the telecom sector (which has its own sectoral regulator), the Supreme Court took note of the position in the USA and the EU to determine the degree of authority a sector agnostic competition regulator has, in the presence of a telecom regulator whose governing legislation confers on it the duty to ensure competition in telecom markets.[30]

iv. Right to legal counsel in evidentiary proceedings: An issue of contention that had arisen was whether a witness may have legal counsel present along with them in investigative proceedings before the Director General ['DG'], which are intended to record testimony. The Delhi HC examined this issue in *CCI v. Oriental Rubber Industries*,[31] which embodied an appropriate approach with respect to analysis, having due regard to the subtle differences in Indian law and foreign law. The court did not rush to adopt or reject the stance adopted in foreign jurisdictions but instead took note of the relevant context i.e. special powers of the DG and the impact that the report of the DG has in enforcement proceedings in India, in contrast to other jurisdictions. Consequently, it took an altered approach from foreign jurisprudence. It may be argued that the stance taken – lawyers may be present but not interfere in the questioning or object to questions posed, was the more optimal one considering the objectives of competition enforcement. The

[24]Azienda Colori Nazionali ACNA S.P.A. v. Commission of the European Communities, (1972) ECR 0933; cited in CCI v. SAIL, *supra* note 22, at ¶ 68, 69.
[25] Competition Commission of India v. Bharti Airtel & Ors., AIR 2019 SC 113, ¶ 94.
[26] Imperial Chemical Industries Ltd. v. Commission of European Communities, 1972 ECR 619 (ECJ).
[27] Excel Crop Care Ltd. v. Competition Commission of India & Ors.,AIR 2017 SC 2734, ¶ 44.
[28] Rajasthan Cylinders and Containers Ltd. v. Union of India & Ors., 2018(13) SCALE 493,¶ 96.
[29] Monsanto Co. v. Spray-Rite Service Corporation, 465 U.S. 752 (1984), cited in *id*, ¶ 98; Matsushita v. Zenith Ratio Corporation, 475 U.S. 574 (1986), cited in *id*, ¶ 99.
[30] Competition Commission of India v. Bharti Airtel & Ors., AIR 2019 SC 113 ¶ 33, 34, 43.
[31] CCI v. Oriental Rubbers, *supra* note 21.

court succinctly elaborated upon the risks of allowing intervention by counsel and how that would be a self-defeating exercise.[32]

v. Anti-competitive Exchanges Between Competitors: The Cement Cartel case, in which the biggest penalty by the CCI has been imposed yet, placed reliance on decisions of the European Court of Justice at a crucial juncture. While determining the standard for determining what kind of communication between competitors may be anti-competitive in nature, the CCI cited large excerpts of the ECJ decision in *T-Mobile v. Commission* in order to hold that any exchange which is capable of removing uncertainties concerning the intended conduct of the participating undertakings would be tainted with anti-competitive object.[33] It was in the context of this threshold that the conduct of the parties was deemed to be anti-competitive. The order of the CCI was upheld by the immediate appellate body – the National Company Law Appellate Tribunal in 2018, however, the cement manufacturers have preferred an appeal to the Supreme Court which would be further illuminative of the law on horizontal agreements.

vi. The Supreme Court has also resorted to citing interpretations adopted in the EU in order to provide further weightage to its interpretations, in the form of leading credence and conformity to global practices viz. commerce. In *CCI v. Coordination Committee of Artists & Ors.*, the Supreme Court's judgment while discussing what activity may be considered economic activity noted, "*We may also mention that the European Union Competition Law recognises that an entity carrying on an activity that has an exclusively social function and is based on the principle of solidarity is not likely to be treated as carrying on an economic activity so as to qualify the expressions used in Section 3.*"[34] (*emphasis supplied*)

The aforementioned examples are only indicative and not exhaustive. Therefore, it can be observed that Indian courts have had a history of seeking to further their understanding of concepts and determine appropriate relief after an analysis of foreign jurisprudence in the absence of Indian jurisprudence.

(B) IMPORTANT ASPECTS OF COMMITMENT MECHANISMS

This section seeks to analyse 4 important aspects concerning commitment mechanisms and success thereof i.e. (i) procedural economies; (ii) monitoring of compliance of commitment terms; (iii) market testing; and (iv) commitment decisions as the basis for private damages. This would be done by examining foreign law and jurisprudence, followed by a recommendation that may be

[32] CCI v. SAIL, *supra* note 21, ¶ 23.
[33] Builders Association of India v. Cement Manufacturers Association & Ors., 2016 SCC OnLine CCI 46, ¶ 198.
[34] Competition Commission of India v. Co-ordination Committee of Artists & Ors., (2017) 5 SCC 17, ¶ 39.

suitable for India in light of the experience of such jurisdictions and how the Competition (Amendment) Bill, 2020 has broached the concerned issue:

1. *Procedural Economies:*

Procedural economies have long been recognised to be the primary advantage behind using commitment mechanisms. One of the principal objectives of commitment decisions have long been accepted to be the *"[elimination] of the time and expense involved in trial preparation*."[35]

In the EU, commitments are offered under Article 9 of Regulation No. 1/2003. In one of the first judgments to be passed by an appellate court in the EU with respect to commitment decisions, the European Court of Justice with a bench of 15 judges, while adjudicating upon *Commission v. Alrosa*[36] succinctly summed up the main motivations behind the commitment procedure, stating:

> *"Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns*."

By entering into such a commitment, wherein, the concerned enterprises along with the competition regulator negotiate upon the final terms of the commitment, it is hoped to lessen litigation as any action required would have the consent of the concerned parties. However, regulators must not rush to resolve cases by commitments where they may not be suitable as doing so would negate any potential procedural economies envisaged. Practitioners of EU competition law have argued that the European Commission's heavy reliance on commitments has led to a scenario wherein it has been unable to lessen the time taken in its investigations through the use of commitments.[37]

In the United States of America, both the competition regulators i.e. the Federal Trade Commission ['**FTC**'] and the Department of Justice's ['**DoJ**'] Antitrust Division ['**Antitrust Division**'], settled approximately 9 out of 10 cases handled by them in over 2 decades.[38] Concerns have been raised

[35] Charles F. Phillips, Jr., *The Consent Decree In Antitrust Enforcement*, 18 WASH. & LEE L. REV. 39, 40 (1961).
[36] Case C-441/07 P, European Commission v. Alrosa Company Ltd., Judgment of the Court (Grand Chamber) of 29 June 2010.
[37] D. Costesec, *Has the Commission kicked its addiction to commitment decisions?*, KLUWER COMPETITION LAW BLOG, accessed on 11.05.2020 http://competitionlawblog.kluwercompetitionlaw.com/2016/06/28/has-the-commission-kicked-its-addiction-to-commitments-decisions/.
[38] The Culture of Consent, *supra* note 18, at 6.

over the quality of the investigations carried out by the officials at these regulatory bodies, as such officials are aware of the high probability of a case being settled by offering commitments. In the context of such a high degree of settling of cases, academic researchers have commented that regulators "*will neither need nor acquire nor cultivate more sophisticated forensic skills. A degree of laxity if not sloppiness may come to infect an agency's investigations that are heading inevitably toward resolution by consent.*"[39]

This would lead to a very perverse understanding and outcomes of perceived procedural economies. Furthermore, resolving cases by means of commitments may have other, more direct adverse consequences if not done properly. In the event commitments are adopted for technically complicated cases, the quantum of efforts required in monitoring of compliance of such commitments may vitiate any perceived procedural economies from not going to trial for an infringement decision.

However, the question still stands, when should procedural economies be sought after?

It is of utmost importance to determine when is it suitable to enter into a commitments negotiation and when to seek a judicial infringement decision. Prof. Dr.Wouter P.J. Wils, in this regard, noted that "*Optimally, commitment decisions should be used instead of infringement decisions only in those cases where the benefit in terms of an earlier termination of the infringement and the saving of the cost of longer proceedings outweigh the benefit of the other contributions to the enforcement of competition law which infringement decisions could make, in terms of clarification of the law, public censure, deterrence, disgorgement of illicit gains and punishment, and facilitation of follow-on actions for compensation.*"[40]

While the Indian competition regulator could certainly take advantage of the procedural economies afforded by the commitments mechanism in light of the data highlighted regarding time to resolve cases and collection of fines, the regulator should also not rush to adopt commitment decisions the way it is seen in the EU and USA. In the United Kingdom, any "serious abuse of dominance" cases are not permitted to be resolved by way of commitments.[41] The Competition Markets Authority ['CMA'] defined "serious abuse of dominance" to mean cases "*which the CMA considers are most likely by their very nature to harm competition. In relation to infringements of [abuse of dominant position*

[39] *Id.*
[40] W Wils, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003*, 29 WORLD COMPETITION: LAW AND ECONOMICS REVIEW(2006) 345.
[41]Competition & Markets Authority, *Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, 46 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771970/CMA8_CA98_guidance.pdf, ¶ 10.19.

provisions], this will typically include conduct which is inherently likely to have a particularly serious exploitative or exclusionary effect, such as excessive and predatory pricing."[42]

While the author recognizes that this too is a subjective standard prone to differing interpretations, a standard is set nonetheless which is definite with respect to some issues i.e. predatory pricing. This is in stark contrast to the approach adopted under the proposed Section 48B which states that the CCI may pass a commitment decision if it deems the commitments offered to be adequate in light of the relevant factors concerning the alleged contravention.[43] The CCI, while formulating regulations for the commitments mechanism under Section 64(2), would be well-advised to limit the scope of commitments to a standard more in line with the standard devised by the United Kingdom.

Such limiting of scope would also be required keeping in mind that many cases under the Competition Act, 2002, concerning alleged violations under Sections 3(4) & 4 may also deal with alleged violations under Sections 3(3), with only the former 2 being permitted to be resolved by commitments. The confusion and potential litigation caused in the absence of clarity regarding this issue have the potential to vitiate the procedural economies sought until such position is cleared out. Therefore, the author is of the view that the aforementioned standards set out by Prof. Dr. Wils and the United Kingdom ought to act as an important reference point while Indian regulators seek to eke out the primary advantage of commitment mechanisms i.e. procedural economies.

2. *Monitoring the Compliance of Commitment Terms:*

Commitments can take 2 forms – either structural or behavioural, while certain commitment decisions may be a hybrid of the two. Structural commitments refer to the requirement to divest certain assets with the resulting effect of remedying AAEC.[44] Behavioural commitments refers to the requirement of (a) altering conduct whether this may take the form of altering a particular manner of operation such as change in pricing systems to reduce concerns of market foreclosure;[45] and/or (b) desisting from certain actions such as tying or bundling practices.[46]

[42] *id,* at 46, explanatory footnote to ¶ 10.19.
[43] Competition (Amendment) Bill, 2020, proposed § 48B(3).
[44] Such requirements were seen in EC Decision of 26 November 2008 in Case COMP/39388 - German Electricity Wholesale Market.
[45] Such requirements were seen in Commission Decision of 18 December 2013 in Case/COMP 39.678 Deutsche Bahn.
[46] Such requirements were seen in Commission Decision of 16 December 2009 in Case/COMP 39.530 Microsoft.

Ensuring compliance of the terms of the commitment is an indispensable part of commitment mechanisms, in order to ensure that competitive concerns sought to be addressed are actually being remedied. While structural commitments would not require continuous compliance, behavioural commitments would require periodical reviews with respect to compliance.

In the USA, with respect to FTC consent orders, such compliance review is done by the Compliance Division attorneys who negotiate with the committing enterprise and help draft the terms of the decree.[47] With respect to the DoJ, this is done by members of the Antitrust Division who carried out the investigation which resulted in the commitments offered.[48] In the EU, such monitoring requirements are not carried out by the European Commission only and may also be done by monitoring trustees, however, the exact monitoring mechanism would be agreed upon before giving finality to the commitment decision.[49] Such monitoring trustees would submit reports to the European Commission in accordance with the terms of the commitment decision with respect to monitoring.

The monitoring mechanisms adopted in India would only be clarified once the CCI has introduced the relevant regulations with respect to commitments, as under Section 64(2). In the event an approach similar to the one in the USA is adopted, the Director General's office – which carries out the investigations, would be required to take up the additional task of monitoring. However, this is heavily reliant on the office of the DG not facing a paucity of man-power, as it has been known to have in the past (as highlighted in the introductory section). It must be noted that monitoring trustees are appointed by the CCI to monitor compliance with remedies subject to which approval has been granted to combinations. However, the same is done as under Regulation 27 of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, which would not apply to enforcement matters which are the subject of commitments. Consequently, whether monitoring would be carried out by monitoring trustees or the Director General's office would only be clarified once appropriate Regulations are devised.

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[47] OECD, *Commitment Decisions in Antitrust Cases: Note by the United States of America,* DAF/COMP/WD(2016)23, pg. 6,http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2016)23&doclanguage=en,[hereinafter 'Commitments – Note by the USA'].

[48] *Id,* at 6.

[49] OECD, *Commitment Decisions in Antitrust Cases: Note by the European Union,* DAF/COMP/WD(2016)22, pg. 5 http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2016)22&doclanguage=en.[hereinafter 'Commitments – Note by the EU'].

Therefore, the approach adopted in the EU would be a more optimal approach. Permitting the use of monitoring trustees enables a more efficient allocation of resources, wherein, the more standard monitoring mandates can be executed by monitoring trustees, however, monitoring of commitments in fast developing and/or fast changing markets can be reserved by the competition regulator. This would be beneficial with respect to developing a better on-going understanding of market dynamics in such fast-moving markets such as e-commerce, financial technologies, advertising on social and online media, which the CCI has otherwise had to do using market surveys which key market players have at times refused to take part in.[50]

3. Market Testing:

Market testing refers to the process of setting out the terms of the commitments and relevant background information in the public domain in order to solicit comments about the effects and sufficiency of such commitments.[51] Comments may be sought from subject-matter experts, competitors, and consumers. In the event that any comments bring to light pertinent concerns about potential insufficiencies of the measures or any alternate issues that may arise from such measures, the commitment terms may be required to be altered. Such measures help in increased transparency and reduce the possibility of arbitrary decisions by the competition regulator.

In the EU, any commitment decision adopted must adhere to the procedural requirement of publishing the proposed commitment decision in the Official Journal of the European Union "*a concise summary of the case and the main content of the commitments or of the proposed course of action*."[52] However, such a publication should not infringe upon the protection of their business secrets. Third parties which have an interest may submit their observations within a time period fixed by the Commission in its publication, but which may not be less than one month. After the third-party comments have been received, a "state of play meeting" would take place wherein the comments received, and the sufficiency and propriety of the commitments would be examined in light of such comments. Any modifications required to be made to make the commitment decision suitable would be made at this stage.[53]

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[50] *Amazon, Walmart's Flipkart may avoid key queries in CCI study to protect trade secrets*, BUSINESS TODAY,(May 28, 2019), https://www.businesstoday.in/current/economy-politics/amazon-walmart-flipkart-key-queries-competition-commission-of-india-study-trade-secrets/story/351419.html.

[51] Commitments – Note by OECD Secretariat, *supra n*ote 15, at 7.

[52] Council Regulation (EC) No. 1/2003 of 16 December 2002, Article 27(4).

[53] Commitments – Note by the EU, *supra* note 49, at 4.

In the USA, the FTC does not carry out a formal market testing exercise wherein all comments received will be reviewed at a "State of Play" meeting, however, in the course of the investigation it will interview industry stakeholders, including competitors and consumers, about the sufficiency of the measures proposed as part of the consent order i.e. the commitment decision.[54] Furthermore, once the consent order is finalized it shall be provisionally accepted at first, and the FTC would be mandated to publish the consent order in the Federal Register of the USA for examination indicating its intention to finally approve of it, and providing a fixed time period to concerned parties to provide cogent reasons as to why such a consent order should not be conclusively approved.[55] The consent order shall be accompanied by an explanation of the measures adopted,[56] which the FTC refers to as an 'Analysis of Proposed Consent Order to Aid Public Comment'[57] in the Federal Register.

The DoJ carries out a similar process wherein it publishes in the Federal Register the proposal for the consent judgment submitted to the relevant court, along with a competitive impact assessment of the same.[58] Additionally, summaries of the terms of the proposal for the consent judgment and of the competitive impact assessment would be required to be published in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in any other districts which the court which shall approve the proposal may require.[59] Such comments would be considered within 60 days and a response to such comments be published in the Federal Register subsequently.[60]

Such measures help market participants assess not just sufficiency of measures but also regulatory trends, in addition to ensuring transparency in a process which might otherwise be very opaque. Requiring the CCI to publish a description of the competitive concerns, the terms of the commitments and an analysis of the proposed commitments and their sufficiency, in the Gazette of India would be helpful in this regard. The author is of the view that such an approach would be conducive to effective and transparent competition enforcement in India. The CCI has anyhow

[54] Commitments – Note by the USA, *supra* note 47, at 5.
[55] 16 C.F.R. § 1605.13 (d).
[56] 16 C.F.R. § 2.34 (c).
[57] *See generally Ortho-Clinical Diagnostics, Inc.; Analysis of Proposed Consent Order to Aid Public Comment*, FEDERAL REGISTER 85 FR 19481. Available at: https://www.federalregister.gov/documents/2020/04/07/2020-07311/ortho-clinical-diagnostics-inc-analysis-of-proposed-consent-order-to-aid-public-comment.
[58] 15 U.S. Code § 16 (b).
[59] 15 U.S. Code § 16 (c).
[60] 15 U.S. Code § 16 (d).

been a transparent regulator putting out yearly Annual Reports detailing key metrics relating to investigations, disposal of cases, fines collected, projects undertaken, amongst others. Although competition law in India is at a very nascent stage, the actions of the CCI have been subject to much scrutiny which has led to a large body of academic research.

An exercise of such inclusive decision making wherein the relevant entities and experts are afforded an opportunity to comment, coupled with the resultant transparency in decision making and other processes, would aid academic research consequently helping assess the effectiveness of the CCI's ability to employ commitments, in the longer term. In the short term, it will assure an enterprise under investigation that the regulator would avoid arbitrary and disproportionate demands with respect to remedies required, and also assure competitors and consumers that the remedies adopted are not adopted without due consultation and consideration.

4. *Commitment Decisions as the Basis for Private Damages:*

Private damages claims refer to claims for compensation brought by consumers of goods or services of a company which has indulged in anti-competitive conduct, and such conduct led to an economic loss. In the event an action for damages is brought pursuant to and on the basis of competition authorities finding an infringement, such an action is known as a 'follow-on action'. In the event an action for damages is brought in the absence of a formal finding of infringement by competition authorities, such an action is known as a 'stand-alone action'.[61] In India, only follow-on actions i.e. action for damages arising after a finding of infringement by the CCI, can be brought as under Section 53N of the Competition Act, 2002. With respect to this particular issue, there is no uniform practice in this regard across jurisdictions.

i. United States of America:

Both the competition regulators in the USA have the authority to resolve cases using commitments referred to as 'negotiated consent decrees'. The standard decree of the Department of Justice states that the defendants "*have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law*", with the FTC adopting similar language in its decrees.[62] The latter part of the

[61] CEPS, EUR and LUISS, Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report, (2007), at 33.

[62] C.D. EHLERMANN AND M. MARQUIS, EUROPEAN COMPETITION LAW ANNUAL 2008: ANTITRUST SETTLEMENTS UNDER EC COMPETITION LAW, 216 (Hart 2010).

aforementioned excerpt effectively rules out any use of such a decree in an action for private damages. Such an interpretation would benefit businesses which may resort to entering into a negotiated consent decree containing the fallout of any anti-competitive action, once and for all. The effects of this with respect to consumers are a separate issue, and a factor which has led to concerns amongst academics regarding quick adoption of such consent decrees.

ii. European Union:

It must be remembered that the EU is a supra-national body, and the European Commission is a supra-national regulator. This poses its own unique issues from a state-sovereignty point of view. In this regard, it may be pertinent to take note of the precise text of Article 9 of Regulation 1/2003 under which commitments are entered into:

"*Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.*" (emphasis supplied)

This provision has been interpreted differently by different member states of the EU considering that any action for private damages would be raised before the national competition authorities and courts under the EU's Private Damages Directive.[63] Certain national authorities have chosen to interpret the phrase "*there are no longer grounds for action by the Commission."* to mean that the commitment decision is a final action only in respect of the European Commission and the wording of Article 9 nowhere excludes them from using such a commitment decision in an action for private damages. Such an interpretation gains further weightage in light of Article 13 of Regulation 1/2003 which states that commitment decisions of the European Commission are "*without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case*".

Therefore, the author submits that an analysis of the EU position on this issue would not be helpful from the point of view of an Indian researcher, as the issue is fraught with conflicts regarding supra-national EU law versus national law of EU member states and a lack of uniformity therein leading to conflicting positions across EU States. However, for illustrative purposes,

[63] Directive 2014/104/EU of the European Parliament And of the Council, Recital 3.

reference may be made to certain European cases involving the application of national law in order to understand the approach some countries have adopted.

In France, in the case of *Eco Emballages*, the national courts took a view that would indicate that while such commitment decisions do not hold the same weight an infringement decision does, it can still have evidentiary value to the extent of *prima facie "*quasi-admission of guilt" which would need to be further substantiated.[64] In Italy, commitment decisions have been cited to be indicative of the possible existence of an infringement which would need to be further probed as a commitment decision cannot be accorded the same evidentiary value as an infringement decision.[65]

iii. Singapore:

Private damages actions on the basis of commitment decisions are not permitted in Singapore owing to the fact that the committing enterprise accepts no infringement of the law on its part neither is any infringement established. In an absence of such a finding of infringement, any damage caused cannot be attributed to the acts of the committing enterprise.[66]

iv. United Kingdom:

The Competition and Markets Authority accepting commitments from an enterprise does not bar an action for private damages in respect of an action for which commitments have been provided.[67]

v. Lessons for India:

As is apparent, there is no uniformity with respect to private damages claims across jurisdictions. The Competition (Amendment) Bill, 2020 does not carve out an exception for permitting stand-alone actions seemingly indicating that no actions for private damages may be brought pursuant to a commitment decision as there is no finding of infringement. It must be noted that private damages have been observed to have various macro-economic benefits. In a whitepaper submitted

[64] A. Duron, *Private Damages Actions in the Wake of a Commitment Decision: New Risks after the Judgment of the Paris Commercial Court in Eco-Emballages*?, 7, Journal of European Competition Law & Practice 125, 128 (2016) [hereinafter 'Eco-Emballages'].
[65] Commitments – Note by OECD Secretariat*, supra* note 15, at 26.
[66] OECD, *Commitment Decisions in Antitrust Cases: Note by Singapore,* DAF/COMP/WD(2016)46, p. 7, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2016)46&doclanguage=en.
[67] OED, *Commitment Decisions in Antitrust Cases: Note by the United Kingdom,* DAF/COMP/WD(2016)27, at 6, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2016)27&doclanguage=en.

by the UK Secretary of State for Trade & Industry to the UK Parliament, it was opined that "*Private actions are a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators – getting the compensation they deserve*"[68] Academic research seems to further establish such a claim with researchers noting "*An efficient private enforcement can have an overall macroeconomic positive impact thanks to the creation of a more competitive market and a reduction of allocative inefficiencies.*"[69] In order to garner such macro-economic benefits, further legislative amendments would be required in respect of Section 53N expanding the scope of the same to allow stand-alone actions.

However, an absence of such a provision may encourage enterprises to enter into commitment decisions. This is on account of committing enterprises also having more immediate incentives to undertake commitments. Long-drawn investigations by competition regulators into one potential infringement always has the potential of bringing to light another potential infringement as well as actions for private damages, and listed companies have witnessed reduction in share prices owing to announcements of investigations by competition regulators.[70] As one commentator described this phenomenon, "*commitment procedures enable the "quarterly reports" driven business community to make a trade-off between, on the one hand, a tolerable decision rendering prompt business leeway and, on the other hand, uncertain projections of the outcome of years of battle to secure a "legal victory".*"[71] Thus, one of the possible benefits of a commitments mechanism might be an adversely impacted private damages regime as long as only follow-on actions are permitted.

5. Effect on Deterrence

One of the main objectives of imposition of penalties as under the Competition Act, 2002 is to achieve a deterrent effect and prevent enterprises from engaging in contraventions of the law. The Supreme Court in *Excel Crop Care v. CCI* noted that "*the aim of the penal provisions is also to ensure that it acts as a deterrent for others.*".[72] Such motivations behind monetary penalties are well recognised in

[68] U.K. Secretary of State for Trade & Industry, *A World Class Competition Regime*, at 8., (2001), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/265534/5233.pdf.
[69] CEPS, EUR and LUISS, Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report, (2007); cited in C. Migani, *Directive 2014/104/EU: in search of a balance between the protection of leniency corporate statements and an effective private competition law enforcement*, GLOBAL ANTITRUST REV.81, 92 (2014).
[70] *Amazon, Google and Facebook Stocks tumble over antitrust concerns*, CNBC (Jun. 3, 2019), https://www.cnbc.com/2019/06/03/amazon-facebook-and-google-stocks-stumble-over-antitrust-concerns.html
[71] B. E. HAWK, INTERNATIONAL ANTITRUST & POLICY: FORDHAM COMPETITION LAW 2012, at 91 (Juris 2012).
[72] *supra* note 27.

antitrust enforcement globally as well. For example, the European Commission's guidelines on the imposition of fines state that "*Accordingly, when the Commission discovers that [provisions relating to anti-competitive agreements and abuse of dominance have] been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings […] (general deterrence).*"[73] Therefore, the deterrent effect may be blunted on account of the removal of penalties on enterprises in the case of resolution via commitments.

However, there are other benefits to such a system of negotiated remedies and competition authorities would have to endeavour such that the benefits of commitment mechanisms are not outweighed by the costs of lack of deterrence. It must be noted that cartels – which are considered to be the most egregious form of competition violation, have been excluded from the purview of the proposed negotiated remedies framework altogether. This seems to be done so in order to ensure the deterrent effects with respect to cartelization. Competition authorities such as the CCI must also consider whether the CMA's approach of not resolving cases of "serious abuse of dominance"[74] is a step they wish to take in order to maintain a "general deterrence", as described by the EC mentioned in the preceding paragraph. This can be seen from two points of view: (a) the feasibility of resolving issues of "serious abuse of dominance" and (b) the loss of precedent as a result of commitment decisions.

i. Feasibility of Resolving Issues of "Serious Abuse of Dominance"

It must be noted that one of the main objectives of commitment decisions is procedural economies as has been elaborated upon in preceding sections. In order to attain this objective, it must be questioned whether complex cases involving serious abuse of dominance ought to be resolved using commitments. Not only is there a possible vitiating effect with respect to deterrence, but it might also not be feasible in certain instances to resolve cases of "serious abuse" via commitment decisions. For instance, the European Commission's attempts to arrive at a commitments decision in its investigation into Google Search which satisfied its own enforcement needs and also met the needs of Google such that it entered into a commitments decision. The aforesaid attempts at commitments took a period of 5 years wherein Google and the Director General Competition

[73] European Commission, (2006/C 210/02) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, ¶ 4.
[74] s*upra* notes 41 and 42.

negotiated over the form of the commitment but to no avail.[75] It may be argued that not only was the basis for commitments i.e. procedural economies vitiated, but it also had an adverse impact with respect to deterrence in the form of "quarterly reports driven companies", as described in the previous section, being permitted to kick the can down the road and hope that a possible resolution is worked out.

ii. Loss of Precedent as a Result of Commitment Decisions

One of the main concerns raised about the use of commitment decisions is that "*they fail to sufficiently elucidate the law in novel and complex competition cases*".[76] In common law countries, precedents help clarify the development in the position of law and reduce the lack of clarity with respect to provisions of the law. Since commitment decisions are specific to laying down the remedies in a particular case as opposed to laying down the position of law and clarifying the same, if required, the same do not act as a guide for relevant stakeholders in determining what is within the bounds of law and what kind of conduct may be deemed objectionable by the competition regulator. Therefore, in order to remedy such concerns involving alleged abusive conduct, it would need to be determined what kinds of cases ought not to be resolved using commitments.

In this light, it may be noted that the use of technology and its pervasiveness in all forms of business has become a focal point of debate in antitrust enforcement globally. This is evidenced by the recent reports of multi-faceted investigations into major technology companies namely Amazon, Apple, Facebook, and Google, in major jurisdictions.[77] The use of technology by such entities presents novel issues not dealt with previously by competition authorities, such as how

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[75] *supra* note 15, at 19.

[76] M. Wathelet, *Commitment Decisions and the Paucity of Precedent*, 6, Journal of European Competition Law & Practice 553 (2015).

[77] *EU antitrust regulators say they are investigating Google's data collection,* Reuters (Dec. 1, 2019), https://www.reuters.com/article/us-eu-alphabet-antitrust-exclusive/exclusive-eu-antitrust-regulators-say-they-are-investigating-googles-data-collection-idUSKBN1Y40NX ; *Antitrust: Commission opens investigations into Apple's App Store Rules,* European Commission (June 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073 ; *Apple's App Store Rules Scrutinized in US. Antitrust Probe,* Bloomberg Law (June 27, 2020), https://news.bloomberglaw.com/tech-and-telecom-law/apples-app-store-rules-scrutinized-in-u-s-antitrust-probe ; *DOJ Close To Wrapping Up Google Antitrust Probe*, Competition Policy International (June 28, 2020), https://www.competitionpolicyinternational.com/doj-close-to-wrapping-up-google-antitrust-probe/ ; *Amazon to Face Antitrust Charges From EU Over Treatment of Third-Party Sellers*, Wall Street Journal (June 11, 2020), https://www.wsj.com/articles/amazon-to-face-antitrust-charges-from-eu-over-treatment-of-third-party-sellers-11591871818 ; *U.S. Justice Department to open Facebook antitrust investigation,* Reuters (Sept. 26, 2019), https://www.reuters.com/article/us-facebook-probe-antitrust/justice-department-to-open-facebook-antitrust-investigation-source-idUSKBN1WA35M ; *EU starts new preliminary probe into Google and Facebook's use of data*, CNBC (Dec. 2, 2019), https://www.cnbc.com/2019/12/02/european-commission-opens-probe-into-google-and-facebook-for-data-use.html.

data may be used to gain competitive advantage and when can data practices said to be anti-competitive. Further, even as such technologies evolve continuously, competition regulators are trying to understand how online conduct can be used to gain competitive advantages and the fairness thereof. For instance, the CMA released a report detailing the power of default settings and how such settings are used by Google in order to favour its search engine over others, and the possible remedies for such conduct, etc.[78]

Precedents in such cases can help enterprises affected by competition rules in various facets of the digital and technology sectors. The CCI itself has begun dealing with cases involving alleged abusive conduct and alleged anti-competitive vertical agreements stemming from the technologies space involving the much-debated aspect of anti-competitive use of data. In *Harshita Chawla v. WhatsApp & Anr.,*[79] amongst other things, the CCI adjudicated upon the integration of WhatsApp Pay into WhatsApp and whether such conduct constituted abusive and anti-competitive conduct. While CCI dismissed the allegations of anti-competitive conduct on account of WhatsApp Pay being at the beta stage of testing, having only recently received the requisite regulatory approvals, the case constitutes an important precedent from the point of view of delineation of markets, the dominant status of WhatsApp and the market of payments via the United Payments Interface (UPI).

Therefore, competition enforcement in India with respect to the digital and technologies space may be furthered and clarified in the event commitments are not used for cases wherein structural issues concerning such markets are concerned. It must be noted that the corona virus and the response thereto by various facets of society has only increased an already high use of technology further warranting clarity in such a space. Therefore, the CCI ought to not proceed in a manner wherein precedent is lost in such a manner that antitrust enforcement itself is adversely impacted.

IV. CONCLUSION

Negotiated remedies can act as an effective tool of competition enforcement as has been noted around the world. They can help remedy allocative inefficiencies with respect to resources on part of the competition regulators, and aid enforcement in cases in which infringement decisions would

[78] Competition and Markets Authority, *Online platforms and digital advertising* (July 1, 2020), https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf.
[79] Harshita Chawla v. WhatsApp & Anr, Case No. 15 of 2020 (Competition Commission of India, Order dated 18.08.2020).

be the more suitable resolution. Moving towards introducing a commitments mechanism is a positive indicator in itself, however, the adage "the devil lies in the details" must not be disregarded. The actual functioning of the commitments mechanism would be clarified once the Competition (Amendment) Bill, 2020 is passed and the CCI formulates the relevant regulations which will shed light on the details of the mechanism. While the CCI ought to factor in relevant characteristics of Indian markets and legal principles while formulating relevant regulations, there is much to be learnt from the missteps of foreign jurisdictions.

Besides formulating a well-thought out commitments mechanism, the CCI must not rush to place heavy reliance on such negotiated remedies as regulators around the world have been seen to do. Instead the CCI can be strategic with its use of such mechanisms. With global economies disrupted due to the effects of corona virus, regulators would also have to be cognizant of the financial health of enterprises - which is going to take a massive blow in certain sectors, while seeking to carry out enforcement actions. Enterprises may not have the ability to mount legal defences or pay large fines without raising concerns about the impact of such actions on the financial health of the enterprise. In such instances, instead of either bankrupting such organizations by fines or by turning a blind eye towards potential violations of competition law, the CCI can use such negotiated remedies where the enterprise changes its behaviour in a conciliatory manner and remedies concerns without paying any fines.

The aforementioned would be with respect to enterprises already existing in India. With governmental efforts to ramp up investments in India owing to the unique geo-political opportunities afforded by the pandemic, such companies would also look to the regulatory framework of the country. A sound regulatory framework in accordance with widely accepted global standards of trade facilitation and regulation would provide comfort to companies looking to explore opportunities within India which has otherwise been perceived to have a protectionist approach. Such an effort would the amalgam of multiple specific actions. The CCI ought to draft regulations concerning commitments accordingly upon the passage of the Competition (Amendment) Bill, 2020.

ARTICLE

FANFICTION: EXPRESSION OR TRANSGRESSION?: COMPARATIVE PERSPECTIVES ON THE LEGALITY OF FANFICTION UNDER THE COPYRIGHT LAWS OF THE US AND INDIA

*-Avani Laad**

ABSTRACT

Fanfiction refers to works of literature that are inspired and based on existing popular media such as television shows, books, movies etc. It has grown to be one of the preferred ways for fans to connect and share one's love for such media, even giving rise to independent book series. While an essential part of popular culture, the legal position of fanfiction in terms of copyright law remains unclear. In an effort to better understand how copyright laws interact with fanfiction, the instant paper compares the positions of the copyright laws of the USA (Copyright Act of 1976) and India (Indian Copyright Act, 1957) with respect to the legality of fanfiction. Further, the ambiguities, loopholes, issues and considerations that may arise from the intersection of copyright law and fanfiction are highlighted. The analysis explores provisions and precedents pertaining to fair use, fair dealings, derivative works and moral rights in the context of fan-fiction. The instant paper makes legal and non-legal arguments for the evolution of copyright law in order to push for the legality of fanfiction as original pieces of literature when published non-commercially.

Keywords: fanfiction, copyright, moral rights, derivative works, fair use.

I. INTRODUCTION

With the advent of the digital age, the gap between content creators and consumers has become practically negligible. There is now a global audience consuming the exploits of the accessibility offered by the internet, fed by a global swarm of creators who have found a platform to express their creative talents by sharing their works, ideas and expressions. Pop culture is thriving like never before, with fans interacting and celebrating their interests on the internet.[1] Fanfiction is just

* Fourth Year Candidate, Symbiosis Law School, Pune.

[1] Stephanie Burt, *The Promise and Potential of Fan Fiction,* NEW YORKER (Dec. 29, 2021, 4:43 PM), https://www.newyorker.com/books/page-turner/the-promise-and-potential-of-fan-fiction.

one of the many fruits of this pop culture movement, with numerous sites providing a medium for fans to write about their favourite shows, movies, books and even celebrities from the comfort of their homes.

Fanfiction is works of fiction written by a fan of, and featuring characters from a particular TV series, film or other works of literature.[2] Most commonly, fanfiction is based on books, shows, comics and movies and is written by amateur fans for the other fans to read. There are several websites engaged in the distribution and sharing of fanfiction, such as Fanfiction.net and Archive of Our Own, with Archive of Our Own having garnered a total of 2 million registered users and 5 million fan works as of July 2019.[3]

While fanfiction has existed for a long time, what was once a niche concept limited to a closed group of people now has newfound visibility and recognition as fanfiction is slowly becoming a part of the mainstream media, created and read by millions. Some of such fanfiction writers even end up signing book deals and becoming published and bestselling authors. The 2019 movie 'After', was an adaptation of a book series derived from a One Direction fanfiction and the book and movie franchise of *"Fifty Shades of Grey"* was based on Twilight fanfiction[4]. Cassandra Clare, was originally a fanfiction author but eventually went on to become a New York Times bestselling author through her popular book series called 'The Mortal Instruments', which was originally a Harry Potter fanfiction.[5] These represent some of the many examples of how fanfiction has provided creators with the platform and recognition to utilise their talents and consequently take off in their careers.

In the Indian context, fanfiction is growing in popularity, with readers using platforms such as AO3 and Wattpad to further their love for the literature, with more than 3% of their users being from the Indian subcontinent.[6] Moreover, alternate and new platforms such as IndiaForum and Commaful are seeing increased attention, specifically from Indian fans.[7]

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[2] *Fan Fiction,* LEXICO (Dec. 29, 2021, 4:49 PM), https://www.lexico.com/definition/fan_fiction.
[3] *AO3 Reaches 5 Million Fanworks!*, ORGANIZATION FOR TRANSFORMATIVE WORKS (Aug. 25, 2021, 5:00 PM), https://www.transformativeworks.org/ao3-reaches-5-million-fanworks/.
[4] Natasha Bertrand*, Fifty Shades of Grey' Started Out as 'Twilight' Fan-fiction Before Becoming an International Phenomenon*, BUS. INSIDER (Feb. 17, 2015, 6:35 PM), https://www.businessinsider.in/entertainment/fifty-shades-of-grey-started-out-as-twilight-fan-fiction-before-becoming-an-international-phenomenon/articleshow/47722708.cms.
[5] Monika Bartyzel, *Girls on Film: The confounding problems of fan-fiction*, THE WEEK (Jan. 9, 2015), https://theweek.com/articles/460833/girls-film-confounding-problems-fan-fiction.
[6] Niket Nishant, *Fan fiction gets more fans in India*, THE SOFTCOPY (May 7, 2022), http://thesoftcopy.in/2020/03/05/fan-fiction-gets-more-fans-in-india/.
[7] *Id.*

However, from a legal perspective, numerous considerations arise when we ponder how copyright laws deal with fanfiction, or if they even deal with it at all. Thus, this paper attempts to analyse the legality of fanfiction with respect to copyright law in two jurisdictions, namely the USA and India. The paper is divided into two parts- the first part discusses copyright laws of the USA, and the second part discusses copyright laws of India *vis a vis* fanfiction.

II. POSITION OF FANFICTION IN THE USA

(A) DERIVATIVE WORKS AND COPYRIGHTS

The US Copyright law defines a derivative work as a "*work based upon preexisting works*" and goes on to enumerate examples of such works such as, *inter alia,* translations, adaptations as well as "*any other modifications, which as a whole represent an original work of authorship*".[8] Since fanfiction, as discussed previously, is nothing but an original fan work that has its foundations in a prior copyrighted work, it should amount to a derivative work as defined in the law. As per Section 106 of the US Copyright law, the author of a work has the exclusive right to produce derivative works based upon their copyrighted work.[9] This means that the creation of a derivative work without the permission of said author would make the work liable for copyright infringement.

Fanfiction is mostly created by amateur writers who do not reach the author personally before creating their works, and therefore, *prima facie*, fanfiction does constitute a copyright violation, and an author may exercise their exclusive right against them. An example of this is the popular case of *Warner Brothers v. RDR Books* ("*Harry Potter Lexicon*"*),* in which JK Rowling successfully sued a fan and enjoined them from publishing a book based on their derivative work of the Harry Potter series. She did this by exercising her exclusive right to produce derivative works, stating that she intended to publish a similar derivative work on the lines of the fan work.[10]

A derivative work itself can be the subject matter of copyright,[11] provided it does not infringe the copyright of the work it is based on.[12] Generally, fanfiction is a derivative work that does infringe the copyright of the original work. Thus, it may be said that it cannot be copyrighted. A similar

[8] Copyright Act of 1976, U.S.C § 101 (1976).
[9] *Id.* § 106 .
[10] Warner Bros. Entertainment, Inc. and J. K. Rowling v. RDR Books, 575 F.Supp.2d 513.
[11] Copyright Act of 1976, U.S.C § 103 (1976).
[12] *Id.* § 102 .

finding was reached in the case of *Anderson v. Stallone*. where a proposed script for a prospective 'Rocky' movie was submitted to Sylvester Stallone by a screenwriter and elements from the same were incorporated into the Rocky IV movie. The Court held that the script could not have been subject to copyright as it infringed the copyright of the original Rocky movie scripts by borrowing its characters and themes.[13] Therefore, the Court essentially pronounced that there was no infringement of the screenwriter's copyright as a work infringing the copyright of another cannot be copyrighted.

In contrast, it has been argued that not all of what comprises fanfiction can be categorised as derivative work.[14] If it can be shown that the fanfiction did not infringe the protected elements of the original work and constituted an *"original work of authorship in a tangible medium of expression"*, then it would not amount to an unauthorised derivative work and would be protected by copyright.[15] This is determined on the basis of how *substantially* similar the specific expression of ideas in the original work is to the latter work, that is if the work has adopted the actual expression of ideas or only the unprotected idea.[16] As was held in the case of *Prunte v. Universal Music Group,* substantial similarity refers to the accused work being so similar to the plaintiff's work that an ordinary person of reasonable attentiveness would infer that the accused unlawfully appropriated the original work.[17] Similarly, in an older but significant case of *Nichols v. Universal*, where an author of a play brought an action against the author of a film for having a story resembling the original play, it was held that while similar plots may be liable for copyright infringement, the degree of correspondence between them would be the determinant of the same.[18] Accordingly, the Court rejected the claim of the plaintiff as the alleged infringement constituted characteristics of 'stock' characters that fall within the public domain.[19] Thus, if a fanfiction contains a sufficient degree of originality so as to transform the prior work entirely into a different work of traditional authorship, it would not infringe on any intellectual property rights.

(B) THE EXCEPTION OF FAIR USE

[13] Anderson v. Stallone, 11 U.S.P.Q.2d 1161.
[14] Mynda Rae Krato, *Fictitious Flattery: Fair Use, Fan-fiction, and the Business of Imitation*, 8 AM. U. INTELL. PROP. BRIEF 91, 16 (2017).
[15] Copyright Act of 1976, U.S.C § 102(a) (1976).
[16] Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985).
[17] Prunte v. Universal Music Grp., 484 F. Supp. 2d 32 (D.D.C. 2007).
[18] Nichols v. Universal Pictures Corporation, 45 F.2d 119 (2d Cir. 1930).
[19] Metro-Goldwyn -Mayer, Inc. v. American Honda Motor Co., Inc. 900 F. Supp. 1287 (C.D. Cal. 1995).

The exclusive rights of an author, as laid down under the US copyright law, however, are not absolute. The Copyright Act of 1976 stipulates certain limitations to these exclusive rights, the most pertinent of which is the exception of fair use.[20] Hence, under Section 107, certain factors are prescribed which must be kept in mind when deciding whether a particular usage of a copyrighted work amounts to fair use. If the usage of a copyrighted work satisfies the conditions of fair use, then it is exempted from being an infringement. An exception in the form of the fair use doctrine ensures that the copyright law is not rigid and does not stifle the very creativity that it otherwise intends to foster.[21]

These factors were first pronounced in the case of *Folsum v. Marsh* after which they were codified under the Copyright Act as a statute.[22] They are not exclusive and are required to be weighed against each other. These are as follows-

1. The purpose and character of the use

The first factor can be considered the most important when it comes to the determination of the legality of a particular fanfiction. It corresponds to determining whether a particular use is transformative or to what extent is it transformative, if at all. In other words, the test of 'transformativity' checks whether the work adds anything new to the prior work in terms of characters, expression, meaning or message.[23] Any work that adds more value to the original in terms of providing new information, insights, aesthetics, and understandings would constitute a transformative work.[24] With respect to the 'purpose' ingredient of this factor, Section 107 provides a broad and non-exhaustive list of purposes that would satisfy the same and constitute fair use, such as criticism, comment, research etc.[25] A parody has also been held to fall within the ambit of fair use as a corollary to the statutory prescriptions of criticism and comment.[26] Further, the greater the transformative value of the work, the less important the other factors become.[27] This means that a subsequent work may be permitted to be commercialised if it can be shown that it is sufficiently transformative to warrant the same.

[20] Copyright Act of 1976, U.S.C § 107 (1976).
[21] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).
[22] Folsom v. Marsh, 9 F Cas 342 (1841).
[23] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).
[24] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).
[25] Copyright Act of 1976, U.S.C § 107 (1976).
[26] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[27] *Id.*

In the context of fanfiction, the works that only minimally revolve around the original work and include additional creativity so as to not just be a mere substitute for the original work, might constitute transformative works. Arguably, works in which the canonical characters have been dislocated from their original identities and situations and placed in a different world entirely or where new and original characters are introduced to the world of the prior work might be considered transformative works as they add sufficient originality to the foundational work. A lot of fanfiction also tends to subvert expected gender identities and norms and may fall under the transformative requirement in light of the same. Nonetheless, the question of a work being transformative is prone to subjectivity, and thus, corresponding case laws display a murky approach to the same.

In the case of *Salinger v. Colting,* the publication of an unauthorised sequel to the book 'Catcher in the Rye' was enjoined by the Court.[28] The Court held that the work did not amount to fair use as the purpose of the work amounted to a mere continuation as opposed to a critique or parody. In contrast, in *Suntrust v. Houghton Mifflin* ("*Wind Done Gone case*"), where the legitimacy of a book as a copy of the book 'Gone with the Wind' was challenged, the Court held that it constituted fair use.[29] In this case too, the new work had borrowed the characters and universe of the original. However, what distinguished it from the *Salinger* case was that the purpose of the work was to provide a social benefit in the form of a critique and thus constituted a transformative work.

As far as borrowing the universe of the original work is considered, the *Paramount Pictures v. Axanar* case sheds some light on the question.[30] In this case, a Star Trek fanfiction film by the name of *Axanar* was challenged as infringing the copyright of the original movie franchise. The fanfiction did not include any of the original characters or plots of the franchise but borrowed elements from the Star Trek universe, such as the logo, ships, uniforms etc. Individually none of the things borrowed was protected by copyright; however, the Court held that when taken together, all the elements as a whole constitute a copyright infringement. Subsequently, an out-of-court settlement was reached between the parties to resolve the conflict. Therefore, even where only the world of the work is borrowed in the fanfiction, it may not be considered transformative in the USA.

In respect of the determination of whether the purpose of the new work constitutes fair use, the position is again somewhat murky as Courts tend to abide by the list of purposes provided in the

[28] Salinger v. Colting, 607 F.3d 68 (2nd Cir. 2010).
[29] Suntrust v. Houghton Mifflin, 268 F.3d 1257 (11th Cir. 2001).
[30] Paramount Pictures Corp. v. Axanar Prods., 2016 U.S. Dist. Lexis 1651 (C.D. Cal. 2016).

statute despite acknowledging that they are not exclusive.[31] This may be attributed to the ambiguity surrounding what other instances may constitute a purpose warranting fair use. There are also possibly conflicting conclusions reached in different cases as regards what would be a legitimate purpose under fair use. For example, Courts have held that a trivia book based on a TV Show does not satisfy a purpose required under fair use[32] ; however, a book that contained the synopsis of episodes would fulfil the commentary purpose under Section 107.[33] Although in the latter case, the book had finally been held to not amount to fair use due to other factors, its acknowledgement as a 'commentary' illustrates the discrepancies as regards legitimate purpose under US Copyright law. The *Harry Potter Lexicon* case, as discussed previously, also failed the test of fair use despite it being a sort of encyclopedia that could fulfil the purpose of commentary. Further, even in cases where the new work might amount to a parody, it would be required to be a parody specifically of the copyrighted work. In *Dr. Seuss Enterprises v. Penguin Books USA*, a parody work about the OJ Simpson trial in the style of Dr. Seuss was held to infringe Dr. Seuss as it was not a parody of Dr. Seuss specifically and did not constitute fair use of Dr. Seuss.[34]

The purpose and character of use also include the consideration of whether the work is being used for commercial or non-profit educational purposes.[35] While most fanfiction is generally non-for-profit and purely-for-entertainment, thereby attracting the not-for-profit educational head for fair use, this factor is not in favour of fanfiction when it is commercialised. As is evident from the foregoing cases, only in the *Wind Done Gone* case was a commercial use held to be fair use, and only because it was held transformative enough to outweigh the commercialisation aspect. In all the other cases, especially the *Axanar* case, the commercialisation was held to not constitute fair use and the same was enjoined. The recent case of *Authors Guild Inc v. Google Inc* sheds some light in that regard.[36] In this case, the subject of the challenge was Google making digital copies of books and providing the same online via a search function. This act was held to constitute fair use as the search function was regarded as highly transformative. The Court held that the fact that Google used its digitalisation for profit was irrelevant as most of the fair use forms as provided under Section 107 are carried out for profit. Therefore, the *Wind Done Gone* case and the *Google* case

[31] Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1567 (2005) [hereinafter "STENDELL"].
[32] Castle Rock Enm't, Inc. v. Carol Pub. Grp., Inc., 150 F.3d 132, 140 (2d Cir. 1998).
[33] Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 966 F.2d 1366, 1374 (2d Cir. 1993).
[34] Dr. Seuss Enterprises v. Penguin Books USA, 109 F.3d 1394 (9th Cir. 1997).
[35] Copyright Act of 1976, U.S.C § 107(a) (1976).
[36] Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

display how the transformative nature of a work may overshadow its commercial nature to allow a finding for fair use.

2. The nature of copyrighted work

The second factor corresponds to the type of work that the challenged work is alleged to infringe. The degree of protection under Copyright Law is different for different works. While a fictional work incorporating creativity or inventiveness would be extensively protected by copyright, a work that does not involve any creativity and is more of diligence would be less deserving of protection.[37] This differentiation exists due to the understanding that creative works are closer to the intention behind copyright protection, being the promotion of creativity.[38] Therefore where the work comprises stock characters and settings, such as in *Metro-Goldwyn -Mayer, Inc. v. American Honda Motor*, may be made out of this factor.[39] However, most fanfiction tends to be based upon fictional books, movies and shows which are afforded a greater degree of protection and therefore, generally, this factor would not be held in favour of fanfiction.

3. The amount and substantiality of the portion used with respect to the entire work

The third factor refers to the 'amount and substantiality' of the portion used from the copyrighted work. It essentially attempts to evaluate how much of the copyrighted work has been copied in the challenged work and how substantial that portion is in the context of the entire work. It scrutinises whether the amount copied in the secondary work from the original work is justifiable.[40] Thus the Court analyses the quantity and the quality of the copied work to determine whether the said use is fair or not. With respect to fanfiction, their very nature necessitates borrowing elements from the original work, as without the same they would merely be fiction and not 'fan' fiction. Thus, this factor may be tilted against fanfiction. However, it has been held that the substantiality of the use should be determined vis-à-vis its "reasonableness with relation to the purpose of copying".[41] This means that where the work is sufficiently transformative, such as a parody, this factor would weigh in favour of fair use.

[37] TY, Inc. v. Publications International, Ltd., 333 F. Supp. 2d 705 (N.D. Ill. 2004).
[38] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).
[39] Metro-Goldwyn -Mayer, Inc. v. American Honda Motor Co., Inc. 900 F. Supp. 1287, 1296 (C.D. Cal. 1995).
[40] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).
[41] Rebecca Tushnet, *Legal Fictions: Copyright, Fan-fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 678 (1997) [hereinafter "TUSHNET"].

4. The effect of the use on the potential market and value of the copyrighted work

The fourth and last factor is concerned with the impact the secondary work would have on the market for the original work in terms of the potential sales of the work as well as its future derivative works.[42] This is determined by ascertaining the extent to which the secondary work may act as a market substitute for the original work so as to harm the sales of that work if it becomes widespread.[43] This factor has been regarded as one deserving particular scrutiny and being central to the fair use evaluation.[44] This factor is scrutinised by looking into the potential market, lost current sales, and decrease in future sales of the copyrighted work as well as the degree of substitutability of the secondary work with the copyrighted work.[45]

The secondary work would have to be different from the type of derivative work the author might wish to produce in the future. For example, in the *Harry Potter Lexicon* case, since an encyclopedia of the Harry Potter universe was something that JK Rowling had in mind to produce in the future, the fan-made lexicon was enjoined from publication as this factor came into effect to negate a finding of fair use.[46] However, that is an exception to a general trend of fanfiction not competing with the original work at the same level. Further, most fanfiction also does not satisfy the market substitute requirement as they mostly revolve around concepts that an author would be unlikely to create, such as the slash or homoerotic genres.[47] On top of that, there is also the consideration that fanfiction is generally shorter in size than a full-length work such as a novel.[48]

Moreover, as regards the market harm aspect, fanfiction is likely to promote the market for the original works as opposed to competing with them. Firstly, they are mostly consumed and enjoyed by preexisting fans of the original work and secondly, a new reader would, in any case, be directed to the original work either out of interest as to the canonical storyline and characters or to familiarise themselves with the elements of the original work used in the secondary work or to keep up with the other readers of the community well-versed in the original work. This is aligned with the observations of the Ninth Circuit in the case of *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, where a finding of fair use was made on the basis of the use actually improving the market of

[42] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).
[43] Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985).
[44] Stewart v. Abend, 495 U.S. 207, 236 (1990).
[45] STENDELL,*supra* note 31. .
[46] Warner Bros. Entertainment, Inc. and J. K. Rowling v. RDR Books, 575 F.Supp.2d 513.
[47] TUSHNET, *supra* note 41.
[48] TUSHNET, *supra* note 41.

the original game by adding variety to the same.[49] Additionally, where the secondary work is of a non-commercial nature, precedents showcase a presumption in favour of fair use, and the burden lies on the copyright holder to prove the market harm.[50] As is also apparent from the *Wind Done Gone* case, a presumption of fair use is also sustained where the work is deemed transformative, essentially in light of the consideration that the transformative quality of a work removes it as a market substitute of the original.[51] Therefore, this factor generally lies in favour of fanfiction as a form of fair use.

(C) SUMMING UP

It is evident that the US Copyright law is more or less in the dark when it comes to the legality of fanfiction. In the absence of a conclusive ruling specific to or a law directly addressing fanfiction in general, the position may differ from case to case as per the individual fanfiction. Generally, where a fanfiction does not fulfil the requirements of a transformative work, it would be extremely difficult for the courts to consider fair use, as the second and third factors tend to disfavour fanfiction as it is. Thus, a fanfiction may be held liable for copyright infringement, regardless of its commercial or non-commercial nature. Indeed, fanfiction does occupy a precarious position under the copyright law as to its legality, where the balance is rare to tip in their favour, so long as the definition of transformative is restricted by the supposedly non-exhaustive purposes outlined in Section 107. The assessment would have to be made on a case-by-case basis to ascertain if a particular fanfiction can take recourse to the exception of fair use.

III. POSITION OF FANFICTION IN INDIA

(D) FANFICTION AS DERIVATIVE WORKS UNDER COPYRIGHT LAW

The Indian Copyright Act does not define derivative works. The closest provision in that regard is found under Section 2(a) where the term adaptation in terms of a literary work has been defined as the conversion of a literary work to a dramatic work by way of performance in public or otherwise.[52] Any kind of abridgement or any version where the story or action is fully or mainly

[49] Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 964 F.2d 965 (9th Cir. 1992).
[50] Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 427 (1984).
[51] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).
[52] Indian Copyright Act, 1957, § 2(a)(ii), No. 14, Acts of Parliament, 1958 (India).

conveyed by pictures in a form suitable for reproduction in a book, newspaper, magazine or any other periodical is also included under adaptation.[53]

Fanfiction is often a "reinterpretation" of an existing piece of literature. It may use the same characters in new situations, different characters in the universe established by the author or any set of modifications to create a different story that has similarities to the original. However, the Indian jurisprudence of copyright does not cover the concept of reinterpretation- hence, leaving "adaptation" to be the closest legal concept for fanfiction.

Generally, adaptation has been seen as a conversion of a work from one format to another- for example, a written work to a dramatic work. Fanfiction generally, especially as discussed in this paper, is not a change of format- a written work based on and inspired by another written work. The Courts have discussed "adaptations" as being in the same form- the original, as well as the adaptation, being dramatic works, as discussed under the Act. In the case of *R.G Anand v. M/s Delux Films,* the plaintiff claimed that the film "New Delhi" was modelled on a play of his- "*Hum Hindustani*". Both had similar storylines, of families opposing marriage between a North Indian woman and South Indian man and finally, coming around. The Supreme Court, in this case, laid down the following points:

i. An idea, subject-matter, theme, plot or historical or legendary fact cannot be copyrighted, and violation of copyright is limited to the form, manner and arrangement and expression of the idea by the author of copyrighted works.
ii. It is to be considered whether the similarities between the works are fundamental or substantial to the mode of expression. Any copying should be of substantial or material nature.
iii. The standard for similarity is whether viewers, having seen or read both works, feel that there is an unmistakable similarity.
iv. Similarity in theme is not enough for copyright infringement as long as there is a difference in expression
v. Material and broad dissimilarities between the two works when existing with similarities do not amount to copyright violation[54]

[53] *Id.* § 2(a)(iii).
[54] R.G Anand v. M/s Delux Films, AIR 1978 SC 1613.

The principles laid down by this case play an important role in protecting those works of fanfiction that have similarities with the original piece of work but also have material dissimilarities. A notable example would be Twilight, the original work and Fifty Shades of Grey, which was originally a fanfiction. While the two works share similarities, there are material dissimilarities- Twilight has supernatural elements such as vampires and werewolves, which are not featured in Fifty Shades of Grey.

Essentially, fanfiction that brings in new elements- while staying true to its original material may be considered to be "derivative works". The reason the trueness to the original works matter is due to the very nature of fanfiction since a completely different story with no connection to the original does not constitute a derivative work or a fanfiction. These new elements could be changing the original premise like Fifty Shades of Grey did, compared to Twilight, or like the Shadowhunters series did, compared to the Harry Potter series. While both had characters that had similar traits, the environments and the challenges that the characters faced were completely different. Authors may re-interpret the same scenarios, introduce new characters, or create different scenarios by changing how the characters relate to others. Further, they may also change the original in such a way that is reminiscent of the original but does not directly violate the rights of the author of the original work.

(E) FANFICTION AS AN EXCEPTION UNDER FAIR DEALING

As discussed earlier in the US context, the concept of Fair Use originated in the case of *Folsom v. Marsh,*[55] and was later integrated into the Indian context as 'Fair Dealing'.

Section 52 of the Indian Copyright Act provides for certain actions that are exceptions to the infringement of the copyright of the owner. Such actions constitute fair dealings of the work and include use for educational purposes in the form of guidebooks, activities at educational institutions, course packs, question papers, as well as for entertainment in the context of Television and Internet broadcasting. India's progress regarding fair dealing has been limited when it comes to literary works and generally corresponds to uses for educational purposes.

In the landmark judgment of *M/S Blackwood v. A. N Parasuraman*, it was laid down that an important factor for constituting fair dealing is the absence of an intention to surpass the original

[55] Folsom v. Marsh, 9 F Cas 342 (1841).

work.[56] Further, in the case of *Kartar Singh Giani v. Ladha Singh*, the Court laid down two conditions to prove unfairness in cases of fair dealings:

i. There must be an intention to compete and to derive profits from the competition between the two works
ii. The infringer must have unfair motives in order for the dealing to be unfair[57]

When it comes to fanfiction, as discussed previously, their creation is generally intended as an enjoyment of the original work and is not in furtherance of capitalistic intentions to monetise on the works of the original authors. Further, various famous authors have even supported the creation of fanfiction of their works, such as Stephenie Meyer of the Twilight fame[58] and J.K Rowling of the Harry Potter series[59]- both of which have inspired multi-book series that have become popular book series in their own right.

The books that do have a large number of fans creating fanfiction are generally of critical and financial acclaim to the authors. Series like Harry Potter and Twilight, which have inspired hundreds of fanfiction, have already sold more than 100 million copies and have been New York Times Best Sellers. The success that these original works have is not easy to surpass, and when writing fanfiction, the intention of the fans is to appreciate the original work and include their own storylines and characters to create a derivative work. Further, it may be debated that fanfiction is generally posted on sites where the author does not profit from their works. Popular fanfiction site "Archive of our own" is run by the Not-for-Profit "Organisation for Transformative Works"[60] and by way of posting on a platform where monetisation is not possible, it may be argued that the work of fanfiction does not have any "intention to surpass" the original work.

The most closely related case that the Indian Judiciary has taken up is that of "parodies". In the case of *Civic Chandran v. Ammini Amma*, the Kerala High Court decided on whether parodies created from an original copyrighted work can fall under fair dealing. The facts of the case, in some ways, can be applied to the grey area of fanfiction. The original work, in this case, was a play called

[56] M/s Blackwood v. A.N Parasuraman, AIR 1959 Mad. 410.
[57] Kartar Singh Giani v. Ladha Singh, 1934 SCC OnLine Lah 277.
[58] Alani Vergas, *Stephenie Meyer Appreciates Fan-fiction but urges writers to 'go do something you can claim' too,* SHOWBIZ CHEAT SHEETS (Sep. 29, 2020), https://www.cheatsheet.com/entertainment/stephenie-meyer-appreciates-fan-fiction-but-urges-writers-to-go-do-something-you-can-claim-too.html/.
[59] *Rowling backs Potter fan-fiction*, FANLORE (Aug. 29, 2021, 10:27am), https://fanlore.org/wiki/Rowling_backs_Potter_fan_fiction.
[60] ARCHIVE OF OUR OWN, https://archiveofourown.org/about (last visited Aug. 29, 2021).

"Ningalenne Communistakki" (You made me a communist). The play revolved around how the Communist Party helped the Labourers of socially and educationally backward classes overcome struggles caused by rich landlords.

The counter-drama was titled *"Ningal Are Communistakki"* which translates to "who did you make a communist", thereby taunting the original drama. The counter-drama used the same characters that the original play did and re-enacted some scenes that were present in the original. At the same time, it also included scenes that criticised the original play. This scene-by-scene re-enactment of the original play with the original characters of Thoppil Basi was challenged as a violation of copyright.

The Court, relying on the judgement in *Hubbard v. Vosper,* laid down three factors to be considered when deciding whether the parody or derivative work has violated the copyright owner's rights:

i. Quantum and Value of the matter taken in relation to the comment or criticism
ii. The purpose for which it was taken
iii. The likelihood of competition between the two[61]

By applying the aforementioned three factors to the use of the characters and scenes in the instant case, the Court stated that the borrowing was not with the intention to reproduce in any substantial manner and did not infringe copyright. It was also relevant that the counter-drama included references to Social and Political leaders, which did not exist in the original. Hence, the allegation of copyright infringement was dismissed by the Kerala High Court.[62]

Fanfiction, like the counter-play, includes features from the original works as well as include their own elements. For example, the original work Twilight featured characters "Edward", and "Bella" in the centre of the story and a certain dynamic was provided between them, which was recreated in the fanfiction work "Fifty Shades of Grey". While there are borrowed elements between the two works, the fanfiction includes elements that do not already exist in the original work- while Twilight focused on supernatural elements, Fifty Shades of Grey was set in a universe without such elements, and both storylines took different approaches to what scenarios the characters are in.

[61] Hubbard v. Vosper, [1972] 2 Q.B. 84.
[62] Civic Chandran v. Ammini Amma, 16 PTC 329 (Kerala).

Another argument supporting how fanfiction is fair dealing is its role in raising awareness and being "educational" regarding sensitive topics such as LGBTQA+ communities, sexual assault and violence, unhealthy relationships, etc. and creating a space where people can re-imagine existing stories to be more diverse. The popular book series- Twilight has often been criticised by psychologists as well as fans for depicting an unhealthy relationship with an inherent power-balance problem.[63] Fanfiction has brought attention to this issue and even corrected it through various recreations of the work. Fanfiction also provides an opportunity to bring classics into the 21st century since many include racism, sexism, homophobia and other forms of xenophobia that are not acceptable anymore.

Fanfiction, when created, is not created with the intention to surpass the original, and the very essence of fanfiction is in introducing various original elements to the preexisting work by the fanfiction author. Considering how the Indian Courts have characterised fair dealings under Copyright law, fanfiction is rightfully fair dealings and hence, is legally valid.

(F) FANFICTION AND MORAL RIGHTS

When analysing the legality of fanfiction under the Indian Copyright Law, it is also important to consider the concept of 'moral rights' of the author. The recognition and protection of moral rights flow from the idea that any work created by the author embodies their personality and reflects their creative soul, thereby being worthy of protection.[64] Being personal to the author, they cannot be assigned to another party and vest with the author even when the ownership of copyright has been assigned to another. Furthermore, being special rights, the fair dealing exceptions are also not applicable as against them. Article 6*bis* of the Berne Convention[65] lays down these moral rights, and Section 57 of the Indian Copyright Act correspondingly incorporates them into the domestic copyright law. Moral rights are twofold in nature. The first right is the right of attribution, which entitles an author to assert authorship over their works and prevent others from claiming false authorship of the same.[66] This particular right rarely finds discussion in the debate regarding fanfiction, as fanfiction writers do not claim authorship of the original work. Rather they

[63] Este Yamosh, *The Undiagnosed Problem: The Twilight "saga",* WOMEN'S MEDIA CENTRE (Aug. 29, 2021, 10:30 AM), https://www.womensmediacenter.com/news-features/the-undiagnosed-problem-the-twilight-saga.
[64] Samantha S. Peaslee, *Is There a Place for Us: Protecting Fan-fiction in the United States and Japan*, 43 Denv. J. Intl'l L. & Pol'y 199, 222 (2015).
[65] Berne Convention, Article 6*bis*.
[66] Indian Copyright Act,1957, §57(1)(a), No. 14, Acts of Parliament, 1958 (India).

tend to provide disclaimers acknowledging the true authorship and respecting the right of attribution of the author.[67]

Of relevance to our analysis is the second right - the right of integrity. This entitles an author to act against any distortion, mutilation, or modification of their work or against any other act pertaining to their work where they are prejudicial to the honour or reputation of the author.[68] With respect to fanfiction, this causes somewhat of a problem. This is because most fanfiction can reasonably qualify as a modification of the original work, as they are based on the original work and incorporate the original characters. Arguably, a case may even be made out for some fanfiction being a 'distortion' of the original work, notably where they fall under the slash category[69] or contain sexual content. Nonetheless, in all circumstances, it would be a prerequisite also to ascertain whether any alleged distortion or mutilation is such that it affects the honour or reputation of the author in a prejudicial manner.

In the case of *Mannu Bhandari v. Kala Vikas Pictures Ltd.,*[70] a movie adaptation of a novel was under question as infringing the moral rights of the novelist. The case went on to be settled outside of court; however, the observations of the Delhi High Court are of particular note. The Court clarified that under Section 57, it does not act as a sentinel of public morals or a super censor imposing its prudish views on the depiction of explicit content. It rightfully stipulated that the inquiry of the Court is only restricted to ascertaining whether there is any prejudice being brought to the reputation of the author by virtue of such depiction.

Another case of relevance as regards moral rights is *Amarnath Sehgal v. Union of India.*[71] In this case, the Delhi High Court attached a wider amplitude to the scope of moral rights. The case was held in favour of the author against the destruction of their artistic mural, on the rationale that such destruction reduced the creative corpus of the author and thus was prejudicial to their honour.

From a perusal of the aforementioned cases, it appears that a portrayal in fanfiction that is unsavoury to the author may be prone to action under moral rights. It is also apparent that Courts are likely to hold in favour of the author and have been found to give a wider interpretation to the

[67] Tiffany Lee, *Fan Activities from P2P File Sharing to Fansubs and Fan-fiction: Motivations, Policy Concerns and Recommendations*, 14 TEX. REV. ENT. & SPORTS L. 181, 182 (2013).
[68] Indian Copyright Act 1957, S. 57(1)(b), No. 14, Acts of Parliament, 1958 (India).
[69] Meredith McCardle, *Fan-fiction, Fandom, and Fanfare: What's all the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 446 (2003) [hereinafter "MCCARDLE"].
[70] Mannu Bhandari v. Kala Vikas Pictures Ltd., AIR 1987 Delhi 13.
[71] Amar Nath Sehgal v. Union of India, 2005 (30) PTC 253 (Del).

ambit of moral rights under Section 57. Therefore, a potential case against moral right infringement by fanfiction is plausible.

At the same time, it would be hard to establish a causal link between the fanfiction and any alleged prejudice to integrity. In the *Mannu Bhandari* case, it is easy to notice the link between the depictions in the movie and the consequent effect on the author's reputation as a result thereof, as the movie is an 'adaptation' of the novel and to any reasonable person, the contents of the movie would be linked to the contents of the book. However, as mentioned previously, generally, fanfiction is not publicised as adaptations of the original work, and disclaimers are customarily put out by fanfiction writers dissociating the fanfiction from the original work. Consequently, a reader would not associate the contents of a fanfiction with the contents of the work that it is derived from. The mere inclusion of explicit content in a fanfiction should not be enough to amount to an infringement of an author's moral right.

(G) SUMMING UP

The Indian Copyright Law is found to be obscure and narrow as regards the concepts of fair dealing and derivative works. In the absence of express clarity, the evolution of the Indian Copyright Act through judicial precedents has been found to mostly be in the areas of cinema and music, as opposed to literature. Nonetheless, the current scenario seems to lean more towards the illegality of fanfiction. This is because the Indian law also provides for the moral rights of authors, where a potential case of infringement may be made out if the work is found to be prejudicial to their honour or reputation, irrespective of fair dealing.

IV. CONCLUSION

As per the analysis undertaken in this paper, if a general view were to be taken as to the legality of fanfiction, both the US as well as Indian laws may potentially view fanfiction as an infringement of copyright. Under US law, the fair use provisions appear wider in scope as compared to the fair dealing provisions in India. However, there is uncertainty as to how likely it would be for a particular fanfiction to constitute fair use. In the case of India, the inclusion of moral rights allows authors to validly act against any fanfiction that they find contrary to their integrity. Hence, in spite of differences between the US and Indian copyright laws, both do not provide complete clarity as

to the position of fanfiction in their respective jurisdictions and rely on a case-by-case approach to assess their legality. While the US courts seem to have dealt with cases surrounding fanfiction, Indian courts are yet to rule on such issues.

Although the origin of fanfiction dates back to the 1960s in the form of "fanzines", it has been the advent of the internet that has democratised the creation and distribution of fanfiction.[72] With the growing number of platforms that support the free publication and consumption of partially original works such as fanfiction.net, Archive of Our Own and Wattpad, the opportunities for young readers and writers to express themselves have grown greatly online. Technology has enabled fanfiction to play into a larger subculture of changing socio-political structures, community building and cultural comment.[73] It has made fanfiction more accessible to enthusiasts while also increasing its visibility to authors of the original works. This newfound visibility has, in turn, further fueled the need for certainty as regards the legality of fanfiction today.

The functioning of copyright law in its current form, i.e., against fanfiction, raises questions of whether copyright law goes against its original purpose. As discussed in the paper, fanfiction lacks a monetary incentive and often includes disclaimers regarding what parts of the fanfiction have been derived from the original work. The purpose of copyright law was to encourage original works and ensure that no monetary benefit was received by persons from someone else's original works.[74] The illegality of fanfiction in various jurisdictions across the world only acts as a barrier to the social and cultural phenomenon that fanfiction has ushered. Literature has always been about taking inspiration from other works, with classics like Shakespeare's Romeo and Juliet being based on a prior poem titled "*The Tragicall Historye of Romeus and Juliet*", and the Three Musketeers having characters from another book.[75] To essentially disbar any kind of inspiration-based works on the grounds of copyright would pose a threat to literature itself and must be considered a factor in upholding the legality of fanfiction.

Organisations such as the "Organization for Transformative Works" (OTW) and the 'free culture movement' dating back to the early 2000s have been advocating for there to be more liberal

[72] MCCARDLE,*supra* note 69.
[73] Jane M. Becker, *Stories around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet*, 14(1) CONN. PUB. INT. 133, 135 (2014).
[74] Aly Wilkins, *Fanfiction and Copyright: Has the digital age rendered copyright laws obsolete?*, MEDIUM (Dec. 30, 2021, 4:54 PM), https://medium.com/swlh/fanfiction-and-copyright-has-the-digital-age-rendered-copyright-laws-obsolete-aa8a82be6fc5.
[75] Charlotte Ahlin, *11 Classics That Are Secretly Fanfiction*, BUSTLE (Aug. 30, 2021, 9:46 AM), https://www.bustle.com/articles/159041-11-classics-that-are-secretly-fan-fiction.

copyright laws in light of the current realities.[76] Fanfiction is mostly created for non-commercial purposes and actually has a positive effect on the market of the original work. In this regard, commentators have also underlined the concept of 'moral ownership', under which the creative interactions of fans with copyrighted works are justified on the moral rationale that fans are equally invested in the copyrighted work as the author and have a vested interest in preserving its integrity and longevity.[77]

Fanfiction poses a unique challenge to copyright law in its current form- to balance the interest of the owner of the original work with the "moral ownership" of fans of such work. Although the protection of owners of original works is accounted for under copyright laws, the strong fan culture that has evolved since has created a new stakeholder- the fans of the copyrighted work. Consequently, copyright law can no longer take a black or white stance. This evolution requires consideration of how one can enjoy art- is it merely to be looked at or to be participated in? Fanfiction is an active engagement with the art and is essential, given the history of the evolution of literature. However, on the other hand, it also should not be allowed to serve as an excuse or an avenue to infringe the very purpose for which copyright law was created.

The development of a system of copyright enforcement that is flexible enough to acknowledge engagement with art whilst barring its exploitation is essential from a legal as well as moral perspective. As mentioned previously, this may be carried out by analysing the different aspects of the fair use or fair dealing doctrines flexibly in a way that is aligned with current realities. For example, when it comes to the effect of the fanfiction on the potential market of the original work is one, where the fanfiction does not pose harm or competition to the market of the original work itself, it should not be held as infringing copyright, as it would not affect the author's ability to derive capital out of their work. This approach would ensure that the rights of both stakeholders are balanced in an equitable and fair manner. Hence, given the prominence of fanfiction and its contribution to creativity, fan culture and community, there is a dire need for the development of an improved framework better suited to the practical nuances of fanfiction.

[76] Stacey M. Lantagne, *The Better Angels of Our Fan-fiction: The Need for True and Logical Precedent*, 33 HASTINGS COMM. & ENT. L.J. 159 (2011).
[77] Sarah Alice Oakley, *"Please don't sue!": Regulation, Control and Ownership in Fan (Fiction) Communities*, The University of Adelaide (2011).

ARTICLE

THE LANDSCAPE OF ISDS AND THE WAY FORWARD

- *Mahith Vidyasagar**

ABSTRACT

The 'legitimacy crisis' faced by the investor-State dispute settlement (ISDS) system, called for reforming the investor-State arbitration regime. As a result, the United Nations Commission on International Trade Law (UNCITRAL) entrusted its Working Group III with a broad mandate of reforming the ISDS. The discontent raised against the system of investor-State arbitration is well documented. However, they also contain certain other issues and the triggering elements that are responsible for growing such criticism against the entire regime was not pinpointed. In that light, this article attempts to provide the concerns that specifically ignited the reform process of ISDS as well as the reasons for such criticism.

Keywords: ISDS, Backlash against ISDS, UNCITRAL, Working Group III, ISDS Reforms.

I. INTRODUCTION

The post-World War II period symbolises the progress of the modern investment treaty regime in the international law sphere. There is a structural shift in the international legal institutions from a classic model of co-existence to an international cooperation of law because of the rising *legalisation of politics of the world.*[1] Various prominent features exemplify this structural change, like treaty law expansion, the increasing number of actors subject to international law and the development of new adjudication mechanisms for the settlement of international legal disputes.[2] A backlash has also been triggered by legalisation of these global affairs from certain

* Ph.D. Scholar, Damodaram Sanjivayya National Law University, Vishakhapatnam.

[1] Malcolm Langford et al., *Backlash and State Strategies in International Investment Law*, *in* THE CHANGING PRACTICES OF INTERNATIONAL LAW 70 (T. Aalberts & T. Gammeltoft-Hansen eds., Cambridge Uni. Press, 2018).

[2] *Id.*

States and stated that international law proliferation is weakening the sovereignty of nations and disregarding the States' political manoeuvre at the international level.[3]

All the above-mentioned features are apparent for regulating foreign investment by international treaties. Primarily structured on an extensive network of bilateral investment treaties *(BITs)*, regional free trade agreements,[4] a few multilateral investment treaties and also customary international law,[5] beneficiary rights focussed at the post-creation protection of investment have been granted to foreign investors. There is an assertion that "*no other category of private individuals is given such expensive rights in international law as are private actors investing across borders.*"[6]

One of such expensive rights is international investment protection, which has been provided for foreign investors in international investment agreements *(IIAs)* against the host-State. The wide similarities amongst the *IIAs* make it possible to discuss the international investment protection regime, which is specifically centred on two aspects.

First, substantive rights have been guaranteed to investors through IIAs by way of international obligations imposed on contracting States. This means that States accept obligations regarding certain investment protection standards (like fair and equitable treatment, protection against expropriation, and non-discrimination) in relation to the foreign investment.[7] Secondly, many IIAs permit foreign investors for the enforcement of such substantive rights by way of a procedural mechanism, which is usually termed as investor-State arbitration or ISDS.

While, the provisions of *ISDS* show differences from one *IIA* to another, they usually offer the following features: *(i) the claimant-investor may bring a claim directly against the host-State; (ii) the dispute is heard by an arbitral tribunal (whether institutional or ad hoc) constituted to hear that particular dispute; (iii) both the disputing parties including the claimant-investor and the respondent-State, play an important role in the selection of arbitral tribunal.*[8]

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[3] *Id.*

[4] *International Investment Agreements Navigator*, INVESTMENT POLICY HUB (Sep. 12, 2020, 1:54 am), https://investmentpolicy.unctad.org/international-investment-agreements.

[5] Patrick Dumberry, *Are BITs Representing the "New" Customary Law in International Investment Law?*, 28 PENN. ST. INT'L. L. REV. 675 (2010).

[6] Beth Simmons, *Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment,* 66 WORLD POLITICS 12, 42 (2014).

[7] G. Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?* 6, ¶ 6 (CIDS-Geneva Centre for International Dispute Settlement, Jun. 2016).

[8] *Id.,* ¶ 7.

Usually, *ISDS* is an instrument with legal character in *BITs* or other multilateral investment treaties, which provide investors with a *right to call for arbitration* in case of any violation of such treaty by the host-State.[9] It is a dispute settlement process for individuals or corporations who seek a neutral forum for the adjudication of a claim against a host-State, where they make the investment.[10] In the international investment protection regime, there is considerable progress of *ISDS* in *IIAs*, especially in *BITs*. While the foreign investors' ability to choose *ISDS* as an investment dispute settlement mechanism has attained more relevance, gradually, it has also come under more scrutiny.[11]

Over the past decade, this investor-State arbitration or *ISDS*, has started facing backlash from the stakeholders. In the past, *IIAs* especially *BITs* with *ISDS* provisions were treated as considerably straight forward and harmless instruments. In the beginning days *BITs* negotiation was not a lengthy or prolonged affair. The developing States would usually be quite anxious to enter into *BITs* with major-capital exporting States and were more enthusiastic to provide most favourable treaty terms to those States in an attempt to secure foreign investment at all costs.[12] However, jurisprudence surrounding the *ISDS* has shown that *BITs* are not harmless, and great care and caution should be exercised by the parties at the time of entering into them.[13]

Against this background, it is appropriate to look into the advantages supplemented by *ISDS* before explaining the current backlash and the criticisms faced by it.

II. PROMINENCE OF ISDS IN INTERNATIONAL INVESTMENT FIELD

Looking at the historical evolution of the foreign investors' treatment to date, one can notice that currently, more rights are being enjoyed by foreign investors than the domestic investors. It is due to the inclusion of protections that are usually not available to the host-State nationals, particularly, concerning the settlement of disputes in investment agreements.[14] Over the past decades, primarily by way of *IIAs*, a dispute settlement regime that allows the initiation of arbitration against the host-States by the foreign investors has been established. This system of

[9] R. Abbott et. al., *Demystifying Investor-State Dispute Settlement (ISDS),* 3 (European Centre for International Political Economy, Occasional Paper No. 5/2014, 2014).
[10] Timothy G. Nelson, *"History Ain't Changed": Why Investor-State Arbitration Will Survive the "New Revolution"*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 555, 556 (M. Waibel et al. eds., Kluwer International Law, 2010).
[11] RODRIGO POLANCO, THE RETURN OF THE HOME STATE TO INVESTOR-STATE DISPUTES: BRINGING BACK DIPLOMATIC PROTECTION? 46 (Cambridge Univ. Press, 2019).
[12] Chester Brown, *Investor-state Arbitration as the "New Frontier"*, 28 THE ARB. AND MEDIATOR 59, 60-61 (2009).
[13] Doug Jones, *Investment Arbitration in Times of Crisis*, 25 NAT'L L. SCH. INDIA REV. 27, 28 (2013).
[14] POLANCO, *supra* note 12*,* at 1-2.

ISDS provides foreign investors a procedural alternative of pursuing international arbitration instead of standing in-front of the domestic courts of the host-State if they believe that their rights, which are recognised in the treaties, have been violated by the host-State.[15]

The provisions of *ISDS* have developed in sophistication and complexity, as attempted by the States to react to difficulties they have been faced while arbitrating the investor-State disputes according to the *IIAs* that were concluded previously. In particular there is a requirement for the increase of control exercised by the States over the procedures of arbitration, encouraging judicial economy, clarify the arbitral tribunal powers and improving the *ISDS* legitimacy.[16]

This novel system of *ISDS* gave a significant break from the conventional mechanisms of dispute settlement at the inter-State level. This development was part of an initiative to establish an institutionalised and formalised process on the international sphere, within a wider initiative, which saw *IIAs* (including their dispute settlement provisions), as instruments to increase the confidence in the stability of the developing States investment environment[17] and thus "*facilitate wealth creating cross-border capital flows.*"[18]

By way of *ISDS*, States have sought to establish a neutral forum that would offer investors a chance of fair hearing in-front of a tribunal *unencumbered by domestic political considerations and able to focus on the legal issues in the dispute.*[19] 'De-politicization' of investment disputes is the idea behind this system.[20] Which means, the disputes between foreign investors and host-States are purportedly isolated against the diplomatic and political relations among the States. Host-States having little political power observed this impartial settlement of disputes as an improved substitute than surrendering to the powerful home-State strong-arm tactics.[21] Thus, it turns out to be a "*useful tool of good governance to create longer-term interests in the stewardship of economic, human and natural resources.*"[22]

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[15] *Id.,* at 2.
[16] INVESTOR-STATE DISPUTE SETTLEMENT: A SEQUEL 20 (UN Publications, UNCTAD/DIAE/IA/2013/2, 2014).
[17] Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,* 73 FORDHAM L. REV. 1521, 1525 (2005). *See also* Christoph. Schreuer, *Do we need Investment Arbitration?, in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 879 (Jean E. Kalicki & Anna Joubin-Bret eds., Brill-Nijhoff, 2015).
[18] *Id.*, at 1527.
[19] INVESTOR-STATE DISPUTE SETTLEMENT: A SEQUEL, *supra* note 17, at 24.
[20] I. F. I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. FOREIGN INV. L. J. 1 (1986).
[21] INVESTOR-STATE DISPUTE SETTLEMENT: A SEQUEL, *supra* note 17, at 24.
[22] T. W. Wälde, *Investment Arbitration and Sustainable Development: Good Intentions- or Effective Results?*, 3 TRANSNAT'L DISP. MANAGEMENT 7 (2006).

Based on this discussion, the merits of *ISDS* can be contextualised as: the foreign investment regime with *ISDS* has commonly proven useful and absolutely contributed for the rule of law promotion in the international sphere, the global market working, growth of the flows of foreign investment, the development of economy and the development of human, in both the capital exporting and importing States.[23]

The above supporting arguments raise an intriguing question – why *ISDS* has attracted such a backlash, especially from the developing States although it benefitted the international investment field? The following section will answer this question.

III. EVENTS, REASONS & BACKLASH AGAINST ISDS

Foreign investors are provided with beneficiary rights that basically aim at the protection of their investment through *IIAs*. Whereas, each *IIA* is a separate agreement with significant diversity and agreements usually contain similar standards of protection, which includes most prominently the provisions of *ISDS*. It is not an exaggeration to say that under international law, no other private individual is provided with such expensive rights in their capacity as private actors.[24]

For a variety of causes, the growth of investment regime with *ISDS* provisions has triggered backlash from certain States, various actors of civic society[25] and scholars.[26] Usually known to as a *'legitimacy crisis'*,[27] even certain important insiders and anticipated supporters in the media have expressed disquiet.[28] Generally, this happening is not related to the expansiveness of the substantive rights provided to foreign investors under *IIAs*, but rather, the amalgamation of such rights along with the toughness of the *ISDS* mechanism embedded within them.[29] The outcome has been an explosion of litigation. This litigation resulted in the payment of huge

[23] Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach,* 55 VA. J. INT'L L. 57, 61 (2011).
[24] SIMMONS, *supra* note 6.
[25] P. Eberhardt & C. Olivet, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fuelling an Investment Arbitration Boom*, (Corporate Europe Observatory & Transnat'l Inst., Nov. 2012).
[26] THE CHANGING PRACTICES OF INTERNATIONAL LAW, *supra* note 1, at 70.
[27] Behn*, Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art,* 46 GEO. J. INT'L L. 363 (2015); Behn, *Performance of Investment Treaty Arbitration, in* THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS 77 (T. Squatrito et. al. eds., Cambridge Univ. Press, 2018).
[28] Malcolm Langford & Baniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?,* 29 EUR. J. INT'L. L. 551, 552 (2018).
[29] *Id.*

amounts to private individuals by governments of host-States, which resulted in raising criticisms and backlash against the system of *ISDS* and international investment treaties as well.

Investment treaties not only empower foreign investors by providing them protection against the conduct of the host-State, which is independent of its domestic law and domestic courts; they also provide notable powers to arbitral tribunals to review the conduct of the government including central public policy decisions under broadly formulated standards of treatment.[30] In a number of cases the breadth and depth of arbitral powers and their impact on the domestic law and policy making powers is clearly visible. Significant examples are *ISDS* cases involving 2001-2002 economic crisis of Argentina,[31] water concessions in Bolivia, Argentina, and Tanzania,[32] an affirmative action program aiming to remedy injustices of apartheid system in South-Africa,[33] banning of harmful chemicals in the U.S., and Canada.[34]

(A) This deep involvement of the *ISDS* and the arbitral tribunal's decision in the host-State's domestic regime have attracted a wider backlash by States, civil society, non-governmental organisations and academics. The first signs of this backlash were discovered in the attempts to attain more 'balanced' *BITs* in the 2004 U.S. and Canadian Model *BIT*. 2004 also witnessed *Methanex* arbitration.[35] In this case the right of the California Government to ban the use of harmful substances on the basis of potential health risks was challenged by a Canadian investor. It is the first significant case that recognised the importance of *third-party* participation as *amicus curiae* in investment arbitration proceedings. However, the full-blown backlash signs didn't appear until around 2007,[36] starting with the discontent against

[30] Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. INT'L DISP. SETTLEMENT 577, 578 (2012).
[31] CMS Gas Transmission Co v. Arg. Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005); LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); Continental Casualty Company v. Arg. Republic, ICSID Case No. ARB/03/9, Award (Sep. 5, 2008); National Grid Plc v. The Arg. Republic, UNCITRAL, Award (Nov. 3 2008); Total SA v. The Arg. Republic, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010); Impregilo SpA v. Arg. Republic, ICSID Case No. ARB/07/17; El Paso Energy International Company v. The Arg. Republic, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011).
[32] Biwater Gauff (Tanzania) Ltd v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award (July 24, 2004); Aguas del Tunari SA v. Republic of Bol., ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005); Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Arg. Republic, ICSID Case No ARB/03/19 and AWG Group v. Arg. Republic, Decision on Liability (July 30, 2010).
[33] Piero Foresti, Laura de Carli and others v. Republic of S. Afr., ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010).
[34] Methanex Corp. v. U.S.A., Final Award of the tribunal on Jurisdiction and Merits, UNCITRAL (NAFTA), Ad Hoc Arbitration (Aug. 3, 2005); Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada, UNCITRAL (NAFTA), Award (Aug. 2, 2010).
[35] Methanex Corp. v. U.S.A., Final Award of the tribunal on Jurisdiction and Merits, UNCITRAL (NAFTA), Ad Hoc Arbitration (Aug. 3, 2005).
[36] THE BACKLASH AGAINST INVESTMENT ARBITRATION (M. Waibel et. al. eds., Kluwer Law International, 2010).

investment arbitration in Latin America. Later, the dissatisfaction with the manner of *BITs* drafting spread to South Africa, and then to other places like India, Indonesia as well as Europe.[37]EVENTS WHICH TRIGGERED THE BACKLASH

It had begun with the denunciation of the *ICSID Convention* by Bolivia in 2007 (*ICSID Convention* Art. 71 effects the denunciation.)[38] It was then followed by Ecuador's and Venezuela's own denunciations, which took effect from January 2010 and July 2012, respectively.[39] Unlike the wider non-governmental backlash against the economic globalisation, which had begun earlier in the late 1990s, this backlash against *ISDS*, had turned out to be an official or governmental backlash. Every State, which expressed its anguish against *BITs* or the regime of investment treaty arbitration had a bitter experience that triggered the review.

1. Latin American Region

In Latin America, the criticism against the investor-State arbitration system started in 2007, when a large number of cases were brought against Argentina, Bolivia, Ecuador, and Venezuela among others.[40] Among all of the Latin American States, Argentina faces 62 cases as a respondent making it the most targeted.[41] Currently, the Latin American and Caribbean countries have been targeted in almost 300 *ISDS* cases.[42]

Argentina's dissatisfaction towards investment awards can be understood from the remarks of the then Minister of Justice Rosatti during the eve of the *CMS award.*[43] He argued that the investment awards are against Argentina's Constitution.[44] Among all the cases filed against Argentina, *Repsol Case*[45] is a prominent one. The claim was brought against Argentina collectively by *Repsol S.A., Repsol Capital S.L. and Repsol Butano S.A.* and invoked the *Argentina-*

[37] C. L. LIM ET AL., INTERNATIONAL INVESTMENT LAW AND ARBITRATION: COMMENTS, AWARDS AND OTHER MATERIALS 478 (Cambridge Univ. Press, 2018); THE BACKLASH AGAINST INVESTMENT ARBITRATION, *supra* note 10.
[38] Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 353 (M. Waibel et. al. eds., Kluwer Law International, 2010).
[39] LIM ET AL., *supra* note 40, at 478.
[40] Munia El Harti Alonso, *Topical Issues in ISDS: Latin America-A Review of Recent Developments- A Report from the CERSA,* KLUWER ARB. BLOG (Sep. 28, 2020, 04:45 pm), http://arbitrationblog.kluwerarbitration.com/2018/12/16/topical-issues-in-isds-latin-america/
[41] *Argentina*, INVESTMENT POLICY HUB (Sep. 28, 2020, 04:57 pm), https://investmentpolicy.unctad.org/investment-dispute-settlement/country/8/argentina.
[42] *Latin America*, ISDS PLATFORM (Sep. 28, 2020, 04:57 pm), https://isds.bilaterals.org/?-latin-america-266.
[43] CMS Gas Transmission Company v. The Arg. Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005).
[44] ALONSO, *supra* note 40.
[45] Repsol, S.A. and Repsol Butano, S.A. v. Arg. Republic, ICSID Case No. ARB/12/38 (Dec. 18, 2012).

Spain BIT (1991).[46] This case was concluded by entering into a settlement agreement between the parties, whereby Argentina agreed to pay US$ 5 billion plus interest as a compensatory amount to the claimants. This incident made Argentina reconsider its past as well as forthcoming investment treaties.

The impact of *ISDS* cases is not only confined to Argentina but most of the Latin American States have faced it. This region even witnessed one of the single largest awards decided by *ICSID* in *Occidental Petroleum Case*,[47] which is against Ecuador. For the cancellation of a 1999 Participation Contract between *Occidental Exploration and Petroleum Company* and PetroEcuador, a claim was brought against Ecuador[48] by invoking the *Ecuador-U.S. BIT (1993).*[49] The tribunal in this case awarded the Claimants an amount of US$ 1,769,625,000 for damages suffered as a result of Ecuador's breach.[50] This was the highest award pronounced by *ICSID* during that time. This award is notable not just because of the large amount of damages (and of the 326-page decision by the tribunal) but because of the tribunal's address to the cutting-edge issues, which include the proportionality principle and the calculation of damages in international investment law.[51] However, the amount of the award was reduced to US$ 1,061,775,000 in the annulment decision.[52]

Following such incidents, along with Ecuador, States like Bolivia, and Venezuela have denounced the *ICSID Convention*. Subsequently, there is change towards the treatment of investment treaties among the Latin American region.

2. South Africa

The dissatisfaction against *ISDS* spread to South Africa later. When *BITs* with Italy, Belgium and Luxemburg were signed by South African President *Nelson Mandela* in 1997 and 1998,

[46] Agreement on the Reciprocal Promotion and Protection of Investments, Arg.-Spain, Oct. 3, 1991, 1699 U.N.T.S 202 [Argentina-Spain BIT (1991)].
[47] Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012).
[48] *Id.,* ¶ 1-3.
[49] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rep. of Ecuador, Aug. 27, 1993.
[50] Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, at 326, ¶ 876 (v) (Oct. 5, 2012).
[51] Tai-Heng Cheng & Lucas Bento, *ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v. The Republic of Ecuador*, KLUWER ARB. BLOG (Sep. 28, 2020, 05:15 pm), http://arbitrationblog.kluwerarbitration.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/.
[52] Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, at 133, ¶ 586 (Nov. 2, 2015).

probably, he never suspected that his actions would impede an anti-apartheid policy. In 2004, the new post-apartheid South African government led by *Mbeki* enacted *Mineral and Petroleum Resources Development Act (MPRDA)*. In addition to the new mining charter, the Act wanted to amend the historical dissimilarities in the mining sector. It required the companies to make partnership with the citizens who had grieved under the regime of apartheid. This new system terminated all the previously held mining rights and in order to continue their operations, the mining companies were required to reapply for licenses.[53]

In 2007, an Italian investors group filed a major investor-State claim against South Africa. [54] The Claimants [*Forseti and Conti families* and *Finstone*] alleged that the South Africa breached *South Africa-Italy BIT (1997)*[55] and *South Africa-Luxemburg BIT (1998)*.[56] However, this case was decided in favour of South Africa and the tribunal ordered the Claimants to pay € 400,000 in respect of fees and costs.[57] Despite the fact that South Africa was still left with €5 million in unreimbursed legal fees, at that time, its government celebrated it as a "*successful conclusion*" in a press release.[58] In this particular instance, a more significant victory has been claimed by the investors of the mining sector. The case pressure permitted the investors to strike an unexpected deal with the government of South Africa. It has been opined that with the introduction of the new mining regime no other South African mining company has been treated so liberally.[59] This instance triggered the discontent against *ISDS* and investment treaties in South Africa, subsequently, it unilaterally withdrew from a number of investment treaties that contained *ISDS*.

3. Indonesia

Following the incidents in South Africa, the same thing was done by India and Indonesia. The Netherlands embassy in Jakarta declared that Indonesia government had informed Netherlands that it intended to terminate the *Netherlands-Indonesia BIT (1994)*,[60] which was due to expire on

[53] Clarie Provost & Matt Kennard, *The Obscure Legal System that lets Corporations Sue Countries,* THE GUARDIAN (Sep. 29, 2020, 08:15 pm), https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid.
[54] Piero Foresti, Laura de Carli and others v. The Republic of S. Afr., Award, ICSID Case No. ARB(AF)/07/1 (2007).
[55] Agreement on the Promotion and Protection of Investments, S. Afr.-It., Jun. 9, 1997.
[56] Agreement on the Reciprocal Promotion and Protection of Investments, S. Afr.-Belgo-Lux. Economic Union, Aug. 14, 1998.
[57] Piero Foresti, Laura de Carli and others v. The Republic of S. Afr., ICSID Case No. ARB(AF)/07/1, Award, at 32 (Aug. 4, 2010).
[58] PROVOST & KENNARD, *supra* note 53.
[59] *Id.*
[60] Agreement on Promotion and Protection of Investment, Neth.-Indon., Apr. 6, 1994.

July 1, 2015.[61] It has also been stated that the government of Indonesia had notified its intention to end all of its 67 *BITs*.[62] This move is the result of having been faced with so many *ISDS* cases involving hundreds of millions of dollars in claims. The most controversial *ISDS* based case, which motivated the decision of the government of Indonesia of that time was the claim brought by *Churchill Mining*, and *Planet Mining*.[63] The claim substantially amounts to nearly US$ 2 billion as damages according to the terms of *Indonesia-U.K. BIT (1976)*[64] and *Australia-Indonesia BIT (1992)*[65] respectively.[66]

The case was a result of the revocation of mining licenses of the *Ridlatama Companies*, a joint venture of *Churchill Mining* and *Planet Mining* in East Kutai Regent. One of the conditions for the license termination was that licenses were allegedly forged.[67] Against the revocation decrees, the *Ridlatama Companies* and the Claimants also engaged in several legal proceedings in domestic courts against the State of Indonesia.[68] Later, both *Churchill Mining PLC* and *Planet Mining Pty Ltd* brought *ICSID* arbitration against Indonesia separately. The tribunal consolidated both the arbitrations.[69] The tribunal accepted the submissions of Indonesia and in its award held that the claims are inadmissible[70] and ordered the Claimants to pay to Indonesia $800,000 or any lower amount that may arise from *ICSID's* final financial statement and also ordered to bear 75% of the costs of Indonesia, *i.e.,* $8,646,528.[71]

Even though Indonesia won the case, the claim that was brought against, raised emphatic calls for Indonesia to immediately withdraw from the *ICSID* and continue to treat *BITs* with caution.[72]

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[61] David Price, *Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?*, 7 ASIAN J. INT'L. L. 124 (2017).
[62] Leon E. Tarkman & Kunal Sharma, *Indonesia's Termination of the Netherlands-Indonesia BIT: Broader Implications in the Asia Pacific?*, KLUWER ARB. BLOG (Sep 30, 2020, 9:20 pm), http://arbitrationblog.kluwerarbitration.com/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/.
[63] Churchill Mining and Planet Mining Pty Ltd v. Republic of Indon., ICSID Case No. ARB/12/40 and 12/14, Award, (Dec. 6, 2016).
[64] Agreement for the Promotion and Protection of Investments, U.K. Gr. Brit. & N. Ir. - Indon., Apr. 27, 1976, 1976 U.N.T.S. 62.
[65] Agreement Concerning the Promotion and Protection of Investments, Aus.-Indon., Nov. 17, 1992, 1993 A.T.S. 19.
[66] PRICE, *supra* note 61, at 126.
[67] Churchill Mining Plc v. Republic of Indon., ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, at 9-10, ¶ 35, 36 (Feb. 24, 2014).
[68] *Id.,* at 11, ¶ 39.
[69] *Id.,* at 14, ¶ 48-49.
[70] Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/40 and 12/14, Award, at 191, ¶ 528 (Dec. 6, 2016).
[71] *Id.,* at 199, ¶ 556.
[72] TARKMAN & SHARMA *supra* note 62.

4. India

There was a paradigm shift in the treatment of *BITs* by India following Indonesia. India had sent notices to terminate *BITs* to as many as 57 countries in July 2016. As of March 2019, India has terminated 69 of its existing *BITs*.[73] One of the reasons for this change was the outcome of the *White Industries Australia Limited v. The Republic of India,*[74] where it was the first case in which *BIT* was successfully administered against India. In this case, *White Industries Australia Limited* - the Claimant - had invoked the arbitration under *Australia-India BIT (1999)*[75] and brought a claim of A$ 8,769,469.07. In this case, based on the contract between Coal India and the Claimant, disputes arose *as to whether White was entitled to the bonuses and/or Coal India was entitled to penalty payments. A number of other related technical disputes also arose, primarily concerning the quality of the washed and processed coal and the sampling process by which quality would be measured.*[76]

The decision of the tribunal went in favour of *White Industries Australia* and ordered India to pay an amount of A$ 4,085,180, along with an interest of 8% per annum from March 24, 1998, until the date of payment to the Claimant.[77] In addition to this amount, India had also to pay an overall amount of A$ 670,249.82, to the Claimants regarding the fees and expenses of arbitrators, for the Claimants' costs in *ICC* arbitration and for the witness fees and expenses of the Claimants.[78] This decision influenced India's step towards the termination of *BITs* and at the same time, enacting a new model *BIT* for its future engagement in investment treaties.

5. Australia

Australia has also joined this list of States, which have been lately questioned about the legitimacy of *ISDS*. The 2011, *Trade Policy Statement* of the Government of Australia declared that Australia would not agree to *ISDS* in its future treaties caused much debate and controversy.[79] The *Philip Morris Claim*,[80] which had been instituted against Australia in 2011, was the motivated factor for change in policy of the country. In this case, the dispute arose between the *Philip Morris Asia* and Australia, regarding the Australia's enactment of the *Tobacco Plain*

[73] Tony Dymond et. al., *Investment Treaty Arbitration in the Asia-Pacific*, 2021 ASIA-PAC. ARB. REV. 24, 28 (2020)
[74] White Industries Australia Ltd. v. The Republic of Ind., IIC 529 (2011), Final Award (Nov. 30, 2011).
[75] Agreement on the Promotion and Protection of Investment, Aus.-Ind., Feb. 26, 1999.
[76] White Industries Australia Ltd. v. The Republic of Ind., IIC 529 (2011), Final Award, 17, ¶ 3.2.24 (Nov. 30, 2011).
[77] *Id.,* at 140, ¶ 16.1.1 (b).
[78] *Id.,* at 140, ¶ 16.1.1 (c)-(e).
[79] TARKMAN & SHARMA *supra* note 66.
[80] Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec.17, 2015).

*Packaging Act, 2011 (*the *TPP Act*), and also the implementation of the regulations known as the *Tobacco Plain Packaging Regulations 2011* (the *TPP Regulations*) (together known as *Plain Packaging Measures*).[81] The arbitration was invoked by the Claimants under the *Australia-Hong Kong, China SAR BIT (1993).*[82] The amount of the claim was unspecified.

The arbitral tribunal decided the case in favour of Australia and held, "*the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute.*"[83] In the final award on costs, the tribunal ordered the Claimants to pay Australia the costs incurred for arbitration.[84] Even though this case was decided in favour of the State, the fear it created made Australia treat investment treaties with caution. From then onwards, a change of government in 2013, has meant that Australia has retracted noticeably from its firm stand. Since then, it has been indicated by the government of Australia that it will consider the *ISDS* inclusion on a case-by-case basis.[85]

6. Germany

Germany is also a prime example of how *ISDS* is now being used to challenge the actions of the government of Europe. Germany became the subject of the € 1.4 billion *ISDS* case instituted by the energy giant of Sweden, *Vattenfall* in 2009.[86]

Investors from Germany have sued so many States, which include Ghana, Ukraine, and the Philippines, at the *World Bank's Centre* in Washington DC, since the 1980s. But for the first time, Germany found itself in the dock with the case of *Vattenfall.* The case was concluded in a settlement in 2011.[87] Another claim was filed by *ISDS* by *Vattenfall* against Germany, over the decision of the federal government to phase out nuclear power.[88] For this second claim, very little information is found in public domain notwithstanding the reports that the company is wanting € 4.7 billion from taxpayers of Germany but the claim is still pending.[89]

[81] *Id.,* at 1, ¶ 5.
[82] Agreement for the Promotion and Protection of Investments, H.K.-Aus., Sep. 15, 1993.
[83] Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, at 185, ¶ 588 (Dec.17, 2015).
[84] Philip Morris Australia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, Final Award Regarding Costs, at 27, ¶ 108 (July 8, 2017).
[85] TARKMAN & SHARMA, *supra* note 66.
[86] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Ger., ICSID Case No. ARB/09/6, Award (Mar. 11, 2011).
[87] *Id.*, at 2, ¶ 12.
[88] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12 (May 31. 2012).
[89] PROVOST & KENNARD, *supra* note 53.

All these events together fuelled the criticisms against *ISDS*.

(B) BACKLASH AGAINST ISDS

The backlash against *ISDS* is well documented.[90] However, it will be difficult to discuss all those here. Hence, for the sake of discussion the backlash against *ISDS* has been classified into two main groups: *those that question the necessity of the system as such and those focused on the functioning of the arbitral procedure.*[91]

1. Against the Investor-State Arbitration System

It has been pointed out that the regime permits the foreign investors to bring a dispute against the host-State in-front of a body other than the own courts of the State,[92] the ability to decide the sovereign acts' legality and in reality, contracting out the judicial function that is rooted in the public law was granted to private arbitrators.[93]

Bolder positions have been taken by some stating that the past decades have observed, "*the silent rise of a powerful international investment regime that has ensnared hundreds of countries and put corporate profit before human rights and the environment*."[94] They highlighted that the international investment arbitration denied consideration of other public policies, which are legitimate and impacting a State's *right to regulate* or *policy space*. Some features of *ISDS* have led to concerns about the arbitrator's independence and impartiality, such as that the parties to a dispute appoint arbitrators by themselves or the manner in which the arbitrators are challenged, either by

[90] THE BACKLASH AGAINST INVESTMENT ARBITRATION (M. Waibel et. al. eds., Kluwer Law International, 2010); O. Thomas Johnson & Catherine H. Gibson, *The Objections of Developed and Developing States to Investor-State Dispute Settlement and What they are Doing about Them, in* 7 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2013, 253 (Arthur W. Rovine ed., Brill Nijhoff, 2014); UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (UNCTAD IIA Issues Note 2, Jun. 26, 2013).
[91] POLANCO, *supra* note 11, at 46.
[92] Schneider, M. E., *Investment Disputes – Moving Beyond Arbitration, in* DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 119, 120 (L. Boisson de Chazournes et. al. eds., Martinus Nijhoff Publishers, 2012).
[93] G. VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 4 (Oxford Univ. Press, 2008).
[94] P. Eberhardt & C. Olivet, *Profiting from Injustice. How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* 6 (Corporate Europe Observatory (CEO) and the Transnational Institute (TNI), 2012).

colleague arbitrators or by organs consisting of members appointed by representatives of business.[95] Other groups of scholars and practitioners rejected both types of criticisms.[96]

It has been stressed by them on the disparities of the system against developing host-States, because they are subject to the most claims and at a higher level than their percentage of international investment.[97] But then, others underlined the procedural challenges faced by a private party when litigating against a State.[98]

As per *UNCTAD,* there is an increasing perception that there is a lack of legitimacy in the system[99] but, most significantly, there is an increase in severance of the contacts between investors and host-States by *ISDS*,[100] undermining the very nature of investment promotion:

> *The nature of the relationship between the investor and the state involves a long-term engagement; hence a dispute resolved by international arbitration and resulting in an award of damages will generally lead to a severance of this link. Moreover, the financial amounts at stake in investor–State disputes are often very high. Time and money required conducting such investment arbitrations (large costs and increased time frame). Cases are increasingly difficult to manage, the fears about frivolous and vexatious claims, the general concerns about the legitimacy of the system of investment arbitration as it affects measures of a sovereign State, and the fact that arbitration is focused entirely on the payment of compensation and not on maintaining a working relationship between the parties.* [101]

Surprisingly, this structural critique has attained adhesion not only when the disputes involve 'classic' format *i.e.,* foreign investors of a developed State in a developing host-State.[102] A similar debate has been witnessed against *ISDS* during the negotiations and ratification of *mega-regional* agreements involving developed States, like the Trans Pacific Partnership Agreement *(TPP)*,[103]

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[95] N. Bernasconi-Osterwalder & D. Rosert, *Investment Treaty Arbitration: Opportunities to Reform Arbitral Rules and Processes,* 12 (IISD Rep., Jan. 2014).
[96] C. N. Brower & S. Blanchard, *What's in a Meme? The Truth about Investor–State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States,* 52 COLUM. J. TRANSNAT'L. L. 689 (2014); S. M. Schwebel*, In Defense of Bilateral Investment Treaties*, 31 ARB. INT'L. 181 (2015).
[97] K. P. Gallagher & E. Shrestha, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal* 8 (Global Development and Environment Institute, Working Paper No. 11-01, 2011).
[98] Wälde, *Equality of Arms, in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 161-88 (K. Yannaca-Small ed., Oxford Univ. Press, 2010).
[99] UNCTAD IIA Issues Note 2, *supra* note 90, at 2-4.
[100] POLANCO, *supra* note 11, at 47.
[101] UNCTAD, INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION xxiii, (United Nations Publications, 2010).
[102] POLANCO, *supra* note 11, at 47.
[103] Leon E. Trakman*, Investor–State Dispute Settlement under the Trans-Pacific Partnership Agreement, in* TRADE LIBERALISATION AND INTERNATIONAL COOPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 179 (Tania Voon ed., Edward Elgar Publishing, 2013).

the *Comprehensive Economic and Trade Agreement (CETA)*,[104] and the Transatlantic Trade and Investment Partnership Agreement *(TTIP).*[105] The proposed *ISDS* inclusion in such treaties has been viewed as precarious by some groups, which include civil society, academia and certain officials of government, as it would provide the foreign investors access to investor-State arbitration forum, which is viewed as unsuitable in legal systems with a *strong tradition of rule of law and independent and impartial courts.*[106]

2. Against the Investor-State Arbitration Functioning

After the backlash against the system, there is another group of concerns that are headed towards the actual functioning of the procedure of investor-State arbitration.

Different problems have been summarised by *UNCTAD* in this regard:

Legitimacy and *transparency,* mostly foreign investors use *ISDS* claims to challenge the policy measures of the States taken in the interest of the public (*e.g.,* policies to promote social equity, foster environmental protection or protect public health).[107] This is referred to as the *regulatory chill* of *ISDS*, especially on environmental policies and human rights.[108] In this regard, the *Chevron-Texaco case*,[109] against Ecuador, which has come to be known as the *Amazonian Chernobyl* is worth considering. It is yet another eloquent illustration of the exemption with which transnational corporations work internationally. It emphasises the necessity for an international instrument to put an end to it. It also, "*Shows how multinational corporations are using the international investment protection mechanism to undermine the sovereignty of countries and challenge the decisions of national*

[104] J. Adriaensen, *The Future of EU Trade Negotiations: What has been learned from CETA and TTIP?*, EUR. POLITICS AND POL'Y (Dec. 21, 2021, 11:44 pm), https://blogs.lse.ac.uk/europpblog/2017/11/29/the-future-of-eu-trade-negotiations-what-has-been-learned-from-the-ceta-and-ttip-experiences/.

[105] European Commission, *Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (2014); P Muchlinski et. al., *Statement of Concern about Planned Provisions on Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, ASIA PEOPLE'S FORUM (Dec. 21, 2021, 11:55pm), https://aepf.info/single-post/2014/08/17/Statement-of-Concern-about-Planned-Provisions-on-Investment-Protection-and-Investor-State-Dispute-Settlement-ISDS-in-the-Transatlantic-Trade-and-Investment-Partnership-TTIP.

[106] R. Polanco Lazo, *The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine,* 30 ICSID REV. 172, 173 (2015).

[107] INVESTOR-STATE DISPUTE SETTLEMENT: A SEQUEL, *supra* note 16, at 25; Daniel J. Gervais, *Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v. Canada*, 8 UC IRVINE L. REV. 459 (2018); James Harrison, *Environmental Counterclaims in Investor-State Arbitration*, 17 J. WORLD INVESTMENT & TRADE 479 (2016); Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423 (2013); Susan L. Karamanian, *The Role of International Human Rights Law in Re-Shaping Investor-State Arbitration*, 45 INT'L J. LEGAL INFO. 34 (2017).

[108] Kyla Tienhaara, *Regulatory Chill in a Warming World: The Treat to Climate Policy Posed by Investor-State Dispute Settlement,* 7 TRANSNAT'L ENV. L. 229 (2018).

[109] Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23 (Sep.23, 2009).

courts of justice. The global investment system imposes corporate profit over and above respect for human rights and the environment."[110] Both disputing parties can keep proceedings fully confidential even in the cases where the disputes involve matters of public interest.[111] Moreover, the concept of 'nationality planning' also helped the investors to gain access to *ISDS* using corporate structuring without effective business in the home-State.[112]

Inconsistency of arbitral decisions- there are differing legal interpretations of identical or similar provisions of the treaty as well as the dissimilarities in the evaluation of the merits of the cases having similar facts by the arbitral tribunals.[113] Certain legal standards, such as the duty to provide fair and equitable treatment, are at potentially high levels of abstraction and can lead to dissimilar interpretations. This inconsistency in interpretations have directed towards uncertainty regarding the meanings of important obligations of the treaty and lack of predictability of their application to future cases.[114]

Erroneous arbitral decisions- this is another concern, prominent questions of law have been decided by the arbitrators without the chance of an efficient review mechanism. The current review mechanisms, such as the annulment process of *ICSID* or the review of National-court at the place of arbitration (for non-*ICSID* cases), function within the narrow boundaries of jurisdiction. It is worthy to consider that an annulment committee of *ICSID* may find itself unable to annul or correct an award, even after having identified *manifest errors of law*.[115] It also means, there are limited powers to correct erroneous decisions.

Independence and impartiality of arbitrators- in the investor-State arbitration regime, this criticism is particularly focussed on the decision makers, *i.e.,* arbitrators (and to smaller extent the arbitral institutions, which monitor the investor-State arbitrations).[116] More usually, the party-

[110] Aldo Orellana López, *Chevron vs Ecuador: International Arbitration and Corporate Impunity*, OPEN DEMOCRACY (Oct. 02, 2020, 01:14 pm), https://www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity/.
[111] UNCTAD, *Improving Investment Dispute Settlement: UNCTAD's Policy Tools,* at 6 (UNCTAD IIA Issues Note 4, 2017) [hereinafter referred to as UNCTAD IIA Issues Note 4].
[112] *Id.;* INVESTOR-STATE DISPUTE SETTLEMENT: A SEQUEL, *supra* note 16, at 26.
[113] INVESTOR-STATE DISPUTE SETTLEMENT: A SEQUEL, *supra* note 16, at 26.
[114] *Id.,* at 27.
[115] *Id.;* CMS Gas Transmission Co. v. The Rep. of Argentina, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment for the Arg. Republic, ¶ 97, 127, 136, 150, 157-59 (Sep. 25, 2007); Christina Knahr, *Annulment and Its Role in the Context of Conflicting Awards, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 151 (M. Waibel et al. eds., Kluwer International Law, 2010).
[116] KOHLER & POTESTÀ, *supra* note 7, at 11, ¶ 20.

appointment system would adversely affect the arbitral tribunals' impartiality.[117] The fact that some practitioners act in the capacity of both as counsel and arbitrator in separate proceedings with a chance of resulting conflicts of interest or otherwise called as issue conflicts, which would also be problematic.[118] In addition, the arbitrators are remunerated for the service rendered and they would have a personal stake in perpetuating the system. As the initiation of *ISDS* claims may only be done by the investors,[119] for their future appointment the arbitrators would in consequence be inclined to cater the interest of the investors.[120]

Time and Cost of arbitration- the actual *ISDS* practice has put into question the oft-quoted notion - arbitration is a prompt and cost-effective method for resolution of disputes. Along with the pecuniary awards issued by the arbitral tribunals,[121] the legal fees and associated costs borne by the parties in the proceedings of investment arbitration, would often be expensive.[122] Subsequently, the governments of host-States would be confined to spend huge amounts of money to defend their public policies, which are legitimate.[123] This resulted in the imposition of a heavy burden on public finances, especially upon the low-income States, which would not be possible for them to defend properly against transnational corporations that are wealthy.[124] The proceedings of *ISDS* are also too lengthy.[125]

IV. APPROACHES TO TREAT THE CRITICISMS

As a reaction against this *procedural* group of criticisms in recent years, novel rule-making forms have been taking place both in *IIAs* and in rules of arbitration in recent years. In order to discourage frivolous claims made by investors, there is an inclusion of a particular procedure for addressing preliminary objections raised by respondents in some *IIAs*.[126] For instance, the

[117] UNCTAD IIA Issues Note 2, *supra* note 90, at 4; Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration,* 16 FLA. J. INT'L. L. 301, 352 (2004); Jan Paulsson, *Moral Hazard in International Dispute Resolution,* 25 ICSID REV. FOREIGN INV. L. J. 339 (2010).
[118] KOHLER & POTESTÀ, *supra* note 7, at 12, ¶ 21.
[119] The initiation of claims by the host-State is very rare and the possibility for counterclaims is fairly limited. *See* Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration,* 1 J. INT'L. DISP. SETTLEMENT 97, 102 (2010).
[120] KOHLER & POTESTÀ, *supra* note 7, at 12, ¶ 20.
[121] Tai-Heng Cheng, *Power, Authority and International Investment Law,* 20 AM. U. INT'L L. REV. 465, 507 (2005); Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 965 (2007).
[122] GARCIA, *supra* note 117, at 352, 358; UNCTAD IIA Issues Note 2, *supra* note 90, at 4.
[123] KOHLER & POTESTÀ, *supra* note 7, at 13, ¶ 22.
[124] David P. Reisenberg, *Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of The English Rule,* 60 DUKE L. J. 977, 1007 (2011); UNCTAD IIA Issues Note 2, *supra* note 90, at 4.
[125] GARCIA, *supra* note 117, at 355.
[126] *See* M. Potestà & M. Sobat, *Frivolous Claims in International Adjudication: A Study of ICSID Rule 41 (5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily,* 3 J. INT'L DISP. SETTLEMENT 137 (2012).

Central America-Dominican Republic-United States Free Trade Agreement (DR-CAFTA), signed in 2004.[127] In 2006, the amended *Arbitration Rules of ICSID* Rule 41 (5), now permit the arbitral tribunals for dismissing the proceedings summarily if they find that the underlying claims are *manifestly without legal merit.*[128]

In order to reduce the chances of treaty and forum shopping, or complete nationality planning, several current *IIAs* include a clause on *denial of benefits*, with the goal of eliminating the protection granted by those treaties to investors or enterprises with no substantial activity of business in the territory of the party under whose law it is situated or organised.[129]

For increasing transparency in the system of *ISDS* several steps have been taken, aiming to raise the dispute knowledge, for non-disputing parties the access to the proceedings, and the publicity of awards and other arbitral documents. Steps towards a more transparent system of investment arbitration are replicated in the most recent *FTAs* and *BITs*, especially those signed by the U.S. and Canada.[130] ICSID also amended its Rules of Arbitration in 2006, which includes the provisions on the awards publication and hearings opening to the public, permitting the chances of *amicus curiae* submissions, among others.[131] On April 1, 2014, further efforts towards transparency were achieved with the commencement of the *UNCITRAL Rules on Transparency* in treaty-based investor-State arbitration[132] and with the acceptance of the UN *Convention on Transparency in Treaty- Based Investor-State Arbitration* (also known as the *Mauritius Convention*) on December 10, 2014, which has been in force since October 18, 2017.[133]

Although the *Rules on Transparency* as well as the *Mauritius Convention* are laudable steps, they did not provide a complete cure for the lack of transparency in the investor-State arbitration system. The *Rules on Transparency* made provisions regarding the disclosure of the key documents of the arbitration proceedings and awards, to the general public. Article 2 and 3 of the rules deal with

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[127] *See* Central America-Dominican Republic-United States Free Trade Agreement (DR-CAFTA) (Aug. 2004) arts. 10.20.4 &10.20.5; U.S.-Uruguay BIT (2004), arts. 28.4 & 28.5; U.S.-Rwanda BIT (2008), arts. 28.4 & 28.5; U.S.-Singapore FTA (2003), arts. 15.19.4 & 15.19.5; U.S.-Chile FTA (2003), arts. 10.19.4 & 10.19.5; U.S.-Morocco FTA (2005), arts. 10.19.4 & 10.19.5; U.S.-Oman FTA (2006), arts. 10.19.4 & 10.19.5; U.S.-Peru TPA (2006), arts. 10.20.4 & 10.20.5; U.S.-Panama TPA (2007), arts. 10.20.4 & 10.20.5.

[128] A. Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules,* 21 ICSID REV. FOREIGN INV. L. J. 427, 438-47 (2006).

[129] L. A. Mistelis & C. M. Baltag*, Denial of Benefits and Article 17 of the Energy Charter Treaty,* 113 PENN. ST. L. REV. 1301 (2009).

[130] OECD, *Transparency and Third Party Participation in Investor–State Dispute Settlement Procedures,* 5 (OECD Working Papers on International Investment 2005/01, 2005).

[131] ANTONIETTI, *supra* note 128, at 432-37.

[132] UNCITRAL, Resolution adopted by the General Assembly 68/109, U.N. DOC. A/68/462 (Dec. 16, 2013).

[133] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 54 I.L.M 747–57 (Mar. 17, 2015).

the same. These provisions grant access to the arbitration proceedings' necessary documents and key information of the arbitration proceedings to the *third-party/third-person(s)*, who are interested in participating as *amicus curiae*. However, Article 7 of the said rules exempted certain information, which is *confidential or protected information* from publication of documents under Article 3. So, the parties may take this as an advantage and allow the publication of information, which they intend to publish and may hide the information by presenting it as confidential. That is the reason why it has been opined that the significance of the *Rules on Transparency* in practice is limited.[134]

The *Mauritius Convention*, on the other hand, helps to achieve the extension of the *Rules on Transparency* to the treaties that are concluded before the adoption of said rules. Article 2 of the *Mauritius Convention* explains the circumstances under which the *Rules on Transparency* are made applicable to the previously initiated investor-State arbitration whether or not pursuant to the *UNCITRAL* Arbitration Rules. When the *Rules on Transparency* are not efficiently able to address the concern of lack of transparency, the *Mauritius Convention* being a supplement to the said rules could not yield desired results. Therefore, both of them failed to attain transparency in the investor-State arbitration system.

To address the backlash and criticisms against the international investment regime, there is no single approach. However, witnessing the recent years' treaty practice can take us to the conclusion that most of the States do not appear to be against *IIAs* or investor-State arbitration *per se*, but against the consequences of having certain broadly defined standards or the manner in which those standards are interpreted in reality by private arbitrators.[135] This is clearly evident from the constantly increasing investment treaties number and the firm practice of States negotiation and conclusion of *IIAs* with investor-State arbitration or other methods of *ISDS* even in the crisis of legitimacy of recent years.[136]

Even though certain countries, like Bolivia, Ecuador, Venezuela and South Africa, have completely or partially *disengaged* from the system in light of the criticisms against *ISDS,* higher majority have opted for an *intra system* and *normative* strategy, participating vigorously in the

[134] KOHLER & MICHELE, *supra* note 7, at 27, ¶ 57
[135] POLANCO, *supra* note 11, at 50.
[136] *Id.*

negotiation and renegotiation of new treaties of investment to correct the various problems of the system.[137]

If these new generation treaties are analysed, one can observe that more control and stronger involvement is given to contracting parties and significantly, one can discover a more dynamic home-State's partaking in investment disputes in various positions, such as the preclusion or administration of such disputes, certain claims filtration, in the inherited treaty mechanisms for the interpretation or clarification of provisions, in regulating the arbitrators work and conduct, and in the arbitral awards enforcement. The investment treaties concluded in 2019, such as Armenia-Singapore Agreement on Trade in Services and Investment, Australia-Hong Kong, China Investment Agreement, Australia-Indonesia Comprehensive Economic Partnership Agreement, Australia-Uruguay *BIT*; Belarus-Hungary *BIT*; Cabo Verde-Hungary *BIT*; EU-Viet Nam Investment Protection Agreement; India-Kyrgyzstan *BIT*; Myanmar-Singapore *BIT*; can be considered as the best examples for the enhanced State participation.[138] Along with this increased State participation, the above-mentioned treaties have applied more caution by limiting the access to *ISDS*.[139] Similarly, the recent *BITs* conclude by Brazil like Brazil-Ecuador *BIT* (2019); Brazil-Morocco *BIT* (2019); Brazil-United Arab Emirates *BIT* (2019); Brazil-India *BIT* (2020) can be noted as the investment treaties that have completely omitted *ISDS*. However, these developments and the cautioned approach towards *ISDS* in investment treaties are not sufficient to address the *systematic* criticism against and legitimacy of the system as such, but mostly those against the arbitral procedure functioning.[140]

V. UNCITRAL WORKING GROUP III & ISDS REFORMS

As an attempt to answer this backlash and criticisms against *ISDS*, the *UNCITRAL* at its 50th Session, entrusted its *Working Group III (WG III)* with a broad mandate to work on the possible reforms of *ISDS*.[141] The mandate assigned to *WG III* is divided into three phases. The *WG III* completed the initial two phases and is currently working on the third phase of the mandate *i.e.,* developing possible reform options for the concerns of *ISDS*. The *WG III* identified the concerns

[137] R. Polanco Lazo, *Is there a life for Latin American Countries after Denouncing the ICSID Convention?,* 11 TRANSNAT'L DISP. MANAGEMENT 11 (2014).
[138] UNCTAD, *The Changing IIA Landscape: New Treaties and Recent Policy Developments* (UNCTAD IIA Issues Note 1, July, 2020).
[139] Burkina Faso-Turkey BIT (2019); Hong Kong, China-United Arab Emirates BIT (2019).
[140] POLANCO, *supra* note 11, at 51.
[141] U.N., Rep. of United Nations Commissions on International Trade Law, 50th Sess., July 3-21, 2017, U.N. Doc. A/72/17, at 46, ¶ 264 (2017) [hereinafter U.N. DOC. A/72/17].

with respect to *ISDS* in the Note by the Secretariat (U.N. Doc. A/CN.9/WG III/WP. 149)[142] and these are detailed in the subsequent documents.[143] In its 36th Session, the *WG III* decided to design possible reform options to the concerns identified in the Note.[144] For all those concerns identified, the *WG III* has considered a varied number of reform options.[145]

As the reform options are currently under deliberations, the efficacy of these reform options in addressing the concerns that have been identified against *ISDS* is yet to be known. However, certain shortcomings can be identified in the work of the *WG III*. At the initial stage despite such an extensive mandate the *WG III* has limited its scope by focussing *'on the procedural aspects of dispute settlement rather than on the substantive provisions'*.[146] In reality, the substantive rules of investor protection and the investor-State arbitration are two important aspects, which are inseparable in nature. When the procedural law is inherently substantive, the *ISDS* is being used to enforce the substantive obligations of the States and crucial questions of possible reforms of *ISDS* involve the underlying rules.[147]

Most of the investment disputes are for the enforcement of substantive obligations that investment treaties on States have created. In such a case, completely confining the work to look into the procedural aspects of *ISDS* will not achieve desired success. Although, in its later stage to a certain extent, *WG III* has showed its willingness to look into the substantive aspects[148] but it will not be a complete cure. So, while making the reforms to procedural aspects, the *WG III* has to keep in

[142] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG III/WP. 149 (Sep. 5, 2018) [hereinafter U.N. DOC. A/CN.9/WG III/WP. 149].

[143] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG. III/WP. 150 (Aug. 28, 2018); UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG. III/WP. 151 (Aug. 30, 2018); UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues, Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG. III/WP. 152 (Aug. 30, 2018); UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS)-Cost and Duration, Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG. III/WP. 153 (Aug. 31, 2018).

[144] UNCITRAL, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 36th Sess., Oct. 29-Nov. 2, 2018, at 6-19, ¶ 27-133, U.N. Doc. A/CN.9/964 (Nov. 6, 2018).

[145]UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, 38th Sess., Oct. 14-18, 2019, U.N. Doc. A/CN.9/WG. III/WP. 166/ADD. 1 (July 30th, 2019).

[146] UNCITRAL, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 34th Sess., Nov. 27-Dec. 1, 2017, at 5, ¶ 20, U.N. Doc. A/CN.9/930/REV.1 (Dec. 19, 2017).

[147] Gus Van Harten et. al., *Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter*, ALL PAPERS 328 (2019) (Dec. 24, 2021, 9:28 pm), https://digitalcommons.osgoode.yorku.ca/all_papers/328

[148] U.N. Doc. A/CN.9/964, *supra* note 148, at 8, ¶ 40.

mind that those reforms might be helpful to address the issues of substantive aspects of the investment treaties also.

The next shortcoming is with respect to phase two of the mandate *i.e.,* identification of concerns. Initially, the *WG III* has only identified three categories of concerns.[149] The fragmented approach adopted by the *WG III* in selecting the three categories of concerns in phase two has had the added consequence of excluding the consideration of *cross-cutting* issues and more systematic concerns.[150] The most prominent among such issues are: (i) *chilling effect* of the provisions of *ISDS* on the regulatory capacity and sovereignty of the States;[151] and (ii) the participation of the *third-party* in the *ISDS* proceedings. Most of the *ISDS* cases are stem from the *regulatory interferences with various aspects of the investment.*[152] This results in a situation where the States are not able to "legislate at will without concern that an arbitral tribunal will determine that the legislation constitutes an interference with an investment."[153]

This regulatory interference of the *ISDS* cases is not only concerned with the parties to the dispute (*i.e.,* investor and host-State) but also the general public. But the public participation in such cases is severely limited.[154] Generally, in any legal proceedings, the party whose interest was affected be allowed to stand in the process to the extent of the interest affected.[155] However, in *ISDS* cases no such participation is given for the parties (*third-party participation*) whose rights are at stake because of the subject matter of the dispute.

The issues of *regulatory chill* of the *ISDS* and *third-party* participation can be considered as the catalyst for the current reform process undertaken by the *UNCITRAL* and they require stand-alone discussion. Nonetheless, the *WG III* did not give adequate consideration for those issues. Because of the criticisms raised against the improper identification of the concerns in its 36th Session, the *WG III* identified other concerns pertaining to *ISDS* in its 37th Session.[156] The *chilling effect* of *ISDS* as well as the *third-party* participation are identified under the other concerns. At the end of that session, the *WG III* had concluded that no additional concern would be identified pertaining to

[149] *Supra* note 145, 146
[150] HARTEN ET. AL., *supra* note 147, at 2.
[151] *Id.*
[152] Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 Int'l & Comp. L. Q. 373, 376 (2010).
[153] Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit*, 41 VAND. J. TRANSNAT'L L. 775, 778 (2008).
[154] *Id.*, at 785-786.
[155] HARTEN ET. AL., *supra* note 147, at 4.
[156] UNCITRAL, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th Sess., Apr. 1-5, 2019, at 6-8, ¶ 29-38, U.N. Doc. A/CN.9/970 (Apr. 9, 2019) [hereinafter U.N. Doc. A/CN.9/970].

ISDS at that stage of deliberations. However, the *WG III* agreed to consider all of the above-mentioned issues as it advanced instruments to address the concerns that have already been identified, so that they would be treated as legitimate by all relevant stakeholders. [157]

If the *WG III* fails to address the other concerns through its reform options, there is a possibility that the system of *ISDS* will break down further. It has to be kept in mind that the possible reform options developed by it should not outweigh the benefits of the system nor it further fragmented the system, they must help for the further development of the *ISDS* regime.[158]

VI. CONCLUSION

The concerns expressed in the context of *ISDS* are legitimate. But reforming it is not an easy task owing to the *'hybrid'* [159] nature of the system, the complexity involved in the investment disputes and the extensive network of investment treaties. However, reforming *ISDS* is the need of the hour because it created a dispute settlement system without any political encumbrances and indirectly helped for the expansion of foreign investment. The structural reforms undertaken by the UNCITRAL *WG III* while addressing the primary concerns, should also preserve the benefits offered by *ISDS* to the international investment regime.

[157] *Id.,* at 8, ¶ 39-40.
[158] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Bahrain, Note by the Secretariat, 38th Sess., Oct. 14-18, 2019, at 2, ¶ 3, U.N. Doc. A/CN.9/WG. III/WP. 180 (Aug. 29, 2019).
[159] Z Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BYIL 151 (2003).

ARTICLE

CURIOUSER AND CURIOUSER: THE PRETERNATURAL PATH FOR THE OPERATIONAL CREDITORS

- Divesh Sawhney and Sanyam Aggarwal***

ABSTRACT

The Insolvency and Bankruptcy Code, 2016 ushered in the creditor-in-control mechanism into Indian bankruptcy law. It was hailed as the harbinger of creditor-oriented reforms, with the concept of the Corporate Insolvency Resolution Process (CIRP) pointed towards assuring debt resolution for recovery by lenders. However, the legislative scheme of the Code entrenched a lower status for Operational Creditors when compared to Financial Creditors. The authors argue that the IBC does not adequately represent the rights of Operational Creditors, leading to grim consequences. A succinct analysis of the resolution procedures for various classes of creditors is presented, highlighting that the rights of operational creditors are more evident on paper rather than in practise. Through a sound legal inspection of the provisions of the IBC, the journey of the resolution plan from the Committee of Creditors to the Adjudicating Authority. In conclusion, the authors put forth their argument for rights of operational creditors, and their crucial importance to the commercial sector.

Keywords: Insolvency and Bankruptcy Law, Operational Creditors, Corporate Insolvency Resolution Process.

I. INTRODUCTION

On 14th November 2019, the NCLAT verdict[1] had to pass the Borsalino Hat test in Justice R.F Nariman's Court[2]. And once the bull was brought down by the matador, a melee of advocates

* LL.B. Candidate, II Year, Faculty of Law, University of Delhi.

** LL.B. Candidate, II Year, Faculty of Law, University of Delhi

[1] Committee of Creditors of Essar (Steel India Limited) v. Satish Kumar Gupta and Others, 2019 SCC OnLine NCLAT 573.

[2] See Prachi Bhardwaj, NCLAT's order set aside in Essar Steel Insolvency case; Key issues on Corporate Insolvency Resolution Process answered, SCC Online(November 16, 2019),

stocked inside Court Room 4, trying to find vantage points to follow the proceedings which held the whole commercial sector on the edge of their seat. In the end, legality indeed reigned supreme, and as Mr. Shardul Shroff claimed in an interview[3], the Ghost was finally buried. The legislature and Judiciary sat cheek by jowl, and the law was lucidly laid out in the Apex Court[4]. It became crystal clear that it is legality that loads the dice. However, does it end the game with the delivery of justice? We aim to analyse this question in this article.

The Insolvency and Bankruptcy Code, 2016 ("**IBC**" or "**the Code**") has indeed brought a paradigm shift vis-à-vis insolvency laws in the country and is indubitably a path-breaking legislation. It does not leave any nook or corner out of its ambit and pictures a whole panorama of actions, intended to balance the interests of all stakeholders.

In the first two and a half years of its enforcement, out of 92 Corporate Insolvency Resolution Process ("**CIRP**") which have cultivated a resolution plan under the Code, the Operational Creditors ("**OCs**") got 42% of the total claims, and the Financial Creditors ("**FCs**") brought home a 44% of their total claim.[5] Albeit this tends to narrate a more or less equitable tale for both classes of creditors, a grain of salt is necessitated here. Meddling statistics is as easy as placing a Christmas crèche in a public park. In ***Committee of Creditors of Essar v. Satish Kumar Gupta***[6], the FCs got the major loaf of bread with approximately 90% of their claims getting approved, the OCs were fed the stepmother slice with a meagre 20.50% of the total claim. However, it would be scarcely prudent to scratch the surface with facts and stats and straightaway delve into the core. Therefore, Part 2 furnishes a ground of vantage i.e., the procedure followed by various classes of creditors, as stipulated by the Code, for filing an application and subsequent implementation of the Corporate Insolvency Resolution Process for a Corporate Debtor. After coming to terms with

https://www.scconline.com/blog/post/2019/11/16/nclats-order-set-aside-in-essar-steel-insolvency-case-key-issues-on-corporate-insolvency-resolution-process-answered/. The Apex Court adjudicated upon the role of Committee of Creditors in CIRP, the extent of judicial review power of the Adjudicating authority and the principle of equality between Financial and Operational Creditors, among other things.

[3] BloomberQuint, Shardul Shroff, on Supreme Court's Judgment in Essar Steel Case, YOUTUBE (Nov. 12, 2019), https://www.youtube.com/watch?v=pqwaLnHd2a4, (last visited on May 1, 2020).

[4] Committee of Creditors of Essar v. Satish Kumar Gupta and Others, 2019 SCC OnLine SC 1478,[hereinafter Committee of Creditors of Essar].

[5] Shilpy Sinha, Haircuts for operational creditors in line with that for financial creditors, The Economic Times(Jun 19, 2019), https://economictimes.indiatimes.com/industry/banking/finance/haircuts-for-operational-creditors-in-line-with-that-for-financial-creditors/articleshow/69855784.cms .

[6] Committee of Creditors of Essar , 2019 SCC OnLine SC 1478.

the procedure, the article in Part 3 aims to point out that the remedy provided to the OCs is more on paper and less in action. Part 4 elicits the treacherous journey of a resolution plan from the table of the Committee of Creditors ("**CoC**") to the bench of the Adjudicating Authority ("**AA**"). After deciphering the consequences of the plenary powers of the CoC, Part 5 calls for introspection over the rights of the OCs. Finally, Part 6 aims towards a heuristic understanding of current predicament facing the entire commercial sector.

II. THE PROCEDURE

The Code enshrines that when a 'default' occurs, the Insolvency Resolution Process is ignited. Default is defined u/s 3(12) as non-payment of debt once it becomes due and payable, in part or full. Debt is further defined u/s 3(11) as a liability or obligation in respect of a claim, and the meaning of claim u/s 3(6) of the Code is a right to payment-disputed or undisputed.

A distinction between FC and OC is made u/s 5(7) and 5(20) respectively. FCs' relation with the CD is a pure financial contract, for instance a loan or debt security[7]; whereas, debt owed to the OCs arises out of day-to-day-operational transactions such as payment for goods and services[8].

U/s 7(1), the Corporate Insolvency Resolution Process ("**CIRP**") can be initiated by any FC in case of a default in respect to financial debt owed. The moment the AA is satisfied that a default has occurred, the application is admitted u/s 7(5) and CIRP is initiated. It is further important to note that the scheme of Section 7 is in stark contrast with that of Section 8. An OC, u/s 8(1) has to first deliver a notice of demand for the unpaid debt in case of a default. As per section 8(2), the Corporate Debtor ("**CD**") has a 10 days period to bring to the notice of the OC, an existence of dispute. The only caveat being, the dispute must have existed before the receipt of the demand notice raised by the OC u/s 8(1). And the moment there happens to be such a pre-existing dispute, the OC gets out of the clutches of the Code. Only in case the payment against the demand notice furnished by OC or/and a notice of dispute raised by CD, is/are not received, the OC may trigger the Code by filing an application before the AA u/s 9(1) and 9(2). The AA further accepts or rejects the application so filed in the manner stipulated u/s 9(5).

[7] The Insolvency and Bankruptcy Code, 2016, § 5(8), No. 31, Acts of Parliament, 2016 (India)
[8] *Id.* § 5(21).

Once the application is admitted, the CIRP is initiated, and in pursuance of the same, a moratorium is imposed by the AA u/s 14. Section 12 provides for the time limit for completion of the CIRP which shall be one hundred and eighty days. On receipt of the application, after the resolution is passed by sixty-six percent of CoC (according to voting share)[9], the AA may extend the duration not exceeding ninety days. In a further proviso added by the 2019 amendment[10], the Code provides that the CIRP shall mandatorily be completed within three hundred and thirty days from the commencement date. However, it is imperative to note that the mandatory nature of the time limit set by the proviso u/s 12 has been struck down by the Apex Court in ***Essar case (supra)***.

U/s 17, the erstwhile management of CD stands vested in the IRP who is to manage the CD as a going concern u/s 20. CoC is appointed u/s 21 and all decisions shall be taken by a vote of not less than fifty-one percent[11] of the voting shares of CoC. The first meeting of CoC is to take place u/s 22, pursuant to which, the Committee appoints the Resolution Professional ("**RP**"). Subsequently, all important functions of the management are performed by the RP u/s 28 by the approval of the CoC. The RP u/s 25(h) invites prospective resolution applicants, who fulfill the criteria as laid down by the Insolvency and Bankruptcy Board of India ("**IBBI**"), to submit a resolution plan. Subsequent to this, interested person(s) submits the Resolution Plan u/s 30. It is only when such a plan is approved by a voting share of sixty six per cent of the CoC, and the AA is satisfied that the plan meets the statutory requirements; the plan is ultimately approved u/s 31. Subsequent to which, it becomes binding on all the stakeholders. The moment the resolution plan is accepted by the AA, moratorium u/s 14 ceases to have effect.

The procedure has been elucidated in the Code by dotting all the i's and crossing all the t's. However, the Apex Court, in a catena of Judgments has held that some procedural strictures are not to be religiously followed at the cost of 'fairness', which is a basic element of justice. The language of the Law may be liberal or stringent, but it cannot in any manner override the fact that the object of the procedure is to advance the cause of justice and not to hinder it.

As observed by the Hon'ble Supreme Court in ***Smt. Rani Kusum v. Smt. Kanchan Devi[12],***

[9] The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018,§ 12,No. 26, Acts of Parliament, 2018 (India).
[10] *Id.*
[11] The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018,§ 12,No. 26, Acts of Parliament, 2018 (India).
[12] Committee of Creditors of Essar (Steel India Limited) v. Satish Kumar Gupta and Others, 2019 SCC OnLine NCLAT 573, [hereinafter Satish Kumar Gupta].

'All the rules of procedure are the handmaid of justice

....

Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice."[13]

Hon'ble Mr. Justice R.F Nariman in ***Ms. Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr***[14] referred to the celebrated ***Heydon's Case***[15]and observed:

> *It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the 'Lakshman Rekha' has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of* ***Heydon****, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle.*[16]

This is the sole reason that the mandatory provision of completion of CIRP in the stipulated time was relaxed by the Apex Court in ***Essar Case (Supra)***, and the mandatory seven day time limit for rectification as provided u/s 9(5) of the Code was diluted in the ***Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Ors.***[17] While construing the language of the Code, it is, therefore, pertinent to keep in mind the underlying object for which the Code came into force.

NOTE*- Whilst the definition of 'OCs' u/s 5(20) r/w the definition of 'operational debt' u/s 5(21) of the Code covers a quite expansive swath of persons, this article deploys this term hereinafter majorly to refer to the trade suppliers. Anywhere the term 'OCs' is to be read extensively as per the Code, it will be mentioned there itself.*

III. REMEDY FOR OPERATIONAL CREDITORS – A RHETORIC SMOKE SCREEN?

The erstwhile insolvency and bankruptcy regime of India was a fragmented one governed by patchwork of laws applicable to different stakeholders[18]. This resulted in a system which would

[13] *Id.*, ¶ 10,14.
[14] Satish Kumar Gupta, 2019 SCC OnLine NCLAT 573.
[15] Heydon's Case,[1584] EWHC Exch J36.
[16] Satish Kumar Gupta, 2019 SCC OnLine NCLAT 573., ¶ 127.
[17] Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Ors., (2017) 16 SCC 143.
[18] The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, No. 51, Acts of Parliament, 1993 (India); The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54,

not fulfill the objectives of an insolvency law regime namely, maximization of debtor's assets and timely resolution of insolvency. Therefore, IBC was introduced as a one stop solution to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.[19]

The Code distinguishes between the Financial Creditors and the Operational Creditors, which is a unique feature not observed in the insolvency laws of other major jurisdictions. Although, only the FCs can constitute the CoC[20], which essentially controls the CIRP, the OCs who generally have smaller claims in comparison to the FCs[21] are at equal footing to trigger the Code and move the AA for initiating CIRP, as explained in the previous section. The Code is a radical shift in the insolvency regime. It lays the stepping stone for protecting the trade creditors (generally the small scale OCs). But a recent 2020 notification[22] by raising the default value from one lac to one crore for triggering the Code has turned back the clock towards the earlier right-less era for the OCs.

Although the Code, as it currently stands, bestows a great many rights on the OCs, this section argues that in they are spurious prerogatives which on the surface seem to be 'equitable'.

(A) SECTIONS 8 AND 9

The partisans advocating the equitable principle in the Code often argue that the process of triggering the Code for the OCs (u/s 8 and 9) and the FCs (u/s 7), though extremely different, leads to the same road viz. CIRP. They say that the steering wheel to drive, or rather drag, a CD into the insolvency process is equally accessible to both the classes of creditors. It is indeed true, that the remedy for CIRP against a corporate debtor yields to similar outcome irrespective of the

Acts of Parliament, 2002 (India); The Sick Industrial Companies (Special Provisions) Act, 1985, No. 1, Acts of Parliament (1986).

[19] The Insolvency and Bankruptcy Code, 2016, Preamble, No. 31, Acts of Parliament, 2016 (India)

[20] Insolvency and Bankruptcy Code, 2016, § 21(8), No. 31, Acts of Parliament, 2016 (India): The only exception is when the CD has no FCs.

[21] GLC & Partners, *Demarcation Between Financial Creditors And Operational Creditors Under the Insolvency and Bankruptcy Code, 2016* (January 29, 2020),https://indianlawblog.com/demarcation-between-financial-creditors-and-operational-creditors-under-the-insolvency-and-bankruptcy-code-2016/.

[22] Ministry of Corporate Affairs, Minimum Amount of Default for Section 4, F. No. 30/9/2020-Insolvency (March 24, 2020).

class of creditor who rolls the ball in motion. The proceedings under the Code may be initiated by an individual creditor. However, once the application stands admitted, the insolvency proceedings become proceedings in rem. For this reason, the creditor who moves the application for initiating CIRP is individually inconsequential there on.

The OCs, even when they are recognised as creditors under the Code, do not have any substantive say in the intermediate or terminal part of the proceedings as they do not find a vote, or for that matter even a place, in the 'domineering' CoC, if FCs are present. It is only in the absence of FCs, that the OCs get an opportunity to form the CoC in terms stipulated in the Code[23]. Hence the ostensibly equitable remedy of triggering the CIRP vis-à-vis OCs serves them no purpose at all. Also, any financial default, in the sense that a debt is due and payable in law and fact, notwithstanding any dispute, entails the CD within the clutches of the Code. However, the picture for the OCs, on the contrary, is dreary. Dr. Abhishek Manu Singhvi, Sr. Advocate, while arguing the matter in ***Macquarie Bank Limited v. Shilpi Cable Technologies Ltd***[24] pointed out that a very low threshold is required in order that an operational creditor's application be rejected, viz. there being a pre-existing dispute between the parties.

The Hon'ble Supreme Court in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited***[25] noted that as long as the plea of a 'dispute' put forth by the CD is not spurious, hypothetical or an absolute moonshine, the AA shall reject the application moved by the OC. The judgement, while taking note of the copious judicial pronouncements of the Australian High Court and the Chancery Division of the UK, noted that the Code, as it presently stands, excludes the term 'bona fide', while laying down the definition of 'dispute'[26], which was earlier stated in the first Insolvency and Bankruptcy Bill, 2015.[27]

[23] The Insolvency and Bankruptcy Code, 2016, § 21(8), No. 31, Acts of Parliament, 2016 (India); Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, Gazette of India, 2016, 17 GN. REG. 004, pt. III sec. 4, Regulation 16. (Nov. 30, 2016), [hereinafter Corporate Persons].

[24] Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., AIR 2018 SC 498.

[25] Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., AIR 2017 SC 4532 [hereinafter Mobilox Innovations Pvt. Ltd.].

[26] The Insolvency and Bankruptcy Code, 2016, § 5(6), No. 31, Acts of Parliament, 2016 (India).

[27] Mobilox Innovations Pvt. Ltd., AIR 2017 SC 4532, ¶ 23.

Hence, the overbearing caveat of a 'pre-existing dispute' attached to the proffesedly 'equitable' right of the OCs to trigger the Code, whilst turning a blind eye towards the usually lingering litigation in courts, arbitral tribunals or other appropriate forums for adjudicating disputes, renders the expedited, time-bound remedy under sections 8 and 9 otiose.

(B) PRIORITISING OCS' DUES

The oft-cited BLRC whilst taking a note of the unavailing position of the OCs, endeavoured to strike a counterbalance to them for not having a vote in the CoC. Thus, the committee opined that the dues of OCs must have priority in being paid.[28] However, prioritising the recovery of dues as a *quid pro quo* to keep the OCs oblivious to the voting rights in the CoC is nothing short of an 'unconscionable bargain'.

Regulation 38(1)[29] embodies the aforesaid opinion of the BLRC. The Code goes a step further and also stipulates the minimum amount mandatorily to be paid to the OCs under a resolution plan.[30] It stipulates that the minimum payment of debts of OCs shall not be less than the amount to be paid in the event of liquidation of CD or the amount that would have been paid, if the amount under resolution plan had been distributed in accordance with the order of priority u/s 53(1); whichever is higher.[31] And it is an established fact that the amount that will percolate in favour of the OCs, following the liquidation priority order, will more often than not be zilch.[32] Now, this highly probable nil amount acts a metric of fair plan under the US insolvency regime[33]. But before drawing any comparisons one must conceive that US follows a 'debtor in possession' model that is diametrically opposite to the 'creditor is possession' model under the Code[34]. Hence, US insolvency regime will not be squarely relevant in Indian context.

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[28] Bankruptcy Law Reforms Committee, The Report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design 89 (November 4, 2015), Ministry of Finance, https://ibbi.gov.in/BLRCReportVol1_04112015.pdf[hereinafter BLRC Report].

[29]Corporate Persons, *supra* note at § 4, Regulation 38(1).

[30] The Insolvency and Bankruptcy Code, 2016, § 30(2)(b), No. 31, Acts of Parliament, 2016 (India).

[31] *Id.*

[32] Committee of Creditors of Essar,, 2019 SCC OnLine SC 1478, ¶ 54.

[33] Sui-Jim Ho and Surya Kiran Banerjee, *Indian Bankruptcy Code—How Does It Compare?*, Cleary Gottlieb, p. 7, https://www.clearygottlieb.com/-/media/files/emrj-materials/issue-8-winter-2018_2019/indian-bankruptcy-codehow-does-it-compare-pdf.pdf.

[34] Akshaya Kamalnath, *Corporate Insolvency Resolution Law in India – A Proposal to Overcome the 'Initiation Problem'* (May 27, 2019), https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/corporate-insolvency-resolution-law-india-proposal-overcome.

The issue of negligible liquidation value has been deliberated in the Insolvency Committee Report, 2018 ("**ICR, 2018**")[35]:

> …
>
> *However, certain public comments received by the Committee stated that, in practice, the liquidation value which is guaranteed to the operational creditors may be negligible as they fall under the residual category of creditors under section 53 of the Code. Particularly, in the case of unsecured operational creditors, it was argued that they will have no incentive to continue supplying goods or services to the corporate debtor for it to remain a 'going concern' given that their chances of recovery are abysmally low.*
>
> *It considered the viability of using 'fair value' as the floor to determine the value to be given to operational creditors. … The Committee also discussed the possibility of using 'resolution value' or 'bid value' as the floor to be guaranteed to operational creditors but neither of these were deemed suitable.* (Emphasis supplied)

However, to the utter dismay of OCs, the committee recommended to continue with the arrangement as it presently stands, without making any amendments to the Code in this context.

Additionally, the fixation of minimum amount for OCs also falls foul of the United Nations Commission on International Trade Law Legislative Guide on Insolvency law ("**UNCITRAL Legislative Guide**")[36]:

'*… It is desirable that the law not restrict reorganization plans to those designed only to fully rehabilitate the debtor; prohibit debt from being written off; restrict the amount that must eventually be paid to creditors by specifying a minimum percentage; or prohibit exchange of debt for equity."*[37] (Emphasis supplied)

The Code by stipulating this superficial minimum payment, flouts the underscored portion of UNCITRAL.Another facet of this smokescreen argument gains substance from a bare perusal of

[35] Insolvency Law Committee, Report of the Insolvency Law Committee, 2018, pp. 56-57[hereinafter Insolvency Report].

[36] United Nations Commission On International Trade Law, *Legislative Guide on Insolvency Law*, U.N. Doc. A/59/17 Supplement No. 17 (25 June 2014)[hereinafter Guide].

[37] *Id*, ¶ IV.A.2.3.

the Preamble[38]. It is quite easy to discern that maximisation of the value of assets and safeguarding the interests of all the stakeholders is the prime goal. Interestingly, though the Code lays down a separate chapter on liquidation, yet the term finds no place in the Preamble of the Code in any form. Suffice it to say, liquidation is availed only as a last resort.[39]

In a nutshell, basing the minimum amount to be paid to any creditor on the premise of section 53 of the code is of no avail given that the Code itself staves off liquidation. More so, as the debts realised by the OCs in concurrence with the liquidation value are zilch in most of the cases.

(C) OCs BEING INVITED TO CoC MEETINGS

The Joint Parliamentary Committee Report of April, 2016[40] on the Code took a note of the inconsequential status of the OCs in the whole process of CIRP and recommended to permit the OCs to be present at the meetings of the CoC, albeit without voting rights, if OCs aggregate to a minimum of 10% of the total debts owed by the corporate debtor. It was only subsequent to this report that section 24 was modified to codify another ostensibly 'equitable right' for the OCs. This seems merely a stopgap arrangement for a rather pressing issue. An OC who is present at the meeting of the CoC will be irked, given that he will be a mere passenger in a bus full of his adversaries, all fighting for the bigger share of the pie, with the domineering FCs in the driver's seat. Any attempt to raise his concern regarding a resolution plan would be like flogging a dying horse as nothing will do him any good.

The rationale behind the Code being inclusive of the OCs is to keep CD a going concern even during the ongoing insolvency resolution plan, and it is nearly impossible to do so without clearing the accounts with the OCs. Another reason for the inclusion of OCs is to bring the law in conformity with the international practices, which permit unsecured creditors (including employees, suppliers etc. who fall under the definition of operational creditors) to file for the initiation of insolvency resolution proceedings.[41]

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[38] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. 2019 SCC OnLine SC 73, ¶ 26.

[39] Arcelormittal India Private Limited v. Satish Kumar Gupta and Ors., (2019) 2 SCC 1.

[40] The Joint Committee on The Insolvency and Bankruptcy Code, Sixteenth Lok Sabha, Report Of The Joint Committee On The Insolvency And Bankruptcy Code, Apr. (2016).

[41] Mobilox Innovations Private Limited v. Kirusa Software Private Limited AIR 2017 SC 4532, ¶ 27.

The 'inefficacious' rights disguised as embellishments of law, might well be an endeavour to bring the Indian insolvency law in line with the international practice, but how far will this arrangement sail, and do justice, is a question that looms large.

IV. TREACHEROUS PATH OF THE RESOLUTION PLAN, FROM THE 'COMMERCIALLY WISE' COC TO THE 'JUDICIALLY SOUND' AA

Any legally-formalistic approach warrants that discretion in any field must be covered with a thick fog of judicial review. Hence the Code, notwithstanding the plenary decision making powers given to the CoC to zero down on the most feasible and optimal resolution plan, mandates approval from the AA, albeit with qualified powers.

But gone are the days when judicial authorities used to be the nemesis of a corporate life[42]. Now commercial considerations control the adjudication process. The Hon'ble Supreme Court in ***Essar case (supra)*** settled the law vis-à-vis the power and extent of judicial review. The Top Court circumscribed the power of the AA inside the four walls of the section affirming the wide array of powers possessed by the CoC, under the veil of 'commercial wisdom', in matters hinged on the acceptance of a resolution plan[43]. In the recent decision of *Maharasthra Seamless Limited v Padmanabhan Venkatesh and Others*[44], the Supreme Court observed that the court ought to cede ground to the commercial wisdom of the CoC instead of quantitatively assessing the resolution plan itself.[45]

While spelling out the manifest tenor of the Code, the Apex Court in *K. Sashidhar v Indian Overseas Bank and Others*[46] observed that the commercial wisdom of CoC is non-justiciable because the members of the CoC, with a team of experts at their disposal, are best equipped to reach the most feasible and viable business decision for the CD[47].

Hints of unqualified power to the CoC can also be found in the BLRC report,

[42] BLRC Report *supra note* …, at 2. Executive Summary.
[43] Committee of Creditors of Essar, 2019 SCC OnLine SC 1478, ¶ 54.
[44] Maharasthra Seamless Limited v Padmanabhan Venkatesh and Others, 2020 SCC OnLine SC 67.
[45] *Id.* ¶ 29.
[46] K. Sashidhar v Indian Overseas Bank and Others, 2019 SCC OnLine SC 257.
[47] *Id.* ¶ 52.

> *There will be no restriction in the Code on possible ways in which the business model of the entity, or its financial model, or both, can be changed so as to keep the entity as a going concern…This decision will come from the deliberations of the creditors committee in response to the solutions proposed by the market.*[48]

The question of utmost importance, here, is - Can the inter se distribution of CIRP funds amongst the majority FCs to the detriment of OCs, by any stretch of imagination, get the blanket insulation under the garb of 'commercial wisdom of the CoC'? The answer must not be affirmative, or else the majority FCs will ride roughshod over the powerless OCs, let alone the minority FCs. Protecting creditors, in general, is an important objective as is protecting creditors from each other. [49] Hence any decision of the CoC must ensure maximization of the value of assets of the CD along with a balance of interests of all the stakeholders including OCs[50]. The Ld. NCLAT recently in *Hammond Power Solutions Private Limited V. Sanjit Kumar Nayak and Other* [51], referring to *Essar case (supra),* rejected a resolution plan as the CoC failed to demonstrate that it has taken care of all the stakeholders' interests[52]. But this alone does not float the OCs boat. The bare-bone powers vested in the CoC hijack the entire CIRP. This is explained in the ensuing sub-sections. **Why a resolution plan will always favor FC over OC?**

It is the resolution applicant ("**RA**") who draws and delineates the resolution plan which in turn reflects the quantum of recovery of debt each class of creditors is going to make. Additionally, apart from the amount of monies to be infused in the corporate debtor, the RA also chalks out the manner in which such monies are to be utilised in realising debts. It is within the ambit of power of the CoC to suggest a modification to a prospective RA to make amends in the resolution plan to safeguard the best interests of all stakeholders. The suggestion of the CoC may be accepted by the RA leading to a subsequent alteration in the distribution matrix of the resolution plan.

Pertinent is to note that the RA is not a person displaying good faith in this commercial exercise. Rather, s/he has a colossal share of interest and puts in all the efforts to get their resolution plan accepted by the CoC. Every resolution plan is motivated and directed towards making a substantial

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[48] BLRC Report *supra note 23,* at ¶ 5.3.3.
[49] Committee of Creditors of Essar, 2019 SCC OnLine SC 1478, ¶ 49.
[50] *Id.* ¶ 54.
[51] Hammond Power Solutions Private Limited V. Sanjit Kumar Nayak and Other, 2020 SCC OnLine NCLAT 199.
[52] *Id.* ¶ 15.

sum out of the whole process. Hence, the RA is inarguably at pains to come out with a plan which lights up the eyes of the majority FCs in the CoC — and, in the process, prejudicing the rights of all other stakeholders.

Referring the UNCITRAL Legislative Guide,

> *The question of what is to be included in the plan is closely related to the procedure for approval of the plan, that is, which creditors are required to approve the plan and the level of support required for approval, …[A]nd whether or not there is a requirement for court confirmation.*[53] (Emphasis supplied)

The above quoted excerpt sheds light on the fact that the constituents of any resolution plan are sensitive to the procedure for approval of the plan, and also the type of creditors required to approve the plan (CoC- formed by the FCs under the Code) along with the level of support necessitated (sixty-six per-cent majority of the CoC).

Delving further into this premise, an RA, who wants their resolution plan to be approved, would always devise a plan which is optimal for the majority FCs who can vote to approve the plan. Hence appeasing the majority FCs works wonderfully well for the RA. Indeed, the only force more cynical than the business of big politics is the politics of big business.

Appeasement of majority FCs might (will mostly) lead to an undesirable outcome for the other creditors. Where do these creditors who object the resolution plan as grossly unfair seek remedy?

The Singapore Court of Appeal in *Daewoo Singapore Pte Ltd. v. CEL Tractors Pte Ltd.*[54] observed:

*...After a scheme is accepted by the creditors, an objecting creditor can persuade the court to withhold its approval, or to approve it subject to such alternatives or conditions as it thinks fit (see s 210(4)). The objecting creditor would succeed if he can show that the creditors did not vote bona fide for the benefit of the creditors or the company as a whole (see Re Wedgwood Coal and Iron Co (1877) 6 Ch D 627), or that the scheme is not fair and reasonable (see Re Dorman, Long & Co [1934] Ch 635...*The rationale behind putting in place a mechanism of judicial review of the resolution plan is a way to placate the clamor that an 'unfair', 'unjust' and a 'patently discriminatory' resolution plan might lead to. The Code also predicates on the same

[53] Guide *supra* note 27, at IV. A. 4.18.

[54] Daewoo Singapore Pte Ltd. v. CEL Tractors Pte Ltd., [2001] SGCA 53.

theme. But before discussing the Code, a whistle-stop discussion of semantics, 'unfair' and 'prejudicial', under the UK law will be useful.

In *Jesner v. Jarrod Properties*[55], the Court stated that 'prejudice' and 'unfairness' are two different requisites — prejudicial conduct may or may not be unfair. In *RockNominees Ltd. v. RCO (Holdings) Ltd*[56], the conduct under question was adjudicated to be unfair but not prejudicial.

The Hon'ble Supreme Court of India has also participated in this game of semantics. The Court, in ***Essar case (supra),*** copiously discussed the inhibited powers of the AA. While differentiating between the jurisdiction of the Hon'ble High Court u/s 392 of the Companies Act, 1956 and the jurisdiction of AA under the Code, the apex Court opined- '…*it is clear that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of*.'[57] (Emphasis supplied)

Per contra, the Code states-

'Section 30

…

(2)(b)

…

Explanation 1 — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.[58]

Juxtaposing the two, it is astounding that the Hon'ble Supreme Court deployed the term 'unfair' and delineating the powers of the AA. The term 'unfair' is perceptibly in contrast with the code itself. The Code empowers AA to reject the resolution plan if it does not conform to the requisites of section 30(2) of the Code. Explanation 1 of section 30(2) stipulates that a distribution shall be fair and equitable. Therefore, if the AA will be ousting its jurisdiction while rejecting a resolution

[55] Jesner v. Jarrod Properties, [1992] BCC 807.
[56] RockNominees Ltd. v. RCO (Holdings) Ltd, [2004] 1 BCLC 439 CA11.
[57] Committee of Creditors of Essar, 2019 SCC OnLine SC 1478, ¶ 75.
[58] The Insolvency and Bankruptcy Code, 2016, Explanation 1 of § 30(2)(b), No. 31, Acts of Parliament, 2016 (India).

plan which is 'unfair', who will be empowered to reject an 'unfair' resolution plan required to be set aside by the Code itself? Gathering the temerity to quote the apex Court again,

> *…it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted for.*[59]

To put this more succinctly, on the one hand, the legislature has put 'fair' in the statute, while the 'interpreter' of legislative statutes, the Judiciary, has employed the term 'unfair'. The legislative intent seems to be inclined towards maintaining fair play while the steering wheel rests in hands of the CoC. However, the judicial intent seems a little nebulous in this context.

(A) JUSTICE, MUST NOT ONLY BE DONE, BUT ALSO BE SEEN TO BE DONE.

The CoC sits at the top of the food chain once the CIRP is initiated, and it would be correct to assert that the prospective resolution plan and its acceptance is the *raison d'etre* of the entire resolution process. It is further pertinent to reiterate that the Code provides for a resolution process which considers the interests of all the stakeholders, and not only the interests of the FCs who form the CoC.

In such a scenario, a celebrated common law principle seems to be of utmost relevance: *"Justice must not only be done, but must also be seen to be done"*.

This dictum was laid down in ***Rex v. Sussex Justices***[60] by the then Lord Chief Justice of England, Lord Hewart.

Beyond any doubt, a decision reached by the CoC is not a judicial decision, and therefore the applicability of the aforementioned principle doesn't come into light at that very instance. However, the moment a resolution plan is accepted by the AA, the order being a judicial act attracts the common law principle.

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[59] Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., AIR 2018 SC 498, ¶ 30.

[60] Rex v. Sussex Justices, [1924] 1 KB 256.

In words of Mr. Arvind Datar, Sr. Advocate *'This principle is important in an era where Tribunals have been constituted to deal with several branches of law… We cause harm to our legal system and its credibility by ignoring this salutary principle'*[61]

But unfortunately, when the resolution plan is accepted by the CoC on the basis of its own vested interest, the only thing which is 'seen' to be done is the maximization of the benefits to the FCs, keeping the other creditors in the lurch. Justice, on the other hand, somehow plunges in vanity, benighted and perforated.

V. TIME FOR AN UPGRADE?

The cat-among-pigeon approach of classifying creditors under the Code was challenged[62] in Swiss Ribbons, but, like legion other constitutional challenges put forth by Mr. Mukul Rohatgi, to no avail. This section posits a two-pronged argument providing impetus for a change: first, India (or Code) centric; second, A global perspective.

(A) LOCAL PERSPECTIVE

A great many aspects of the law have now attained a dispositive flavour, starting with settling the law vis-à-vis the procedural bit of the Code[63]; then, the dilution of mandatory provisions for the AA to 'fact-specific' directory[64]; and finally, the commercial wisdom of the CoC reigning supreme.[65] This catena of judicial pronouncements expounds the commercial/business weighty nature of the law keeping abreast of the object of the Code, which is to bolster an ailing entity. The feasibility and viability of the resolution plan for the maximization of the assets is what the whole CIRP is put in place for. All in all, a reading between the lines leads to the conclusion that it all boils down to business.

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[61] Arvind Datar, *The origins of "Justice must be seen to be done"*, Bar and Bench, (Apr. 18, 2020), https://www.barandbench.com/columns/the-origins-of-justice-must-be-seen-to-be-done, (Last Visited on Apr 20, 2020).

[62] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. 2019 SCC OnLine SC 73, ¶ 44.

[63] Innoventive Industries Ltd. v. ICICI Bankl, (2018) 1 SCC 407; Mobilox Innovations Private Limited v. Kirusa Software Private Limited,AIR 2017 SC 4532; Macquarie Bank Limited v. Shilpi Cable Technologies Limited, AIR 2018 SC 498.

[64] Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Ors, 2018 SCC OnLine NCLAT 251.

[65] Committee of Creditors of Essar v. Satish Kumar Gupta and Others, 2019 SCC OnLine SC 1478.

And by now it has been most strenuously argued that for a CD to operate as going concern, multifarious participation of the OCs is inescapable. The relationship between the OCs and the CD can be termed as 'symbiotic'— both mutually benefitting from each other. However, the BLRC report[66] furnishes the rationale behind keeping the OCs oblivious to a chair in the CoC. It opines that the members of the CoC have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities. It further reasons that OCs are a misfit for the category as they are neither able to decide on matters regarding the insolvency nor willing to take the risk of postponing payments for better future prospects of the entity. Hence, OCs are more obvious suspects to hang the charge of naiveté.

Rather interestingly, homebuyers, creditors who do not possess any techno-economic ken to aid the CIRP, have been treated as FCs under the Code.[67] The recent ICR, 2018 recommended homebuyers to be covered under the ambit of FCs, while it did not root for any relief for the OCs.[68] The Hon'ble Supreme Court upheld homebuyers being treated as FCs as it opined that transaction between a homebuyer and a developer is akin to a transaction between a FC and a CD.[69] While countenancing the rationale of recognizing homebuyers as FCs, it is also to be acknowledged that OCs generally will have a larger interest in the CD's operation as a going concern.

To substantiate the argument, it is imperative to study the aim of both the homebuyers as well as OCs while commencing their business relation with the CD. Initially, the homebuyers' raison d'etre is to get their home/flat. Per contra, the OCs possess a long term goal to maintain a healthy, flowing business relation with the business entity. Keeping this in mind, once the CIRP begins, the only aim of a homebuyer is to somehow get his home/flat, or, as a fallback, recover his monies along with interest, aloof from the fact CD lives or liquidates. However, an OC on the other hand, along with the recovery of his monies, would also want the CD to operate as a going concern as long term relations are profitable for him.

Most literature on the subject has failed to take into consideration this key facet whilst deliberating upon this issue. The symbiotic relationship of between the OCs and the CD feeds on the fact that

[66] BLRC Report *supra note 23*.
[67] The Insolvency And Bankruptcy Code (Second Amendment) Act, 2018, No. 26, Acts of Parliament, 2018 (India).
[68]Insolvency Law Report, *supra* note 25, ¶ 18.5.
[69] Pioneer Land and Infrastructure Limited and Another v. Union of India and Others, (2019) 8 SCC 416.

the judicial death of the CD is going to be a substantial loss for the OCs. The OCs will then have to hunt for new buyers for their goods/services in an excessively competitive market, where, rather uncharacteristically, law of inertia applies and precludes any change when it comes to buyers and suppliers of a particular good/service. Be that as it may, the Code as it currently stands has no provision for voting rights to the OCs in the CoC save when the CD has no financial creditors.[70]

In ***Essar case (supra)***, the OCs with debts less than INR 1cr. were paid in full whilst pulling the rug from under the OCs with debts north of INR 1 cr. All told, it would be fair to structure a remedy for the high quantum OCs to be a part of the CoC on lines similar to regulations[71] prescribed by IBBI, and further represent the interest of all the OCs.

(B) 5.2 GLOBAL PERSPECTIVE

The US and the UK, apart from being global superpowers, have had a significant impact on the Indian laws over the years.[72] Legislative developments in the US and the UK have guided — and, fair to say, veered away — choices of Indian legislature and jurists. Even the Code is posited on the model of the UK law i.e. Insolvency Act of 1986.[73] Yet, the Indian approach classifies 'FCs' and 'OCs,' which is unique.[74]

Title 11 of US Code[75] (Bankruptcy), as pointed out earlier, follows a debtor-in possession regime. It necessitates the classification of creditors into classes, but does not spell out this classification or its procedure. This has effectively lead to classification of creditors depending on the idiosyncrasies of individual cases[76]. Approval of a plan[77] requires a nod from each class of creditors[78] including creditors with impaired claims.[79]

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[70] Corporate Persons, *supra* note at § 4, Regulation 16.

[71] Corporate Persons, *supra* note at § 4, Regulation 16(20(A).

[72] Gautam Sundaresh, *In Whose Interests Should a Company Run? Fiduciary Duties of Directors During Corporate Failure in India: Looking West for Answers*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 291, 297 (2019) (discussing India's use of U.S. and U.K jurisprudence for guidance in drafting statutes and resolving complex legal issues).

[73] Innoventive Industries Ltd. v. ICICI Bankl, (2018) 1 SCC 407, ¶ 15.

[74] M P Ram Mohan, Vishakha Raj, *Apartment Buyers as Financial Creditors: Pushing the Conceptual Limits of the Indian Insolvency Regime,* 219-263, Columbian Journal of Asian Law, Vo. 33 No. 2, 224 (2020).

[75] 11 U.S.C. §§ 101–1501 (2018).

[76] Stefan A. Riesenfeld, Classification of Claims and Interests in Chapter 11 and 13 Cases, 75 CALIF. L. REV. 391, 393 (1987).

[77] 11 U.S.C. § 1126 (2018).

[78] Id. § 1129.

[79] Id. §§ 1126–1129.

Further, the US code, during the insolvency process, charts specific rights for trade creditors (mostly, OCs in Indian context) by providing them leeway to halt deliveries and reclaim goods under different State laws.[80] The US position stands in stark contrast to the Indian Code where the OCs are bereft of even the voting rights.[81]

A leaf may also be taken from the UK insolvency law that bears a similar framework.[82] In UK, the trade creditors enjoy a right to vote in the creditors committee.[83] There is no classification of creditors, except for secured and unsecured, making the law a level-playing field for the trade creditors. The UK law with its 1986 Insolvency Act seems to be all-embracing as compared to its Indian counterpart, which is relatively nascent. The latter, ipso facto, pushes the OCs far afield from meaningful rights.[84]

The liquidation priorities (i.e. the waterfall mechanism) of India, US, and UK laws are all based on the classification of secured and unsecured debts.[85] Meanwhile, India follows a somewhat middle path when it comes to insolvency. It charts secured and unsecured creditors to vote under the same rubric of 'FCs' (in contrast with the US Code[86]); while imposing an embargo on the type of creditors to vote viz., OCs[87] (in contrast with the UK law, which accords each creditor a voting right[88]).

Under the US law, creditors are classified by the rationale of some common interest shared between them.[89] And UK law dispenses with this common-interest classification as, here, all creditors vote on plans proportionate to their debts. In India's case, neither the BLRC report nor

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[80] Daniel A. Lowenthal, *Tough Choices Confront Trade Creditors When a Retailer Faces Bankruptcy*, MONDAQ (Oct. 09, 2014), https://www.mondaq.com/unitedstates/InsolvencyBankruptcyRestructuring/3453 90/Tough-Choices-Confront-Trade-Creditors-When-A-Retailer-Faces-Bankruptcy.

[81] The Insolvency and Bankruptcy Code, 2016, § 21(2), No. 31, Acts of Parliament, 2016 (India).

[82] *Supra note* 34.

[83] Earnst & Young, *How Does The Corporate Insolvency Code In India Measure With The UK?,* Mondaq (Dec 08, 2016). https://www.mondaq.com/india/insolvencybankruptcy/551286/how-does-the-corporate-insolvency-code-in-india-measure-with-the-uk.

[84] S & R Associates, *Operational Creditors in Insolvency: A Tale of Disenfranchisement (Aug 03, 2020),* https://www.mondaq.com/india/insolvencybankruptcy/971940/operational-creditors-in-insolvency-a-tale-of-disenfranchisement.

[85] *Supra Note 75*, p. 227.C.

[86] 11 U.S.C. § 1122 (2018).

[87] *Supra note 82.*

[88] *Supra note 84.*

[89] Bruce A. Markell, *Clueless on Classification: Toward Removing Artificial Limits on Chapter 11 Claim Classification*, 11 BANKR. DEV. J. 12,13 (1995) (discussing US courts' reluctance to allow the artificial classifications of claims).

the Code posit the common interest of FCs for according them voting rights to the detriment of OCs. The reason for this distinction is only the averred capability of the FCs to be the best fit for assessing the feasibility and viability of a Resolution Plan.[90]

This whistle-stop tour of the two foreign regimes manifests that the Indian Code is indeed unique. But if India with its "game changing"[91] Code wants to become the "indebtedness restructuring hub,"[92] like Singapore, it would have to devise a plan by which the interests of all stakeholders are efficiently catered.

VI. IN THE LONG RUN, WE ARE ALL DEAD

Although the title is directed towards an imaginative palette, it actually comes from the father of modern economics, J.M Keynes steeled, '*In the long run we are all dead. Economists set themselves too easy, too useless a task if, in tempestuous seasons, they can only tell us that when the storm is long past the ocean is flat again.'*[93]

It is evident that we are running the same race as the economists, shanghaied by addressing short term troubles and taking accolades home over short-term gains, while turning a nelson's eye to long term implications. An OC, which does not recover its debt in a CIRP, in the short run is also a business entity (aided by both OCs and FCs) that in long run would have to face a similar CIRP because of the ill recovery realised by the myopic view that preferred the FCs.

It would be unfair to overlook the fact that Essar Steel, which was brought back on its feet by a successful resolution process after the landmark Supreme Court ruling, is also a trade supplier for legion manufacturing units. And as the business relations in the Indian scenario suggest, backed by empirical evidence, the steel giant would most definitely be an OC for other business houses.

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[90] *Supra Note 28,* ¶ 2: Executive Summary.

[91] Clifford Chance, *A Guide to Asia Pacific Restructuring and Insolvency Procedures,* Financial Markets Tool Kit, p. 3. https://financialmarketstoolkit.cliffordchance.com/content/micro-facm/en/financial-markets-resources/resources-by-type/guides/a-guide-to-asia-pacific-restructuring-and-insolvency-procedures/_jcr_content/parsys/download/file.res/a-guide-to-asia-pacific-restructuring-and-insolvency-procedures.pdf.

[92] STA Law Firm, *Overview of Singapore's Insolvency and Restructuring Legal Regime* (Nov 25, 2019). https://www.stalawfirm.com/en/blogs/view/insolvency-and-restructuring-in-singapore.html.

[93] J.M. Keynes, A Tract on Monetary Reform 80 (Macmillan and Co., Limited 1924).

While the Code, as it stands today, has given an efficient recovery mechanism for the FCs, it has provided no solace to the OCs. And the erstwhile CD (in this case Essar), which successfully survived the insolvency, credit to the IBC, would find itself running out of remedies when it would move the Tribunal under the same Code as an OC. And that is where we might need to pay heed to what Mr. Keynes once stressed upon.

As stated in the UNCITRAL Legislative Guide, '*The purpose of reorganization is to maximize the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers*'[94]. (Emphasis supplied)

Many distinguished counsels have gone to bat for this very purpose before the top court. But the OCs were always left in in the lurch as the Hon'ble Supreme Court opined that the CoC is the commercial juggernaut and its wisdom is unassailable.

The Ld. NCLAT in ***Binani Industries Limited v. Bank of Baroda and Another***[95] observed, '*If one type of credit is given preferential treatment, the other type of credit will disappear from market. This will be against the objective of promoting availability of credit.*'[96]

It is an integrated process in which preferential treatment to any form of credit, financial or operational, over the other would not do justice to the economic system. Relying on the wisdom of another economic big wig, Milton Friedman, who chose a pencil to explain the complexities involved in the entire process of economic co-operation:

> *Look at this lead pencil. There's not a single person in the world who could make this pencil. ...The wood from which it is made, for all I know, comes from a tree that was cut down in the state of Washington. To cut down that tree, it took a saw. To make the saw, it took steel. To make steel, it took iron ore. This black center—we call it lead but it's really graphite, compressed graphite—I'm not sure where it comes from, but I think it comes from some mines in South America. This red top up here, this eraser, a bit of rubber, probably comes from Malaya….*[97]

[94] Guide *supra* note 27, at Supplement No. 17.
[95] Binani Industries Limited v. Bank of Baroda and Another, 2018 SCC OnLine NCLAT 521.
[96] *Id.*, ¶ 17.3.e.iv.
[97] Anne Elizabeth Moore, *Milton Friedman's Pencil,* The New Inquiry, (Dec. 17, 2012), https://thenewinquiry.com/milton-friedmans-pencil/, (Last visited on May 1, 2020).

All the components of a business (just like the pencil) are a house of cards where each one stands on top of the other. This metaphor mandates understanding the inevitability of the whole house tumbling in both the cases: one, where you try removing a card; two, you prioritise one over the other. A business is run by a strategic co-operation and not by preferential allocation. In the era of commercial dynamism, it is a Red Queen Contest where everyone is running fast in order to maintain relative stability. Amidst this, the OCs face a tough fight in deep waters. And if they do not have an equitable recovery mechanism, it would lead to a hiatus in the business machinery which would in turn make the chopper fall, leading to corporate death.

VII. CONCLUSION

IBC bears the same relation to its predecessors that a modern court of law bears to a qadi under a tree. Whereas the earlier statutes were palimpsestic at the very best, the Code is indeed a path breaking legislation, no mean feat. Moving on from the eulogizing fervour to empirical facts, in the initial 2 years since the inception of the Code, the amount realised from the resolution process was over 202% of the liquidation value.[98] Yet, a fault line has been recognised in functioning of the Code manifested by a host of provisions, backed by judicial pronouncements, resting unfettered powers with the CoC prejudicing the OCs[99].

The nascence and the dynamism of the Code[100] make room for the legislature to provide for the OCs a fair (if not equitable) recovery mechanism, considering the long run ramifications of discriminating against the OCs which would lead to unavailability of goods and services on credit[101]. Going back to the question posed at the beginning of the article, the authors conclude with a hope that this journey witnesses the dovetailing of legality and justice in the ensuing times.

[98] Swiss Ribbons Private Limited And Another v. Union of India And Others2019 SCC OnLine SC 73, ¶ 121.

[99] *K. Sashidhar v Indian Overseas Bank and Others* 2019 SCC OnLine SC 257, ¶ 62.

[100]Capital Market, The IBC Is A Dynamic Law Evolving To Meet Emerging Needs Of Stakeholders, Says IBBI Chairman, Business Standard (November 13, 2019). https://www.business-standard.com/article/news-cm/the-ibc-is-a-dynamic-law-evolving-to-meet-emerging-needs-of-stakeholders-says-ibbi-chairman-119111300169_1.html.

[101] *Supra note 64,* at ¶ 17.3.b.

ARTICLE

DISASTER CAPITALISM: AN OFFENCE OR A SLANT TOWARD ECONOMIC UPLIFT

- *Sulagna Dutta*[*]

ABSTRACT

The "Institute of Policy Studies" survey shows the exponential increase in the net worth of nations between the time period of 1st January and 10th April 2020. About 170 wealthiest billionaires from thirty-four nations have seen their wealth increase "by tens of millions of dollars whereas eight of these have seen their net worth surge by over $1 billion." The regime of making a disaster advantageous to the commercial interests of a State by the formulation of economic policies that would be less likely to be accepted by the citizens under normal circumstances is a phenomenon that the sinister virus has brought to play. Governments have been trying to draw economic gains under the camouflage of the Covid-19 pandemic. The outbreak that has disturbed the global fabric has given rise to a plethora of concerns nationally and internationally. However, multiple countries have been attempting to capture the global market through their policies drafted within the framework of disaster capitalism and the same has been overlooked by most during these unprecedented times of crisis. Minimal concerns have been raised on the legal aspect of disaster capitalism and how they can be effectively applied to the present crisis that the world economy faces, which stands as one of the objectives of this research. This paper aims to look into the depths of this untended intersection of disasters and super-profits as well as suggest legal ways to impose a benchmark upon the shackles of disaster capitalism.

Keywords: Capitalism, China, Shock doctrine, Pandemic, Unites States, India, economy, inequalities.

[*] Fifth Year Student, Symbiosis Law School, Hyderabad.

I. INTRODUCTION

"*So many lives are on the line right now. This system is crashing. It's crashing economically and it's crashing ecologically. The stakes are too high for us not to make the absolute most of this moment.*"[1]

The above lines by Naomi Klein from the year 2007, before the end of the great recession and the 2007-08 financial crisis[2] when the Lehman Brothers collapsed, and the Wall Street bailout followed, ring a bell in the mind of every enthusiast who is acquainted with the current unprecedented economic crisis. The 9/11 attack, the Iraq war, and the 2004 Tsunami in Sri Lanka were all followed by a trail of attempts that perfectly fit the definition of Disaster Capitalism. Hotels and resorts were built on the land of the devastated lives in Sri Lanka subsequent to one of the deadliest tsunamis in the history of humankind. The unbridled capitalism in the present era of neoliberal globalisation does not exempt even disasters from being treated as business. When we read these lines standing midway through the health emergency of COVID-19, the words still make sense after a decade. The common notion that economists associate with the phenomenon of Disaster Capitalism is that the rich get richer and the poor get poorer and the same stands as an eternal theory. In simple terms, it is a concept where a rich capitalist business tycoon makes money and becomes richer by taking advantage of the poor crowd who has been hit by a big disaster. The business tycoon can be an individual, a group of people, or a country.

The best example would be the Chinese Government selling faulty masks and Personal Protection Equipment (PPE) to a different country that has been affected by Covid-19 and does not have massive internal production of such precautionary essentials.[3]

It is safe to say that Milton Friedman, the American economist and Nobel prize winner, was the first to float the idea of Disaster capitalism. In his book "Capitalism and Freedom", he wrote for the very first time: "*Only a crisis-actual or perceived produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around. That, I believe, is our basic function: to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes politically inevitable*."[4]

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[1] NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM (Picador 2008).

[2] SEBASTIAN DULLIEN, DETLEF J. KOTTE, ALEJANDRO MÁRQUEZ, JAN PRIEWE, THE FINANCIAL AND ECONOMIC CRISIS OF 2008-2009 AND DEVELOPING COUNTRIES (United Nation Publication 2010).

[3] Cdr. Sandeep Dhawan, *Has China Unleashed the Friedman's Disaster Economy on the World*, CHENNAI CENTRE FOR CHINA STUDIES, (2020), https://www.c3sindia.org/defence-security/has-china-unleashed-the-friedmans-disaster-economy-on-the-world-by-cdr-sandeep-dhawan/.

[4] MILTON FRIEDMAN, CAPITALISM AND FREEDOM (40th ed. University of Chicago Press 1892).

However, living through this unfamiliar crisis in a more modernised world, the real question that pops in the mind of a welfare enthusiast is whether the lacuna of legal backing in making commercial benefits profits in reciprocation to a global crisis remains unanswered and non-expounded. Apart from health and social demographic challenges, the novel virus has been accompanied by a chain of economic events, one of which has been attempted to be explored in this paper. This prefatory note aims at bringing to light the economic confrontation that the countries are adopting with the efflux of time.

(A) RESEARCH GAP

A review of the extant knowledge and research linked to disaster capitalism was undertaken based on the data obtained from the bibliography and literature. The instant study has looked at the research gaps from three different perspectives. To begin, we look at the discrepancy between the existing understanding of the issues and the proposed remedies. Second, we look at the gap between the literature accessible in the public domain and what is truly required to completely fix the challenges. The literature currently available is inconclusive and contradictory in certain aspects considering that the pandemic and the tactics to prevent it are continually developing rampantly. Finally, we look at the disparity between available legislative protection and its efficacy of deployment in the global arena.

II. THE SHOCK DOCTRINE: THE INTERSECTION BETWEEN SUPER-PROFITS AND MEGA-DISASTERS

The concept of Neoliberal economics holds some real value in the current times considering capitalism has been accepted in major parts of the world and America is a dominant global power. The concept of a Neoliberal economy has the following ingredients "privatization, deregulation, and cuts to social services.[5]" Naomi Klein, the Canadian social activist, comments on this aspect in her book "The Shock Doctrine". If one needs to understand Disaster Capitalism there is no way around the book and that to understand the book is equal to understanding the concept. Thus, in this segment of the paper, we will first, summarise the book to provide readers with a better understanding of the concept of disaster capitalism, and then analyse its effect on society, aiming to connect the theory with real-world considerations.

[5] Greg Myre, *Israel Economy Hums Despite Annual Tumult-International Herald Tribune*, NY TIMES (Dec. 31, 2006), https://www.nytimes.com/2006/12/31/business/worldbusiness/31iht-israelecon.4059101.html.

An example of Ewen Cameron, a Scottish Psychiatrist has been used by the author. The doctor used "Shock Therapy" to help patients who had some mental issues and in the process he would remove all personality traits of the patient and finally instil in them a social personality. The author says that the same technique has been used by the government "at the macro level to impose neoliberal economic policies in countries around the world."[6] Thus, this factor is the driving reason to title the book 'The Shock Doctrine'. The concept of shock doctrine vis-a-vis disasters capitalism is further explained in the words of Ms. Klein, *"the shock doctrine posits that in periods of disorientation following wars, coups, natural disasters and economic panics, pro-corporate reformers aggressively push through unpopular "free market" measures*."[7] The author further states that people who follow Milton Friedman's thinking and the market theory given by him are "perfecting this very strategy: waiting for a major crisis, then selling off pieces of the state to private players while citizens were still reeling from the shock, then quickly making the 'reforms' permanent"[8] for a period exceeding the last 30 years and this needs to see an end. She says that taking advantage of a crisis is disastrous and cannot be a way to function.

III. RISE OF DISASTER CAPITALISM AMID THE GLOBAL HEALTH EMERGENCY OF COVID-19

Subsequent to the declaration of a worldwide health emergency by World Health Organisation,[9] the world economy started becoming a witness to a downturn in global neoliberalism. However, the same has been opportunistically moulded by various countries into making commercial benefits from the aforementioned economic setback. A new wing of neoliberalism in the manifestation of disaster capitalism. Big corporations and certain economy-centric governments have opted for an approach that allows them to structure neoliberal policies so as to reciprocate the disaster with free-market opportunities and strive towards commercial gains but at the cost of transparent corporate governance.

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[6] Rebecca Lemov, *Brainwashing's Avatar: The Curious Career of Dr. Ewen Cameron*, GREY ROOM, Oct. 2011, at 60–87.

[7] NAOMI KLEIN, *supra note 1,* at 15, 231.

[8] *Id.* at 456.

[9] WORLD HEALTH ORGANISATION, *Temporary Recommendations for COVID-19* (WHO, 30 January, 2020), retrieved from https://www.who.int/news-room/detail/27-02-2020-a-joint-statement-on-tourism-and-covid-19---unwto-and-who-call-for-responsibility-and-coordination#:~:text=On%2030%20January%202020%2C,set%20of%20Temporary%20Recommendations.

Analysts have been warning of the way the global crisis may be exploited through the so-called strategy of disaster capitalism.[10] For instance, as the demand for medical necessities like face masks, gloves, hand wash, and sanitizers soar, many companies have carved an opportunity of making expanded gains by selling the aforementioned at inflated prices.[11] While Government Health departments are struggling to make testing a widespread practice to curb the spread of the sinister COVID-19, many private companies have introduced home testing for those who can pay for the same.[12] Elite access to private testing in the United States is too founded upon the framework of disaster capitalism in reciprocation of the fear created by the health crisis. The United States has been in the spotlight in the recent context of disaster capitalism since the instance of an alleged congressional insider trading was broadcasted when four senators allegedly sold stocks subsequent to a White House briefing as a prefatory move prior to the market crash in the country.[13] This has led to a mongering fear in the minds of the average laymen around nations over governments turning the ongoing health crisis into pushing political agendas of their whims. The Chinese Government has already made public its stance on relaxing environmental regulations and monitoring to facilitate an economic boost.[14] A similar approach was adopted by the United States when President Trump announced an emergency relief package of $2.2 Trillion for bailing out economic uplift to heavy and key in the aviation, oil, and gas industries in addition to lowering environmental standards in the country. The aforementioned attempts have all been aimed at reciprocating the crisis by making economic or commercial benefits out of the same.

Regardless of the fear and outrage, someone would always find a way to push through corporate-friendly agendas amidst the misfortune of others. The same has been inferred as an unfortunate culmination of several dynamics at play. The States however assume a secondary role in such situations, unlike the private companies who come to the forefront as primary exploiters of a disaster. One of the forms of the so-called Disaster Capitalism as mentioned above has been the phenomenon of "Price Gouging"[15] especially prevalent in the pharmaceutical Industry around the

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[10] Marie Sollis, *Coronavirus is the perfect disaster for Disaster Capitalism*, THE VICE, (Mar. 16 2020), https://www.vice.com/en_in/article/5dmqyk/naomi-klein-interview-on-coronavirus-and-disaster-capitalism-shock-doctrine.

[11] John B. Dubrow, *Price Gouging in the Crosshairs during COVID-19*, NATIONAL LAW REVIEW, Apr. 24, 2020.

[12] Megan Twohey, Steve Eder, Mark Stein, *Need A Coronavirus Test? Being Rich and Famous may help*, NYT, (Mar. 18, 2020), https://www.nytimes.com/2020/03/18/us/coronavirus-testing-elite.html.

[13] *Coronavirus: US Senators face calls to resign over 'insider trading',* BBC, (Mar. 20, 2020), https://www.bbc.com/news/world-us-canada-51976484.

[14] Muyu Xu, Brenda Goh, *China to modify Environmental Supervision of firms to boost Pot-Coronavirus Recovery*, REUTERS, (Mar. 10, 2020), https://www.reuters.com/article/us-health-coronavirus-china-environment-idUSKBN20X0AG.

[15] Lee, D. *Making the Case against "Price Gouging" Laws: A Challenge and an Opportunity,* INDEP. REV. *,* 2015, at 583.

global markets. The current unprecedented times post the pandemic is no exception when it comes to price gouging which is intuitively unfair. However, the in-depth comprehension of the same is not accompanied by a direct conclusion. Economists' deliberations have often delved into whether anti-gouging laws would actually prove to be beneficial to the interests of the consumers. What may be viewed from the perspective of a prudent business decision and a risk to consumer protection at the same, may be inferred to have wider and more remote consequences than the ones previously mentioned. The anti-gouging laws formulated may be considered a wise political move, however, there cannot be inferred a desirable economic or pro-consumer stand by the Nations. The immediate consequence of inducing such artificial pricing regulations would facilitate procurement of the gouged product at a comparatively favourable price than the price determined by market forces of demand and supply. Such events will eventually lead to short supply making such products unavailable to the rest of the consumers. Therefore, regulations to govern price-gouging may seem a desirable move from the political perspective however it may not produce the desired results when it comes to the protection of consumer interests. The problem has taken an aggravated form on the online marketplace platforms which are directly controlled through demand algorithms. Several complaints have been reported against players like Amazon where third-party sellers have taken to the course of extreme rates of price-gouging besides alleged claims of Amazon benefitting through commissions from such third-party dealings and promise of fraudulent cures for the contracted infections.[16]

However, the unaddressed issue surrounding disaster capitalism and the constant warns of economists against the adversities arising out of it, has procured an advanced approach during the current pandemic. The instant disaster of COVID-19 has been no exception to the phenomenon of drawing economic gains under the camouflage of the global pandemic. The global fabric has been witness to various such threads of disaster capitalism in the previously recorded pandemics in the history of mankind and the theory can be well inferred from Klein's take on the Shock Doctrine.[17] The same calls for grass root level analysis of the consequences born out of the otherwise corporate-friendly decisions.

[16] Annie Palmer, *Amazon calls for federal price-gouging law amid Covid-19 scams*, CNBC, (May 13, 2020), https://www.cnbc.com/2020/05/13/top-amazon-exec-calls-for-federal-price-gouging-law-amid-coronavirus-scams.html.

[17] NAOMI KLEIN, *supra* note 1.

IV. ABSORPTION OF DISASTER CAPITALISM BY THE UNITES STATES

The United States is yet another country that has portrayed its attempt of converting the global health crisis into a commercial-friendly approach. A reasonable stance on United States' take on the economic front by an extra-terrestrial observer, can be righteously referred to as a confronted action against the decency of organised human existence. The question that has secured the forefront is whether it is just the developing nations who are making an attempt toward mitigating or overcoming the pandemic while some superpower economies are racing towards achieving economic prosperity at the cost of environmental degradation and nuclear rebellion threats. In this state of collective shock, the average population of the United States has been witnessing the State's inclination toward the adoption of the Shock Doctrine as a response to the global health emergency. Ranging from privatised testing at an escalated cost to indulging in insider trading practices by the officials, the United States in the recent past has been caught the focus and lens of various international media houses. American linguist and philosopher Noam Chomsky in an interview with The Guardian,[18] had explicitly affirmed that the practices and tactics to make gains out of the current health crisis would in no way be favourable to the welfare of the organised society.

The disaster might be in the form of 9/11 or the Iraq War, the aftermath has always resulted in a shock to the global community which is followed by an economic war by private establishments but funded by public finances. A similar approach has been studied by economic strategists in the corporate bailout to the tune of $500 passed by the American superpower. This extends to financial assistance to private healthcare providers, and American citizens as well as facilitating low-interest loans to a number of corporations.[19] The inclination of the Government to make the most out of the ongoing disaster has also been reflected in its urgency to meet the infrastructural needs of the economy by approving the immediate foundation of the Keystone XL pipeline which had once received heavy protest and criticism by the general population.[20] The quarantined lifestyle has given an edge and ample opportunity to the state governments to formulate laws that make disruption to 'critical infrastructure' a felony. The Environmental Protection Agency of the United States has also put in a contributory hand at fuelling this intersection of mega-disaster and commercial super-

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[18] Noam Chomsky, *How to Destroy the Future*, THE GUARDIAN, (Jan. 4, 2013), https://amp.theguardian.com/commentisfree/2013/jun/04/us-disaster-race-naom-chomsky.

[19] Nick Routley, *The Autonomy of the 2 trillion Covid-19 Stimulus Bill,* THE VIRTUAL CAPITALIST, (Mar. 30, 2020) , https://www.visualcapitalist.com/the-anatomy-of-the-2-trillion-covid-19-stimulus-bill/.

[20] *The Keystone XL Pipeline has won approval in Nebraska*, THE ECONOMIST (Nov. 25, 2017, Chicago), https://www.economist.com/united-states/2017/11/25/the-keystone-xl-pipeline-has-won-approval-in-nebraska.

profits by announcing an indefinite suspension period of environmental regulations. The new policy formulated by the Capitalist governmental agency provides undue freedom and self-governing provisions of "acting reasonably", leaving it unsupervised by any governmental control. The government has given an open gateway to the major polluters in the country to justify their violations by citing the pandemic as the crucial cause of their lapses.[21]

V. INDIA'S DIG AT DISASTER CAPITALISM

Subsequent to a full-length deliberation on the shock doctrine, it is imperative to understand that though the doctrine is mainly in relation to the development of American and European economies; the Canadian author has categorised India as an exception. A few observations made by Klein included instances like the slow diversion of health and education sector towards privatisation and minimisation of good welfare schemes including pensions, an abrupt end to the desirable environment, and labour laws that once existed, the abruption now clearer with the recent environment bill[22] being heavily deliberated and the code associated to wages.[23] This is to say considering the last thirty years, capitalism has unknowingly hit India extremely hard without the citizens realising it, and the public sector subjected to being scattered.[24]

However, in the wake of Covid-19, all these observations made by the visionary author stand corrected in all aspects. The apparent economic fracture in the economy has been visible in golden light very recently. It is important to understand that the current Indian Government has utilised the current crisis and has pushed forward its policy which directly waters the roots of disaster capitalism. The *Aatmanirbhar Bharat Abhiyaan*[25] announced by the government has put forward the vision and desirable assumptions of the shock doctrine in relation to the present Indian economic status. The stated elements, that form the basis of Disaster Capitalism have been arranged very

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[21] Cynthia Gilles, *Next Generation Compliance: Environmental Regulation for the Modern Era,* HARVARD LAW SCHOOL ENVIRONMENTAL & ENERGY LAW PROGRAM, http://eelp.law.harvard.edu/wp-content/uploads/Cynthia-Giles-Intro-FINAL.pdf.

[22] MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION (Mar. 2020).

[23] MINISTRY OF LABOUR AND EMPLOYMENT, DRAFT CODE ON WAGES(CENTRAL) RULES (July 10, 2020).

[24] Harshvardhan, *COVID-19 and Disaster Capitalism in India*, JAMHOOR, (Aug. 22, 2020), https://www.jamhoor.org/read/2020/8/22/covid-19-and-disaster-capitalism-in-india.

[25] MINISTRY OF FINANCE, *Presentation made by Union Finance & Corporate Affairs Minister Smt. Nirmala Sitharaman under Aatmanirbhar Bharat Abhiyaan to support Indian economy in fight against COVID-19*, (May 13, 2020), https://static.pib.gov.in/WriteReadData/userfiles/Aatmanirbhar%20Presentation%20Part1%20Business%20including%20MSMEs%2013-5-2020.pdf.

strategically, "*long term privatisation schemes, public sector deregulations, disturbed labour law policy and finally suppression of rebels and religious minority have been placed very well.*[26]"

NITI Aayog and the Prime Minister of India stated that "crisis has to be made an opportunity". However, we failed to understand the gravity of the situation or provide a clear interpretation for the same. Here comes the question of whether it would be legal to take advantage out of a crisis. India has no defined law governing this unaddressed area of concern. Currently, the Indian government has made the following reforms which are significantly aimed at practicing disaster capitalism and are against the concept of organised welfare economy in India.

In the last few months of the pandemic, the government has taken decisions founded on the cabinet and standing committee deliberations which do not stand the democratic structure of the country.[27] For instance, modified reforms associated with new legal framework of environmental law. The 2020 EIA draft includes almost all the relevant court orders since 2006, in order to ensure that the EIA process is faster and more transparent. The 2020 draft has given permission under "post facto clearance of project"[28] which denotes that the project can continue provided that the owner has adhered to the obligation of paying a fine of Rs.1000 to Rs.5000 per day in case they report to the authority. The fun fact here is the dependence of the law formulator on the law violator and the fact that mere payment of a fine is not a difficulty for such a large company and the environmental loss so made will be irreversible. There is yet another section that says that any project information that concerns national defence, security or involving strategic consideration, will not be revealed to the public and the category of information would be decided by the government. The problem that lies is the unduly wide scope of the word strategic and that the word is not defined anywhere. Thus, this law can be concluded to be quite arbitrary by nature.[29]

The B2 list now includes waterways and the expansion of national highways.[30] The project in the B2 list does not need an extensive EIA regulation. Taking that into consideration, building road

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[26] Anita Gurumurthy, Nandini Chami, *Profiteering from the pandemic: How India's lockdown paved the way for big e-commerce disaster capitalism*, HEINRICH BOLL STIFTUNG BRUSSELS, (June 19, 2020), https://eu.boell.org/en/2020/06/19/profiteering-pandemic-how-indias-lockdown-paved-way-big-e-commerce-disaster-capitalism.

[27] GEIR HEIERSTAD, ARILD RUUD, INDIA'S DEMOCRACIES DIVERSITY, CO-OPTATION, RESISTANCE (Universiteitsforlaget 2016).

[28] MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION, §20(5) (Mar. 2020).

[29] Section 5(7), Ministry of Environment, Forest and Climate Change, Environment Impact Assessment Notification, §5(7) (2000).

[30] *Id.,* §4(1).

infrastructure especially in border areas has become of strategic importance owing to the current moves in Chinese Diplomacy. However, the definition of border reads as "100 Km. aerial distance from the Line of Actual Control with bordering countries of India."[31] This 100 Km. will include most of North-eastern India which provides ample scope of risk to the territorial sovereignty of the nation. In this draft the 1, the 50,000 Sq. metres can be built without environmental clearance, which was only 20,000 Sq. metres according to the former regulation. This prominent difference in figures raises a plethora of concerns. Another clause aims at reducing the public participation in environmental cases will reduce to zero. Henceforth, only two entities extending to the government authority and the violator himself can take cognizance of the violation, and no public-spirited individual or group can report an environmental violation.[32] The draft is also inclined towards shortening the public consultation days from 30 days to 20 days. It can be safely said that while 30 days was an insufficient period in many cases, the current reduction clearly aggravates the concern.[33] These measures function as proper nourishment so as to make the soil for Disaster Capitalism more fertile and richer.

Next in line of deliberation is the Labour law arena. The labour laws have been reduced or diluted and the major laws that provided safety to laborers in the form of the Minimum Wages Act of 1948, the Factories Act of 1948, the Payment of Bonus Act of 1965, and the Contract Labour Act of 1970, among others have been removed thus providing more power to the capitalism claim. The Public Sector Undertakings are no exception to this phenomenon. The organisational structure of these Companies has been immensely disturbed and FDI limits have reached sky limits after expansion. The long financial relief that was spread over so many days by the finance mister while the move was a future step to culminate Disaster Capitalism by long term privatisation.

The auctioning of airports, privatizing electricity suppliers in Union Territories, privatisation of railways, auctioning of 41 coal plants, and the biggest shock of them all was the privatisation of the space sector all of which has a deregulating effect on the public sector and in the camouflage of kick-starting the process of converting crisis into opportunity. We also note the concept of factor payment,[34] in economics that correlates the factors of land, labour, capital and entrepreneur to rent,

[31] MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION, §2(6) (Mar. 2020).

[32] MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION, §22 (Mar. 2020).

[33] MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION, §14 (Mar. 2020).

[34] Kathryn G. Marshall, *Factor payment shares in a large cross-section of countries*, California Polytechnic State University San Luis Obispo, (Oct. 20, 2012, https://www.dartmouth.edu/neudc2012/docs/paper_146.pdf (15 September 2020)).

wages, interest, and profit respectively. A closer look at the policies would reveal how the recent pandemic reform has paved the way to Disaster Capitalism. The EIA 2020 has resolved issues of land and rent, the labour law has resolved the issue of labour and finally the full sent of grants and relief from the government has resolved the issue of capital and thus assisted in the clear birth of Disaster Capitalism in India.

VI. ANALYSIS OF THE STATUS-QUO

The Covid-19 pandemic has given rise to a once-in-a-century type crisis that is unique both in terms of magnitude and extent of spread. The unprecedented health emergency has struck such segments of the society that would have never faced such a situation in ordinary times. As far as capitalism is concerned, it existed as a deep-rooted menace to society even before the onset of the pandemic. The same was time and again seen through wealth concentration with major emphasis on the healthcare sector- how much it costs and who gets access. The system has come to be a largely privatised one controlled and owned by private players which has made the facilities a scarily expensive proposition for the middle-income groups. For instance, the percentage of the population in the United States that is dependent on private health insurance stands at 91.5%.[35] It was further found that majority of the people are either underinsured or uninsured and medical emergency is one of the most recognizable causes of bankruptcy. This problem has seen an aggravated form during the Covid-19 pandemic. Despite regular Government plans and directives around the globe, crucial supplies like masks, PPE kits and ventilators have seen major shortage alerts. A large majority of the population in many countries have perished not because of the virus *per se* but owing to the lack of access to adequate health care and protective gear or due to their inability to bear the exorbitant medical expenses.

Back in 2015, the World Health Organisation listed coronavirus as one of the top emerging diseases that could lead to an epidemic.[36] This priority list, which focuses on hazardous diseases that are most likely to cause epidemics, is the backbone of the new WHO Blueprint for research and preparation development preparation. The Blueprint will examine behavioural treatments as well as bridge important gaps in scientific understanding, in addition to pushing for the beginning or

[35] Katherine Keisler-Starkey and Lisa N. Bunch, *Health Insurance Coverage in the United States:2019,* UNITED STATES CENSUS BUREAU, Report Number P60-271, (Sept. 15, 2020).

[36] WORLD HEALTH ORGANISATION, *First list of top emerging diseases likely to cause major epidemics*, (Dec. 2015), https://www.who.int/news-room/events/detail/2015/12/08/default-calendar/december-2015---first-list-of-top-emerging-diseases-likely-to-cause-major-epidemics.

development of diagnostics, vaccines, and medicines for illnesses. So how is it that the biggest pharmaceutical companies have been caught off-guard by the onset of the pandemic? The answer to this lies in commercial considerations over which serious matters like pandemic preparedness are held hostage by the pharma companies. The same rationale was uncovered by a study conducted by a Brussels Bases Research Centre, the Corporate Europe Observatory in May 2020.[37] The investigation published that Innovations Medicines Initiative, the world's biggest Public-Private Partnership in life sciences among major pharma companies with funds worth billions of dollars had turned down working on pathogens like coronavirus in 2017. Instead, large amounts of the funds were directed to commercially profitable projects. It can be inferred from the above instances that capitalism existed as a menace that induced the pandemic to turn into a disaster. During the outbreak, there was also a significant change in drug commercialization financing. Government entities and charitable groups are pledging huge sums to assist not just studies but also early product innovation, production capability growth, and optimal logistics providers. The Indian government decided agreed to provide Serum Institute of India and Bharat Biotech a loan of more than Rs 4,500 crore to assist enhance vaccine manufacturing in the nation.[38]

When the world economy was grappling with the casualties of the ongoing pandemic, another aspect that caught headlines was the investments made by corporate giants towards vaccine development by famous personalities like Bill Gates, Mark Zuckerberg, Jeff Bezos, and so on. However, under the camouflage of societal contribution, the majority fails to realise that such attempts are band-aid solutions that are founded upon a ramshackle approach. Encouraging and applauding such actions is applauding and affirming that capitalism works for everyone. On the contrary, that very wealth is a result of collective creation and not the individual creation of these business giants. It is high time that allowing such actions as a distraction from meaningful changes and rampant corporate tax avoidance is refrained, thus preventing the concentration of wealth. One striking element of the present downturn in the economy is that, whilst the actual economy has declined dramatically, equity markets, particularly in the United States, have recovered after a catastrophic drop. This is connected to some experts' mistaken hope that the market would revive as immediately as the lockdowns expire, but no one knows if that will happen, but somehow, a

[37] *Pharma Industry's EU Lobbying*, CORPORATE EUROPE OBSERVATORY, (May 31, 2021), https://corporateeurope.org/en/2021/05/big-pharmas-lobbying-firepower-brussels-least-eu36-million-year-and-likely-far-more.

[38] *Covid-19: Vaccine companies Serum Institute, Bharat Biotech get govt's Rs 4,500 crore advance*, THE TIMES OF INDIA, (Apr. 20, 2021), https://timesofindia.indiatimes.com/business/india-business/finance-minister-approves-advance-payment-of-rs-4567-crore-to-serum-institute-of-india-bharat-biotech/articleshow/82149322.cms.

quick recovery is improbable. The fundamental driver of the stock market's rise is central banks' massive cash infusions into capital markets, which are being used to buy bond funds and other investment derivatives. This includes a record €870 billion in European Central Bank contracts.[39] Further, the pandemic has momentarily suspended the hierarchy of labour around the economic systems of the world. For instance, the proposed post-Brexit immigration controls in the United Kingdom categorised essential workers as underpaid and under skilled to receive visas to work in the country. These approaches have created economic voids for workers working in the healthcare sector who are unable to live on the earnings drawn from their services. Price gauge for basic healthcare amenities which has been discussed before, along with shortage alerts at crucial periods has been kept obscured from public scrutiny at a time when the people are already reeling under the emotional and economic burden of a pandemic.

According to a New York Times story, Amazon claimed nearly a 200-percent increase in revenues, aided by most of North America's rapid migration to entirely online purchasing. Amazon's revenues were $96.1 billion, up 37% over the previous year, with earnings reaching a staggering US$6.3 billion. The epidemic has enhanced not just the company's profitability but also its growth. Amazon increased its fulfilment capacity by 50% in 2020, employing more than 250,000 people. Amazon now engages over one million individuals globally for the very first time in its corporate history.[40]

[39] Jorge Valero, *ECB unveils €750 billion stimulus against coronavirus*, EURACTIV, (Mar. 19, 2020), https://www.euractiv.com/section/coronavirus/news/ecb-unveils-e750-billion-stimulus-against-coronavirus/.
[40] Bruce Takefman, *Amazon profits increased nearly 200% since start of covid-19 pandemic,* RESEARCH FDI INVESTMENT ATTRACTION, (Jan. 06, 2021), https://researchfdi.com/amazon-covid-19-pandemic-profits/.

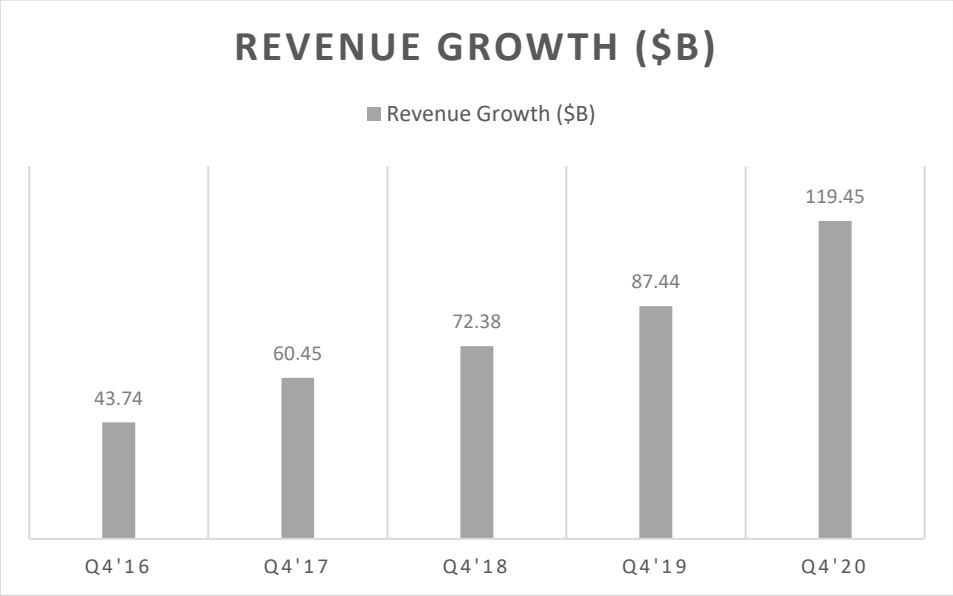

Figure 1: Amazon Inc. Quarter 4 Revenues (FY16-FY20)[41]

Capitalism, as it has done in prior crises, will survive this one as well. Capitalism's basic structures are generally slow to alter. However, they may and do alter, particularly at crucial historical junctures like wars and economic crises – or, possibly, pandemics. Longer-term considerations – such as the need to establish a more equal playing field versus businesses helped by economic players. There will be continued pressure on governments to maintain or enhance current levels of state involvement, regardless of how quickly the global economy recovers from the crisis.

VII. THE LACUNA OF LEGISLATIVE BACKING TO CURB DISASTER CAPITALISM

The need for legislation to regulate disaster capitalism is being heavily felt around the globe in the unprecedented times brought about by the coronavirus pandemic. Quite a number of industries have started adopting means to draw assistance for bailouts resulting from their own business models. For instance, the Airline Industry has faced the greatest demand shock in history as a result of the fast spread of the coronavirus pandemic. Overnight demand has dissipated, and with each passing day, news of airlines grounding whole fleets emerges. In the last five years, airlines have seen various degrees of profitability. However, when looking at the industry's cash levels, they have

[41] S&P GLOBAL MARKET INTELLIGENCE, estimate as of Nov 23, 2020, https://www.spglobal.com/marketintelligence/en/.

been low. It is none other than capitalism which is allowing losses to be socialised at times of crisis and outside the crisis, allowing the gains always to be privatised. There is a need to deconstruct the idea of capitalism through proper legislative formulations that will prioritize recognition of the merit associated with collective action over individual attempts.

The legal lacuna has also created voids for strong governments to undertake decisions that would have attracted strong public scrutiny in ordinary times. Both the Indian and US governments have eased environmental requirements for industries to facilitate commercial growth. This brings to light three fundamental problems of capitalism. *First*, capitalism relies on perpetual economic growth, which would have been a success if the planet was also growing at an equivalent rate, which is not happening. *Secondly*, there seems to be an extraordinary belief associated with capitalism that numbers in the bank account give one the right to own natural wealth. A fourth home in the countryside or a private jet on the other hand ends up taking away natural wealth from the planet. *Thirdly*, the very idea of capitalism is based on thrashing the ecological system under the camouflage of private luxury to the privileged class of the society. Illegal deforestation and mapping out wildlife stand as the leading causes for the origination of zoonotic diseases.

The need for regulating such acts through structural laws stands even stronger during health crises like the present one since most of them tend to become obscured from the scrutiny of the public reeling under the stress of a pandemic. Governments around the world stand as beholders of global ethics. Instead of allowing major corporations to overshadow the collective actions of many individuals or passing the blame for structural voids to individual people, it becomes imperative for the global leaders to formulate legislative penalties for acts that go against the basic ethos of human dignity and right to life. Such a law should also put bars on the private players from exploiting the hierarchy of labour by denying basic amenities to the weaker sections in terms of healthcare and livelihood. Further, statutory obligations are to be laid on big corporations to invest funds that are of importance from the viewpoint of lives and not commercial gains.

VIII. WHETHER THE NEGATIVE IMPACTS OF CAPITALISM OUTWEIGHS THE POSITIVE EFFECTS ARISING OUT OF IT?

Venture capitalists are salivating at the prospect of profiting from the COVID-19 pandemic, whereas many smaller businesses are still battling to stay afloat, hedge fund managers and private equity view this as a favourable moment to lend them money at exorbitant interest rates. Many of these companies may take these dangerous loans because they have no other choices, making these

firms wealthy in the meantime. Additionally, we have encountered incredible instances of communities banding together to help people who are most susceptible to COVID-19 and virus-related problems. Collaboration among different systems has cropped up in Seattle to transport groceries and sanitation supplies to the households of those who are economically suffering or unwell, with poor communities of colour being the worst impacted. Such networks are the polar opposite of capitalism's response to the virus; rather than profiting from the predicament, these grassroots-level groups voluntarily distribute resources to areas that were already vulnerable due to pre-COVID inequities.

However, the negative impacts outweigh the few favourable outcomes that have proved to be of gain to a handful of those belonging to the higher income group. High-income households investing their newfound fortune and spare time in individualized leisure pursuits, such as growing hybrid produce in their backyards, gated off from the less fortunate. A mongering scare about food scarcity and illness has resulted in stockpiling and monopolistic practices of vital sanitary items like sanitizers and antibacterial wipes in reaction to the crisis. Instead of donating these items to people in need, others have purchased mass amounts to resell at excessive rates when normal stores' stocks run out. Moreover, attempts of various governments in reducing payroll taxes have put tremendous pressure on the future of social security funding for the aged and needy. The strive towards turning the sinister virus into an instrument to make profits has left the poor and vulnerable devasted and devoid of crucial medical care and a healthy livelihood. When weighed on a scale, the negative impacts have clearly outweighed the good the pandemic has brought to the privileged.

IX. THE WAY FORWARD AND PLAUSIBLE RECOMMENDATIONS

As a part of the research, the following are some of the plausible suggestions by the authors to fill the legal voids and thereby address the menace of the growing trend of disaster capitalism around the globe:

(A) MAINTENANCE OF RECORD FOR GOODS AND SERVICES BEING BOUGHT AND SOLD

For any government to work efficiently it becomes important that the demographic and financial data is available to understand, implement and target the vulnerable part of the society in situations

of disaster. Developed countries like the USA[42] and UK[43] keep a systematic check on their population which makes it easier to bring goods and services to a large part of society. However, such data comes with its own complications since it can be used effectively to track a person. Thus, transparency in such a system is also required. In India, the AADHAR card was introduced with the same aim, however, the privacy issues have created more chaos than relief for the public.

There should be a policy that mandates the government to disclose expenditures and supplies during such a crisis. Although there is a system of RTI in India, most of the time, the information is not provided. Thus, for a particular disaster activity, data relating to the expenditure should be provided transparently. There should be a committee to oversee that neither the government nor any corporate business is trying to gain an advantage of the situation. Thus, even for private enterprises, during such period, it should be made compulsory to disclose such data and the government should be able to restrict any hike in price beyond a reasonable amount. This should apply to areas affected with drought, flood, earthquake, or any other calamity. It has been seen several times that the price of the commodities ends hiking in such situations as the public has no option but to buy from certain spaces.[44]

The data of the public and the logistic of every good being used and sold will keep a record if the required help and commodities are reaching the affected people which will minimize the unnecessary profit gains made by the corporate.

(B) PROVISION OF LOGISTICS FOR ESSENTIAL COMMODITIES

In March 2020, the Government of India included surgical masks and sanitizers as an essential commodity under the Essential Commodities Act, 1955.[45] However, what happened in actuality is very different from what was supposed to happen. This is not just about the pandemic, any natural disaster thereof requires proper essential materials to be provided to the public. Thus, logistic data of such specific materials being stored, supplied, or transported has to be taken care of. During such specific periods, it has to be made sure that the essential commodities reach the affected area to affected people at reasonable prices. The logistical support will also prevent the holding of goods during such a period and will increase efficiency. Furthermore, the pricing of such commodities

[42] SOCIAL SECURITY NUMBER ADMINISTRATION, https://www.ssa.gov/ssnumber/ (last visited May 30 2022).

[43] UNITED KINGDOM GOVERNMENT, NATIONAL INSURANCE NUMBER, GOV. UK., https://www.gov.uk/apply-national-insurance-number (last visited May 30 2022).

[44] Valentina Stoevska, *Covid -19 is driving up food prices all over the world*, INTERNATIONAL LABOUR ORGANISATION, (Dec. 9, 2020), https://ilostat.ilo.org/covid-19-is-driving-up-food-prices-all-over-the-world/.

[45] AMLEGALS, *COVID- 19 Outbreak How about essential commodities?,* MONDAQ (May 5, 2020), https://www.mondaq.com/india/operational-impacts-and-strategy/928382/covid-19-outbreak-how-about-essential-commodities.

should be determined by the government in such circumstances for such a period to make available to the public and a minimum price policy to be provided for the vulnerable section of the society.

(C) REDRESSAL MECHANISM

The present pandemic has caught the attention of the powers that government holds in disaster situations and thus, in some instances, the government can take measures which are intended to boost the economy, but may prove to be disastrous for the vulnerable section of the society. Certain cases could arise where private enterprises might affect the market in a way that might prove to be a huge loss to the vulnerable part of the society. In order to resolve such issues, a redressal mechanism especially for such period should be constituted so that the aggrieved person does not have to go through the litigation process and a speedy process like arbitration can solve any such issue.

(D) TRANSPARENT INFORMATION SYSTEM

In any disastrous situation, information becomes a crucial point. With the rapid advance social media, the corporate hubs may advertise more or stir certain information in a certain direction to market their product. Although competition law is in place for such issues but during such disasters, it is crucial to take every aspect seriously as it leads to violation of human rights, justice, fairness, and lives of people at a very huge level. Thus, transparency is required. Provisions should be made to make sure that the government or the enterprise encloses full information of their product and it is made sure through every means that it has reached even rural areas by every possible means. Penalizing provisions should be provided strictly making liable any person under this special circumstance.

(E) ENHANCING PROFIT AND ECONOMIC PROSPERITY THROUGH OTHER MEANS

Promoting Corporate Social Responsibility[46] among the private corporate may be one of the many ways by which the economy can be balanced by encouraging corporations to invest in social services along with profit-making process. Although it cannot be mandated, provisions can be made with regards to use of a certain small percentage of the big corporate or giant companies to invest in a scheme to be used for such reliefs. This can be done based on the market of the specific company.

(F) CONSTITUTE A SPECIAL COMMITTEE

[46] UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANISATION, *Corporate Social Responsibility: 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 (last visited May 30 2022).

As government and private entities both are under the same umbrella in this doctrine, it is crucial that an independent committee is set up to review the task, maintain, the records, and oversee the results and working of the administration. The Committee should consist of majority of people advanced and educated in such fields as to understand the impact and working of the government.

(G) ADDRESS THE SOCIAL & INCOME INEQUALITIES

In the UK, the numbers might be high but the situation arising out of the pandemic was still controlled in an efficient manner. In countries like USA[47] and India, it created much havoc due to the inequalities in income in the society. Even though one is equipped with health facilities and the other got a lot of help from various other countries, there were still rising cases and more deaths as compared to other countries. Laws should provide a special scheme for such a section of society. Financial assistance and any other assistance (food or shelter) depending upon the disaster should be provided. Reaching the affected section of the public becomes an issue and majorly administrative work. Thus, for an effective administration penalty should be defined in case corruption or held by a government officer or a private entity emerges. This can be done to make sure that the public does not have to buy core facilities from corporate giants at higher prices.

(H) CLEAR DISTRIBUTION OF POWERS

In the disaster management process, the powers of the state and the centre are different which may create conflict in certain instances.[48] Therefore, for the reduction of capitalization, it is crucial that there is a clear division of powers between the centre and states in consonance as prescribed under the Constitution.[49] The division between the powers will allow for maximum efficient functioning which will be governed and thus providing inquisitive ways to provide relief to people and keeping corporate policies within a limited frame. Moreover, it will also allow curbing the confusing federal scheme faced by India during the beginning of the pandemic as the states and the centre struggled with the decision-making power.[50]

(I) SUSTAINABLE DEVELOPMENT AS A MAJOR CONSIDERATION

[47] Jean Ait Belkhir, *Race, Gender and Class Lessons from Hurricane Katrina*, RACE, GENDER & CLASS, 2007, at 120, 131.
[48] April Porteria, *Making Money out of People's Misery: Has Disaster Capitalism Taken over Post- Haiyan Philippines?* PHILIPP. SOCIOL. REV., 2015, at 179, 199.
[49] INDIA CONST. Sched. 7.
[50] Dr. Ramachandran, *Coronavirus and lessons for improving urban governance*, DECCAN CHRONICLE, (July 5, 2020), https://www.deccanchronicle.com/opinion/op-ed/050720/coronavirus-and-lessons-for-improving-urban-governance.html; UN India, *Take action with is in cities and communities*, UNITED NATIONS IN INDIA, https://in.one.un.org/can-covid-19-fill-the-void-of-city-governance-for-urban-transformation/.

The menaces of disaster capitalism affect climate change as well which is aggravated in less developed societies. Sustainable development is an important part that has been gaining significance through judgments in various courts such as *Narmada Bachao case,*[51] *Environ- Legal Action case,*[52] and the *Godavaraman case,*[53] where courts have recognized the need to balance capitalism and protect environmental requirements. As a preventive measure, for any disaster, it becomes crucial to acknowledge the environmental disasters that may eventually lead to harm for the vulnerable people.[54] Natural disasters and loss to the public form a vicious cycle and thus to curb disaster capitalism it is crucial that preventive measures are taken to minimize the effect of the same. Sustainable development has been recorded as an essential aspect of development by many industries and as an awareness strategy and preventive measure it can be used to minimize the effect of disaster capitalism. Thus, provisions regarding the use and awareness of sustainable development, especially in low-income areas, should be included and the function of the same should be regulated by the Committee.

Disaster Capitalism stems from the deep-rooted income inequality factor in a majority of the countries. The difference in income makes '*richer rich and poor poorer'*. It becomes the responsibility of the Government to make sure that assistance is reached to every social section and that no undue advantage is taken. No doubt that it becomes difficult to curb these issues, especially in a developing country where development and social advancement have to grow side by side. Advancing economy and social structure have always been on the fence and no doubt any corporate party tends to think of profit rather any social structure, which is not wrong as it is the corporate culture. But it has to be kept in mind that during situations where there is a question of life and death, monetary gains and profits should be neglected and human rights should be given preference over anything else.

X. CONCLUSION

While some are struck by the misery and struggle of combatting the menace of Covid-19 from the face of the earth, quite a few others chose to make a fortune from the catastrophic setback. Born out of a combination of political patronage and neoliberal policies, disaster capitalism can be

[51] Narmada Bachao Andolan v. Union of India, [2000] INSC 518.
[52] Indian Council for Enviro-Legal Action v Union of India, 1996 AIR 1446.
[53] T.N. Godavaraman Thirumulpad v. Union of India, (1997) 2 SCC 267.
[54] Robert Fletcher, *Capitalizing on chaos: Climate Change and Disaster Capitalism*, EPHEMERA JOURNAL, Feb. 2022, http://www.ephemerajournal.org/contribution/capitalizing-chaos-climate-change-and-disaster-capitalism.

rightfully termed a phenomenon that needs instant insulation to save the future of an organised society from the shackles of such distressing attempts. There is no element of surprise in ascertaining the run for profits even in the most distressing disasters considering the fact that we are in the era of neoliberal globalisation. As stated earlier, the state in such actions of disaster profiteering delves in as a facilitator of the private sector who is the primary beneficiaries of the mechanism. The role of the state thereby ends up pushing the general population into dispossession and compels them to feel the cringe of disempowerment. Empowerment and a degree of resistance can prevent the unbridled capitalism from becoming a continued phenomenon rather than a shock.

The nuances projected by disaster capitalism, which certainly records to a higher number than the benefits drawn, can be traced down to a manifested notion that the private sector is more efficient and equipped in terms of technology, finances, and organisational structuring. Why should we stick to such a touted notion instead of empowering and bringing the Government establishments at par? During disasters and tumultuous times, it's vital to remember that people will always have a different perspective. They understand that this is a chance to use the conditions in order to benefit certain parties and agendas, rather than to serve society as a whole. Studies suggested that in the aftermath of the 2004 tsunami in Sri Lanka, the Government had a crucial role in retitling and recording the list of survivors as an aiding hand to the humanitarian organisations.[55] Therefore, being the primary stakeholder of trust for the general public, who are worst-hit by such catastrophic disasters, it is upon a strong Government to decide whether to facilitate the corrupt commercial-friendly motives of the private corporations by exploiting the miseries of the survivors, or to stand by them.

[55] Oli Brown, Alec Crawford, *Addressing Land Ownerships after Natural Disasters*, (INTERNATIONAL INSTITUTE OF SUSTAINABLE DEVELOPMENT 2006).

ARTICLE

DIGITAL RIGHTS OF CHILDREN: A FIGHT AGAINST THE DISREGARD

*-Anushka Mehta and Cheshta Tater***

ABSTRACT

Legislations that actualise digital rights in the online realm often side-line children. Parents or guardians are given the power to act on their behalf. This is detrimental to their development which is significantly aided and enhanced by digital resources such as educational interactive interfaces and audio-visual media for entertainment. While it is true that children require special protection owing to their susceptibility to online threats emerging from anti-social elements, a balance between their best interests and their autonomy must be maintained. The authors delve into a child's right to informational privacy and digital consent across jurisdictions, with emphasis on India. Children themselves should be able to choose their online activities and provide consent prior to processing of their data by the service provider. This paper advocates reduction of the minimum age requirement, known as the 'digital age of consent'. The proposed age limit of eighteen years, below which consent is vested with the parents, as envisaged under the Personal Data Protection Bill, 2019, should be lowered to sixteen years, to prevent undue restrictions upon the child's growth. This paper makes a case for the protection of children from over-sharing of information by parents regarding the child, which causes anxiety amongst children and affects their future career prospects, among its other harms.

Keywords: data protection, sharenting, child rights, privacy policies, digital age of consent.

I. INTRODUCTION

The internet has become a necessity in India and is used across all generations, with more than 66 million users being minors.[1] The United Nations Children's Fund ("UNICEF") estimates that 71

**Third Year, B.L.S. LL.B.; GOVERNMENT LAW COLLEGE, MUMBAI

[1] INTERNET AND MOBILE ASSOCIATION OF INDIA, INDIA INTERNET 3 (Nielsen, 2019) [hereinafter "IAMAI REPORT 2019"].

per cent of young people are already online, constituting one in three total users.[2] The internet provides children with more freedom to communicate, learn, create, share, and engage with society than ever before. On the face of it, the internet appears to be a boon but its increased penetration into our lives comes with a consequent increase in personal data exchanges. The downside of the same can be seen through data breaches such as those of Aadhaar,[3] WhatsApp,[4] and Facebook,[5] indicating that data is neither safe in the hands of the government nor private companies (hereinafter "data fiduciaries"). While there is sufficient awareness about rights possessed by adults, the rights of the child are often ignored.

A child's path to legal recourse has traditionally been through his/her parents; but this paper delves into the facets of children's right to privacy, especially data protection, and the infringement of this right by their parents, whether knowingly or otherwise, while also advocating for the preservation of a child's autonomy in the online sphere.

Children form a vulnerable class of netizens who are deemed to be unable to comprehend the complexly structured privacy policies used by many apps and social media platforms, despite composing a large constituency of users of the internet.[6] Although there exists a requirement for higher levels of protection in the context of the virtual world for children,[7] certain issues go unnoticed by experts and parents alike. This has unfortunately led to a lack of legislation, expert opinion, and parental protection towards children's data. For the purposes of this paper, children aged between sixteen and eighteen years are deemed to be competent to consent to the processing of their personal data, whereas children below the age of sixteen should be consulted by their parents whenever the personal data of the former is under consideration.

The global consensus is that children merit special protection to ensure privacy of their personal data as they may be less aware of the risks, consequences, safeguards and their rights concerning

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[2] INTERNATIONAL TELECOMMUNICATION UNION & UNICEF, GUIDELINES FOR INDUSTRY ON CHILD ONLINE PROTECTION 6 (2020) [hereinafter "ITU & UNICEF, GUIDELINES FOR INDUSTRY"].

[3] Yogesh Sapkale, *Aadhaar Data Breach Largest in the World, says WEF's Global Risk Report and Avast*, MONEY LIFE (Feb. 19, 2019), https://www.moneylife.in/article/aadhaar-data-breach-largest-in-the-world-says-wefs-global-risk-report-and-avast/56384.html.

[4] Shaswati Das, *Centre Warns WhatsApp against any Further Breaches in Security*, LIVE MINT (Nov. 21, 2019, 12:21AM IST), https://www.livemint.com/news/india/no-further-breach-will-be-tolerated-india-warns-whatsapp-11574259913633.html.

[5] Shweta Ganjoo, *Facebook Faces Another Data Breach, Data of 267 Million Users Exposed*, INDIA TODAY (Dec. 20, 2019, 4:10PM IST), https://www.indiatoday.in/technology/news/story/facebook-data-of-267-million-users-exposed-online-1630084-2019-12-20.

[6] COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE B.N. SRIKRISHNA, A FREE AND FAIR DIGITAL ECONOMY PROTECTING PRIVACY: EMPOWERING INDIANS 45(2018) [hereinafter "SRIKRISHNA REPORT"].

[7] Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 633 (India) [hereinafter "*Puttaswamy*"].

the processing of personal data, especially online,[8] necessitating the framing of special provisions for their protection. There broadly exist, two schools of thought with respect to extending such protection to children. The first believes that the child is a person who is not physically and psychologically mature. The second, holds that a child is in the process of developing physically and mentally to become an adult. The rights of the child and the exercise of those rights should be expressed in a manner recognising both these perspectives.[9] The concept of digital age of consent, which signifies the age at which persons can consent to use of online services by themselves, under the General Data Protection Regulation ("GDPR")[10] is an attempt to maintain a balance between both these perspectives.

The primary issue at hand is the minimum age requirement to provide consent prior to the processing of a child's personal data. Age limits are a formal reflection of society's perception of the evolution of a child's capabilities so as to regulate his/her conduct in accordance with societal norms. It is the arbitrary fixing of high age limits in the digital sphere in India which will be argued against in this paper. Secondly, when such age requirements are set, parents are required to consent on behalf on their children. In the present age, this is a cause for alarm, with instances of children's privacy being breached by none other than their own parents or guardians, through the means of 'sharenting'. This takes away from the right to informational privacy of children, severely hampering their capacity to opt for legal recourse without the aid of their legal guardians as well as against them.

II. PROBLEMS IN THE STATUS QUO

Presently, no provision exists in India which vests in children the ability to grant, for themselves, the consent mandated by any online service provided by data fiduciaries. However, the Indian legal system allows for a provision to be enacted, which bestows upon children certain special rights, by virtue of the enabling clause under Article 15 of the Constitution of India ("Indian

[8]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC, 2016O.J. (L 119) 7 [hereinafter "GDPR"].

[9] European Union Article 29 Data Protection Working Party, Opinion 2/2009 on the protection of children's personal data (General Guidelines and the Special Case of Schools), 3, (Feb. 11, 2009), https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp160_en.pdf [hereinafter "EU Article 29 Working Party Opinion"].

[10] GDPR, *supra* note 8, art. 8, 2016O.J. (L 119) 37, 38.

Constitution"). Article 15(3) of the Indian Constitution allows the State to make special provisions for women and children, notwithstanding their equal status. Further, Article 39(f) envisages that children should be given opportunities and facilities to develop healthily. Similarly, under international law, the United Nations Convention on the Rights of the Child ("UNCRC"), to which India is a signatory, provides for the right to development of the child as well as the right to privacy.[11] These two rights are interrelated and can only be achieved by allowing for the child to make his/her own decision and to contribute to decisions being made about them.

Scaling back to the history of the UNCRC, during the second reading of the draft Convention by the Working Group to the Commission on Human Rights, India submitted the following proposal to the definition of "child" under Article 1:

> *"According to the present Convention a child is every human being up to the age of 18 years unless, under the law of his State, he has ceased to be a child earlier or different age-limits for different purposes are recognized."*[12]

Although this proposal was not ultimately included in the final text of the UNCRC, this shows that India's legislative intent has not been to restrict the definition of "child" to one who has not attained the age of eighteen years, but to allow for this age to be reduced or increased for various purposes as required. The same can be seen through various Indian legislations, such as the Juvenile Justice (Care and Protection of Children) Act, 2015 ("Juvenile Justice Act"), which provides that a child means a person who is below eighteen years old.[13] Also pertinent is the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 wherein a child is defined as a person who has not completed fourteen years of age.[14] Whereas, the Prohibition of Child Marriage Act, 2006 provides that a child is one who, if male, has not completed twenty-one years of age and, if female, has not completed eighteen years.[15] Although the Indian Contract Act, 1872[16] does not define the term child, it nullifies consent provided by a minor, a person below the age of eighteen years, and renders an agreement entered into by them void *ab initio*. The necessity of a

[11] United Nations Convention on the Rights of the Child art. 7, 16, 27, 29, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter "UNCRC"].

[12] 1 OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, LEGISLATIVE HISTORY OF THE CONVENTION ON CHILD RIGHTS 311 (2007), https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf.

[13] Juvenile Justice (Care and Protection of Children) Act, 2015, § 2(12), No. 2 of 2016 (India) [hereinafter "Juvenile Justice Act"].

[14] Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, § 2(ii), No. 61 of 1986 (India).

[15] Prohibition of Child Marriage Act, 2006, § 2(a), No. 6 of 2007 (India).

[16] The Indian Contract Act, 1872, §11, No. 9, Acts of Parliament, 1872 (India) [hereinafter "Indian Contract Act"].

carve out provision to supersede this deemed illegality of a minor's agreement vis-à-vis digital age of consent, has been deliberated upon later in this paper. In a similar vein to the above statues, it is required that an age limit lower than eighteen years be recognized for the purpose of digital consent provided by children when they engage in online services. This digital age of consent should be lowered to sixteen years, as explained subsequently, since minimum age requirements are not, in any case, uniform across all laws in India and the world.

The authors understand that age-based restrictions on competency to consent are required to protect the interest of those truly incapable of understanding the terms of service or the extent of personal information provided to the data fiduciary and its repercussions. However, the age of eighteen years is too high and has been arbitrarily decided upon, as is highlighted hereinafter.

(A) NEUROSCIENTIFIC APPROACH

Deviating from the legal framework and elucidating upon the biological and neuroscientific approach to a child's competence as per age, various neurologists claim that the 'adolescent' brain is not fully developed and therefore, incapable of reasoning.[17] However, studies show that prohibiting young people from engaging in certain activities is counterproductive because they lose opportunities to develop intuition through experience, which is critical for good decision-making and judgement.[18] Thus, the new proposition established is that some young people are sometimes at risk not because their brains are underdeveloped, but because they have not had the opportunity to develop the skills and judgment, which engagement in activities and experiences, supply.[19] Further, another study has shown that children are more careful about their privacy and restrict their profiles on social media[20] when compared to adults. A recent report shows that children, especially belonging to the twelve to seventeen years old age group, engage in strategies to keep their devices and online profiles safe from unwanted interference, emphasizing upon their understanding of privacy.[21] Children wish to experience the learning curve of navigating their

[17] Rachel Tompa, *This is Your Brain in Adolescence,* UC BERKLEY NEWS (Oct. 16, 2008), https://www.berkeley.edu/news/media/releases/2008/10/16_neurolaw.shtml.

[18]Judith Bessant, *Hard Wired for Risk: Neurological Science, "the Adolescent Brain" and Developmental Theory,* 11(3) J. YOUTH STUD.347, 358 (2008).

[19]*Id.* at 347, 358.

[20] Larry Magid, *Survey: Most Teens Take Steps to Protect their Privacy*, CNET (May 21, 2013, 9AM PT), http://www.cnet.com/uk/news/survey-most-teens-take-steps-to-protect-their-privacy-podcast/.

[21]SONIA LIVINGSTONE, MARIYA STOILOVA & RISHITA NANDAGIRI, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, CHILDREN'S DATA AND PRIVACY ONLINE: GROWING UP IN A DIGITAL AGE 10-19 (2019) [hereinafter "SONIA LIVINGSTONE"].

online presence, with parental guidance only in relatively complex situations such as making payments.

Another method of judging competency was developed through the Gillick case in England[22] where an unsuccessful attempt was made to stop doctors from giving contraceptive advice or treatment to under sixteen-year-olds without parental consent. The guidelines laid down, state that:

> *"As a matter of law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment, terminates if and when the child achieves sufficient understanding and intelligence to understand fully what is proposed [and has] sufficient discretion to enable him or her to make a wise choice in his or her interests."*

This test can be extended to evaluate the competence of children to provide consent with respect to their personal data.[23]

At this stage, a caveat regarding the limited scope of the appeal for lowering of the digital age of consent must be made. The authors neither endorse nor deny the need for lowering of the age of consent in other circumstances, such as engaging in sexual intercourse. Without prejudice to this, the arguments put forth by the way of this paper would not apply to lowering of the age of sexual consent, although one facet of privacy laid down in *K.S. Puttaswamy v. Union of India*[24] is decisional privacy which encompasses an ability to make decisions about one's intimate relationships. However, the ambit of this paper falls squarely within the limits of informational privacy.

Further, the rationale behind increasing the age of sexual consent from sixteen years to eighteen years was to reflect the changed attitude pursuant to the increase in age of marriage.[25] However, the reason, as explained hereinafter, for stipulating the digital age of consent as eighteen years is only to maintain consistency with existing laws.[26] Lastly, the Supreme Court has opined, based upon a large number of reports and studies, that sexual intercourse with a girl child below the age of eighteen years, is detrimental to her physical and mental well-being and also her social standing,

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[22] Gillick v. West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402 (HL).

[23] *What Is Valid Consent,* INFORMATION COMMISSIONER'S OFFICE, UK, https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/consent/what-is-valid-consent/#what8 (last visited Apr. 23, 2020).

[24] Puttaswamy, *supra* note 7, ¶250.

[25] Law Commission of India, Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence, Report No. 84, 8-9 (April 25, 1980).

[26] *See infra* SRIKRISHNA REPORT, note 57.

which are ordinarily of paramount importance to everybody.[27] No court has directed the age of sexual consent to be lowered, only passing observations have been suggested as obiter dicta.[28]

(B) SHARENTING

The heightened sensitivity displayed by children with regard to their understanding and need for privacy as emphasised upon earlier, brings to light another issue which has not been given due recognition and remedy. Social media has become a vital channel of daily interaction for many. Where 3.8 billion people of the global population are active social media users,[29] it is apparent that many of those are parents. Studies have shown that 80% of the children of such social media users, have an internet presence by the age of two years.[30] The UNICEF defines this overuse of social media by parents to share child-based content as 'sharenting'.[31]

The online sharing of parenting or 'sharenting' leads to creation of children's social media presence much before they even understand its meaning. The right to freedom of expression of these parents often trumps over the right to privacy of the children, primarily because parents are the ones making decisions on behalf of their children until the latter reach the age of majority. The information disclosed can range from images and names to medical issues, and from academic information to 'potty-training' videos. Not only could the availability of such content, online, cause embarrassment and resentment amongst children, but could also be misused by child predators. Moreover, once information is made available on the internet, it always stays there, finding its place in the dark web and deep web, even if it removed from the surface web. Therefore, parents must be very cautious of what they share, even on their private profiles.

The issues arising due to sharenting are unintentional and these "sweet" gestures are largely unaddressed.[32] In order to understand the conflict at hand, it is crucial to first explore the nature

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[27] Independent Thought v. Union of India, (2017) 10 SCC 800, 829, 848 (India).

[28] Sabari v. Inspector of Police & Ors., 2019 SCC OnLine Mad 18850, ¶40 (India).

[29] Simon Kemp, *Digital 2020: 3.8 Billion People Use Social Media,* WE ARE SOCIAL (Jan. 30, 2020), https://wearesocial.com/blog/2020/01/digital-2020-3-8-billion-people-use-social-media.

[30] *Digital Birth: Welcome to the Online World,* BUSINESS WIRE (Oct. 6, 2010 1:02PM EDT), https://www.businesswire.com/news/home/20101006006722/en/Digital-Birth-Online-World.

[31] MARIO VIOLA DE AZEVEDO CUNHA, UNICEF OFFICE OF RESEARCH – INNOCENTI, CHILD PRIVACY IN THE AGE OF WEB 2.0 AND 3.0: CHALLENGES AND OPPORTUNITIES FOR POLICY - INNOCENTI DISCUSSION PAPER 2017-03 4 (Dec. 2017), https://www.unicef-irc.org/publications/pdf/Child_privacy_challenges_opportunities.pdf [hereinafter "UNICEF - INNOCENTI DISCUSSION PAPER"].

[32] Stacey Steinberg, *Sharenting: Children's Privacy in the Age of Social Media,* 66 EMORY L.J. 839, 843 (2017) [hereinafter "Stacey, *Sharenting*"].

of the content posted by parents and further how it may affect the child, in the immediate and distant future.

(C) PURPOSES AND CONSEQUENCES OF SHARENTING

Parents, everywhere, indulge in sharenting for different reasons. While some do it out of love for their children, others do it for community support, and some even for money or to boast about their child's accomplishments. The ability to connect with peers through social media opens a gateway of parenting techniques and support groups for parents.[33] This has allowed many to feel a sense of solidarity, connectedness and a sense of greater wellbeing,[34] creating a belief in themselves that they have become better parents. Several studies show that parents receive support and positivity through sharenting,[35] making them feel good about their full-time task of parenting. This enables them to share their experiences with others, while still being beside their children, even documenting their childhood on a single platform which is immortal and just a click away.

On the contrary, some parents tend to disregard the vulnerable link between the online and offline lives of children, severely impacting their future. It is important to note that adults usually do not post similar content about themselves that they share involving their children. They often fail to draw a line between 'good' and 'bad' sharenting, by publicly shaming their child in an attempt to instil discipline.[36] Innocent pictures of diaper-clad babies are viewed as "cute" but such photographs may be altered and re-used on illegal websites to cater to child predators and paedophiles on the internet.[37] Apart from serious consequences such as that of child pornography, sexual grooming, solicitation, stalking, etc.,[38] sharenting is also known to cause embarrassment and anxiety in children[39] since they grow up with constant criticism from the vicious internet. There

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[33] Maeve Duggan, Amanda Lenhart, Cliff Lampe & Nicole Ellison, *Parents and Social Media,*PEW RESEARCH CENTER 3 (July 16, 2015), http://www.pewinternet.org/2015/07/16/parents-and-social-media [hereinafter "Maeve, *Parents and Social Media*"].

[34] Stacey, *Sharenting*, *supra* note 32, at 852.; Priya Kumar & Sarita Schoenebeck, *The Modern Day Baby Book: Enacting Good Mothering and Stewarding Privacy on Facebook, in* PROCEEDINGS OF THE 18TH ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 1302, 1304 (Association for Computing Machinery, New York, 2015) [hereinafter "Kumar & Schoenebeck"].

[35] Maeve, *Parents and Social Media, supra* note 28; Kumar & Schoenebeck*, supra* note 34, at 1302.

[36] Lisa Belkin, *Humiliating Children in Public: A New Parenting Trend?*, HUFFINGTON POST (Apr. 18, 2012 5:22PM EDT), http://www.huffingtonpost.com/lisa-belkin/humiliating-children-to-teach-them-_b_1435315.html.

[37] Stacey, *Sharenting*, *supra* note 32, at 847.

[38] UNICEF, THE STATE OF THE WORLD'S CHILDREN 2017: CHILDREN IN A DIGITAL WORLD 73 (Dec. 2017), https://www.unicef.org/publications/index_101992.html [hereinafter "UNICEF, The State of World's Children"].

[39]*Sharenting: Are You Ok with What Your Parents Post?,* BBC UK (Feb. 7, 2017, 1:23PM GMT), http://www.bbc.co.uk/newsround/38841469; *Parents on Social Media: Likes and Dislikes of Sharenting*; CS MOTT CHILDREN'S HOSPITAL (Mar. 16, 2015), https://mottpoll.org/reports-surveys/parents-social-media-likes-and-dislikes-sharenting; FAMILY ONLINE SAFETY INSTITUTE, PARENTS, PRIVACY & TECHNOLOGY USE 3, 22 (Nov. 17, 2015).

have also been instances wherein young adults have been rejected jobs based on online activity related to them.[40]

As the primary caretakers of their children, it is the parents' responsibility to be mindful of what they share regarding their child with their immediate connections and the rest of the world. However, it is argued by many parents that such mindfulness actually restricts their freedom of expression.[41] Given that most of the countries do not have specific laws relating to a child's privacy from their parents, the intersection of parents' rights and children's rights is not paid heed to. However, changing times and the dangers of the internet call for an immediate need to acknowledge the consequences of sharenting and afford protection to children by placing responsibility upon both data fiduciaries and parents. Such measures along with existing legislations in various jurisdictions are discussed below.

III. EXISTING LEGAL MECHANISMS

As mentioned above, very few countries provide mechanisms which allow children to take action against their parents, when the child's personal data is shared without their prior consent. However, the right to privacy is, universally, a fundamental right of all persons.[42] The protection which children seek from their parents in the digital space is a right they are entitled to. This furthers the notion of enabling children to access websites and applications based upon their competence to understand privacy risks associated with the internet as against their incapacity to contract below the age of 18 years, which has been arbitrarily fixed as the digital age of consent in India.

(A) India

In 2017, privacy was held to be a fundamental right in India,[43] enshrined under the right to life.[44] The Puttaswamy judgment recognised the vulnerable position of children—in both the virtual and real-world—and stated that children require special protection of their privacy.[45] Since then, efforts

[40]UNICEF - INNOCENTI DISCUSSION PAPER, *supra* note 31, at 7.
[41]ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE PROTECTION OF CHILDREN ONLINE: REPORT ON RISKS FACED BY CHILDREN ONLINE AND POLICIES TO PROTECT THEM 37 (2012).
[42] International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 UNTS 171; Universal Declaration of Human Rights art. 12, Dec. 10, 1948, UNGA Res 217A(III); INDIA CONST. art. 21.
[43]*Puttaswamy, supra* note 7, ¶637.
[44]INDIA CONST. art. 21.
[45] *Puttaswamy, supra* note 7, ¶630.

have been made to codify the right to privacy through the floored Personal Data Protection Bill, 2019 ("PDP Bill"). Presently, the only protection afforded to personal data in India is by the means of the Information Technology Act, 2000 ("IT Act") and Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("SPDI Rules"). With a specific emphasis upon privacy of children only the Juvenile Justice Act affords a modicum of protection to children.[46] It prohibits the disclosure of the identity of a child who has committed an offence or who is need of care, through audio-visual media.[47]

Privacy is not culturally rooted in India and is not given much importance. Even in urban and educated households, the request for privacy results in a snarky remark asking what that person has to hide. Culturally, privacy is not seen as a right, but as an immoral need to maintain secrecy. India's cultural context imposes challenges in understanding and implementing privacy as a right that is intrinsic to life and liberty,[48] which may also be sought from one's family. Therefore, the current measures to protect one's privacy in India are rather insufficient and poor,[49] and could result in grievous harm to people, especially children.

On the other hand, the SPDI Rules apply against body corporates,[50] only in cases where sensitive personal data is not made available in public domain.[51] Sharenting on public platforms denotes the implied consent of the parents, thus, reducing the liability of body corporates if this information is misused.

Although the IT Act is not a privacy-specific legislation, some of its provisions focus on the punishment for violation of privacy. However, this is limited to images and videos[52] of the non-consenting party's naked or undergarment clad genitals, public area, buttocks or female breast.[53] Essentially, the only information vis-a-vis children which is afforded privacy under the IT Act, has to be sexually explicit.[54] However, when parents share nude or semi-nude images of their children, they are not intended to be sexually explicit in nature, hence, not qualifying the *mens rea* requirement

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[46] Juvenile Justice Act, *supra* note 13, § 3(xi).
[47] *Id.*, § 74.
[48] Osama Manzar & Udita Chaturvedi, *Understanding the Lack of Privacy in the Indian Cultural Context*, DIGITAL EMPOWERMENT FOUNDATION 15 (Sept. 2017), http://defindia.org/wp-content/uploads/2017/09/Understanding-the-Lack-of-Privacy-in-Indian-Cultural-Context.pdf.
[49] Bismee Taskin, *India in Bottom Three as Study Assesses Privacy Laws in 47 Countries,* THE PRINT (Oct. 17, 2019, 3:58PM IST), https://theprint.in/india/india-privacy-rank-worlds-worst/307009/.
[50] Information Technology Act, 2000, § 43A(i), No. 21, Acts of Parliament (India) [hereinafter "IT Act"].
[51] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Gazette of India, Pt. II sec. 3(i) (Apr. 11, 2011).
[52] IT Act, *supra* note 50, §66E(b).
[53] *Id.,* §66E(c).
[54] *Id.,* §67B.

so as to be penalised under the IT Act. Unfortunately, the fact remains that the child's nude/semi-nude image is still available on the concerned social media profile not only grossly breaching privacy but also becoming a target for child predators and paedophiles. Therefore, the IT Act fails to protect the child in such circumstances. The floored PDP Bill does not solve the existing problems either.

The PDP Bill has one section dedicated to children but does not grant any special rights, independent of their parents, to children despite the Supreme Court identifying a need for greater aegis for children.[55] A unity of interests of the child and the parent is assumed. According to the PDP Bill, the consent of the parents or guardians of a child, under eighteen years of age, must always be obtained prior to the processing of the child's personal data.[56] The need for special protection of a child's privacy can only be realised by conferring upon them individual rights since the age-old notion of protection of a child's interest by their parents, has given way to the hazard of sharenting.

The Report of the Committee headed by retired Justice Srikrishna, recommends the age of consent as eighteen years only to maintain consistency with the existing legal framework, such as the Indian Contract Act, 1872 and the Indian Majority Act, 1875. Therefore, the basic rationale upon which the digital age of consent has been decided, is solely to ensure that the provisions of the PDP Bill remain in conformity with legislations currently in force. The Committee admittedly took cognizance of this cut-off age as appearing to be too high when keeping in mind the 'full, autonomous development of a child'.[57] Further, the Report even condemns the efficacy of parental approval, seeing that it is prone to circumvention, for primarily two reasons. Firstly, it encourages children to lie about their age, without necessarily achieving the intended purpose of protection.[58] Secondly, an overt reliance upon parental consent may take away from the seriousness of the choice made by parents.[59] However, it is pertinent to note that the PDP Bill itself does not limit the exercise of any rights to a particular age group and anyone is eligible to enforce his/her rights as envisaged under the PDP Bill, i.e., for instance Section 20 is silent with regard to the age at which the right to be forgotten can be implemented by any person.

[55] *Puttaswamy, supra* note 7, ¶ 630.
[56] Personal Data Protection Bill, 2019, §16(2), No. 373of 2019 (India) [hereinafter "PDP Bill"].
[57] SRIKRISHNA REPORT, *supra* note 6, at 44.
[58] *Id.*, at 45.
[59] *Id.*, at 45.

The PDP Bill seemingly gives some autonomy to children since consent is not to be obtained from guardians, by data fiduciaries providing child counselling and child protection services,[60] and data profiling and targeted advertising using children's data is prohibited.[61] However, the provision never mentions obtaining the consent of the child. So, while a seventeen year-old has to obtain their parent's consent to access any website or mobile application processing children's data, a parent can freely share their child's personal data to whomever they wish. This grossly deprives a child of informational privacy and creates no accountability on the parents or the data fiduciary. The ability and right to have veto power over their information and privacy is in the interest of the child and is the only manner in which their fundamental right to privacy can be actualised.

India has accessioned to the UNCRC[62] which provides the right to privacy to children,[63] even within the family,[64] once the child attains an appropriate age.[65] The role of the parents and guardians then is to guide and provide direction to the child in the exercise of his/her rights.[66] The UNCRC recognises, at the same time, the evolving capacities of the child and rejects the formulation of an arbitrary age limit,[67] which has not been inculcated in the PDP Bill. The concept of providing children with the freedom to express their views once they are capable of forming them has been further bolstered by Articles 12 and 13 of the UNCRC, whereby children should have the freedom to *"seek, receive and impart information and ideas of all kinds"* through any media of their choice. This therefore, puts upon States an obligation to *"refrain from interference in the expression of those views, or in access to information, while protecting the right of access to means of communication and public dialogue."*[68] It is time that India enacts the necessary legislation to give domestic effect to the UNCRC, as done by several countries discussed below.

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[60] PDP Bill, *supra* note 56, §16(7).

[61] *Id.,* at §16(5).

[62] UNCRC, *supra* note 11.

[63] UNCRC, *supra* note 11, art. 16.

[64] RACHEL HODGKIN & PETER NEWELL, UNITED NATIONS CHILDREN'S FUND, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 203 (3rd ed. 2007), https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf.

[65] *Id.*at 205.

[66] UNCRC, *supra* note 11, art. 5; U.N. Commission on Human Rights Working Group on a Draft Convention on the Rights of the Child, *Report of the Working Group on a Draft Convention on the Rights of the Child,* ¶¶105, 109, U.N. Doc. E/CN.4/1987/25 (Mar. 9, 1987).

[67] CHILD RIGHTS INTERNATIONAL NETWORK, AGE IS ARBITRARY: SETTING MINIMUM AGES 4 (2016), https://archive.crin.org/sites/default/files/discussion_paper_-_minimum_ages.pdf.

[68] U.N. Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* ¶81, U.N. Doc. CRC/C/GC/12 (Jul. 1, 2009), http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf [hereinafter "UNCRC, *General Comment No. 12*"].

(B) United Nations

The UN Committee on Rights of the Child and the UNICEF are leading authorities on child rights. These authorities are keeping up with the digital age, with the former developing General Comments on children's rights in relation to the digital environment[69] and the latter creating awareness about sharenting.[70] Further, the European Union's ("EU") Fundamental Rights Agency has observed that:

> *"Under international law, the right to data protection is part of the child's right to privacy contained in Article 16 of the CRC. This article provides that a child shall not be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. This right must be respected by everybody, including the child's legal representative."*[71]

The UNICEF has consequently identified that the popular practice of sharenting harms a child's reputation,[72] and can create an economy where individuals' online histories may increasingly outweigh their credit histories in the eyes of retailers, insurers and service providers.[73]

The UN Special Rapporteur on the Right to Privacy[74] and the UNICEF have been advocating against sharenting since 2017, recognising yet again, the children's right to privacy and protection of their personal data,[75] and the right not to be subjected to attacks on their reputation.[76] This requires parents and guardians to refrain from sharing such content which may now or later

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[69] *U.N. Committee on the Rights of the Child, General Comment on Children's Rights in Relation to the Digital Environment,* OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS (May 11, 2020), https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx.

[70] UNICEF, The State of World's Children, *supra* note 38, at 92; UNICEF - INNOCENTI DISCUSSION PAPER*, supra* note 31, at 10, 15.

[71] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE, HANDBOOK ON EUROPEAN LAW RELATING TO THE RIGHTS OF THE CHILD 193 (2015), http://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf.

[72] UNICEF, The State of World's Children, *supra* note 38, at 92; UNICEF - INNOCENTI DISCUSSION PAPER*, supra* note 31, at 10, 15.

[73] U.N. CHILDREN'S FUND, PRIVACY, PROTECTION OF PERSONAL INFORMATION AND REPUTATION RIGHTS, DISCUSSION PAPER SERIES: CHILDREN'S RIGHTS AND BUSINESS IN A DIGITAL WORLD 8 (March 2017), https://www.unicef.org/csr/files/UNICEF_CRB_Digital_World_Series_PRIVACY.pdf.

[74] *Child Online Rights and Privacy in focus at major Conference in Brussels*, UNICEF (April 05, 2017), https://www.unicef-irc.org/article/1587-child-online-rights-and-privacy-in-focus-at-major-conference-in-brussels.html [hereinafter "UNICEF, *Child Online Rights*"].

[75] U.N. CHILDREN'S FUND, CHILDREN'S ONLINE PRIVACY AND FREEDOM OF EXPRESSION: INDUSTRY TOOLKIT, GENERAL PRINCIPLES ON CHILDREN'S ONLINE PRIVACY AND FREEDOM OF EXPRESSION8 (May, 2018), https://www.unicef.org/csr/files/UNICEF_Childrens_Online_Privacy_and_Freedom_of_Expression(1).pdf [hereinafter "UNICEF, Children's Online Privacy and Freedom of Expression"].

[76] *Id.*, at 9.

potentially result in harm to the child's reputation. Presently, the UNICEF is creating awareness amongst children and parents about the concept of privacy and the harms of sharenting through conferences[77] and social media.[78]

(C) European Union and the United Kingdom

Europe is perhaps best equipped to deal with contemporary issues like sharenting and digital consent. The GDPR discerns child privacy rights and provides mechanisms for their protection and exercise. The draft proposed prior to the implementation of the GDPR, mandated the age of consent to be thirteen years and above,[79] which meant that children could provide consent autonomously on attaining the age of thirteen. The final text of the GDPR increases this age to sixteen, although if countries wish they can derogate and chose a lower age not less than thirteen years.[80] Until then, data processors are required to obtain parental consent for processing. However, one may point out that problems such as that of sharenting still persist.

Several European countries have taken one step further than the GDPR and developed national legislations which respect a child's consent over his/her personal data. Recently, France updated its *Law Relating to the Protection of Personal Data*[81] which lays down that fifteen year-olds can consent to the processing of their personal data. Before the attainment of this age, joint consent of the child and the parent is required.[82] When parents share the personal data of their children, without their consent, they could be fined upto €45,000.[83] Germany has taken similar steps as well.[84] This is perhaps the most well rounded approach to child privacy and parents' corresponding responsibilities.

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[77] UNICEF, *Child Online Rights*, *supra* note 74.

[78] UNICEF Norge, *Stopp Sharenting*, YOUTUBE, (Dec 19, 2019), https://youtu.be/0hwmh14oQ2A.; UNICEF Norge, *Story Highlight: Sharenting,* INSTAGRAM, https://www.instagram.com/unicefnorge/?hl=hi.

[79] *European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*, art. 8, COM (2012) 0011 final, (March 12, 2014), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014AP0212&from=EN.

[80] GDPR, *supra* note 8, at art. 8, 95/46/EC, 2016O.J. (L 119) 37, 38.

[81] Denise Lebeau-Marianna&Caroline Chancé, *France: New data protection law has been adopted*, DLA PIPER BLOG (May 16, 2018), https://blogs.dlapiper.com/privacymatters/france-new-data-protection-law-has-been-adopted/.

[82] Loi 2018-493 du 20 juin 2018 Projet De Loi Relatif à la Protection des Données Personnelles [Law 2018-493 of June 20, 2018 on Law relating to Protection of Personal Data], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 20, 2018, art. 7-1.

[83] CODE PÉNAL [C. PÉN] [PENAL CODE]art. 226-1 (Fr.).

[84] Courtney Storm, *Over-Sharenting on Social Media*, IMPAKTER (June 14, 2017), https://impakter.com/over-sharenting-on-social-media/.

Although not regarding social media sharing, precedents in the United Kingdom ("UK") have recognised that in certain circumstances, parents can be the perpetrators of violence and harm to their children[85] and that children have a right to life[86] and privacy[87] independent from their family. The UK, with its Data Protection Act, 2018 is moving towards giving children the power to prevent sharenting. A child may, in writing, ask his/her parents to stop sharing and remove previously shared information provided he/she can prove unwarranted and substantial damage and distress.[88]

(D) Canada and the United States of America

Due to the increase in advertisements based on children's personal data,[89] the United States of America ("USA") called for a child-privacy-centric legislation and enacted the Children's Online Privacy Protection Act ("COPPA").[90] COPPA sets a lower age of thirteen years until which parental consent is required by operators to process children's personal data.[91] However, the importance of modernising COPPA to keep up with the evolving digital world has been felt and a Bill to extend the statutory requirements to children until the age of sixteen, however not eighteen, is underway.[92] Another panacea to address the growing concerns against sharenting, is the 'Erasure Bill' which allows individuals under the age of eighteen years to remove or erase their own content from a website.[93] Similar to COPPA, the consent for a minor, under Canada's

[85] Re J (Children) [2013] UKSC 9, ¶¶ 2, 4, 7, 63; Claire Bessant, *Sharenting: Balancing the Conflicting Rights of Parents and Children*, 23(1) COMMUNICATIONS LAW 7, 14-15, (2018) [hereinafter, "Claire Bessant, *Conflicting Rights*"].

[86] Re J (A Minor [1990] 3 All ER 930, ¶ 45.

[87] Re J (a child) [2013] EWHC 2694 (Fam).

[88] Data Protection Act 2018, c. 2, § 10(1) (UK); Claire Bessant, *Conflicting Rights, supra* note 85, at 17.

[89] Kathryn Montgomery, *Digital Kids: The New On-Line Children's Consumer Culture*, *in* CHILDREN, YOUNG PEOPLE AND MEDIA globalisation 189, 198-202 (Gèoteborg Univ., Sweden 2002).

[90] Children's Online Privacy Protection Act, 15 U.S.C. §§6501-6508 (1998).

[91] *Id.,* § 312.5; *Children's Online Privacy Protection Rule: A Six-Step Compliance Plan for Your Business,* U.S. Federal Trade Commission, https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-six-step-compliance (last visited Aug. 09, 2020).

[92] Jesse M. Brody, *Lawmakers propose COPPA Expansion*, LEXOLOGY (January 22, 2020), https://www.lexology.com/library/detail.aspx?g=fb76da1f-68b0-44b1-8b31-8338c3b8c864.

[93] *Teen's Online Privacy,* CONSUMERCAL, https://consumercal.org/about-cfc/cfc-education-foundation/teen-online-privacy/ (last visited May 11, 2020).

Personal Information Protection and Electronic Documents Act ("PIPEDA")[94] may be obtained from a legal guardian, up to the age of thirteen years.[95]

(E) Brazil

The Law on the Protection of Personal Data[96] regulates the collection and processing of personal data like the GDPR. Although it does not define who a 'child' is, a specific legislation known as the 'Statute of the Child and Adolescent' considers a child to be under the age of twelve years and those between twelve-eighteen years to be adolescents.[97] It goes on to further mandate that a child's history on social and educational systems be deleted on his/her entry into adulthood to mitigate the unintended consequences related to childhood data.[98] This includes the data shared by the child's parents as well, consequently discouraging sharenting.

IV. THE STATE OF PRIVACY POLICIES

Section 22 of the PDP Bill (India) mandates preparation of a privacy by design policy, more commonly known as terms and conditions, prior to processing of personal data by a data fiduciary. With regard to children, it is the parents or guardians who consent to the terms and conditions on their behalf,[99] primarily because children are incapable of entering into legally binding contracts.[100] Although, the terms and conditions offered by websites are valid e-contracts,[101] however, there is doubt as to their enforceability across jurisdictions, making the concerns about incapacity a moot point.

The main form of presentation of terms and conditions by most online forums is through a 'clickwrap agreement' which is a software licensing agreement where the terms are presented to a

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[94] Personal Information Protection and Electronic Documents Act, S.C. 2000, c 5 (Can.).

[95] *Id.* § 4.3; *PIPEDA Fair Information Principle 3 – Consent*, OFFICE OF PRIVACY COMMISSIONER OF CANADA, https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p_principle/principles/p_consent/(last visited Aug. 15, 2020).

[96] Lei No. 13.709, de 14 de agosto de 2018, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 9.7.2019 (Braz.) [Law on the Protection of Personal Data (Braz.) [hereinafter "Brazil PPD Law"].

[97] ESTATUTO DA CRIANÇA E DO ADOLESCENTE [E.C.A.] [Statute of the Child and Adolescent]art. 2 (Braz.).

[98] Brazil PPD Law, *supra* note 96, art. 14, 18; Ingrida Milkaite & Eva Lievens, *Children's Rights to Privacy and Data Protection Around the World: Challenges in the Digital Realm*, 10(1) EJLT 1, 11 (2019), http://www.ejlt.org/index.php/ejlt/article/view/674/913.

[99] PDP Bill, *supra* note 56, §16.

[100] Indian Contract Act, *supra* note 16, §11.

[101] IT Act, *supra* note 50, §10A.

user, usually after executing a program, and are laid out along with a button that says I agree or I accept.[102] Facebook, Instagram, Pinterest, LinkedIn, Reddit, etc. employ clickwrap agreements when displaying their terms.[103] Such agreements have been upheld as legally valid since there is reasonable notice of terms and manifest consent,[104] but on the other hand certain courts have declined to infer that clicking a box acknowledging that a user had read an agreement indicates that the agreement was reasonably available to the user.[105]

Another common practice of using 'browse-wrap' or 'web-wrap agreements' occurs when a website's legal terms state that when a visitor browses or otherwise uses the website, the visitor agrees to the policy set forth by the owner of the website in its legal terms and conditions document or web page,[106] via a link present usually at the bottom of the page.[107] This is used by YouTube, Amazon, eBay, once persons engage in their services.[108] Courts generally do not consider such agreements to be valid since the fundamental ingredient of consent is lacking,[109] but in some instances the terms set out via browsewrap have been enforced by court rulings.[110] Additionally, broad statements of company policy do not generally give rise to contract claims.[111] Courts in Europe have not extensively provided guidelines for enforcement of such agreements.

The Indian judiciary has cast serious doubts on the enforceability of clickwrap contracts:

> *"Suppose, in case of a company, a product is purchased by the staff , for its use in regular course of work or business of the company and an employee of the company while installing the software on the computer in the office clicks the button or the icon 'I agree' and thereafter such an employee or any other employee of the company violates any condition of the license agreement, can such license*

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[102] *Click-Wrap Agreement,* BLACK'S LAW DICTIONARY (10th ed. 2019).

[103] Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media,* 4(3) SOCIAL MEDIA + SOCIETY 1, 5 (2018), https://doi.org/10.1177/2056305118784770.

[104] Feldman v. Google, Inc.,513 F.Supp.2d 229, 235-38 (E.D.Pa. 2007); Hotmail Corp. v. Van Money Pie Inc., 1998 WL 3883809, ¶¶7, 35 (N.D. Ca. 1998); Hancock v. American Telephone & Telegraph Co. 701 F.3d 1248, 1252 (10th Cir. 2012).

[105] Harris v. comScore, Inc.,825 F.Supp.2d 925, 926 (N.D. Ill. 2011); Sgouros v. TransUnion, 14 C 1850, 1853-55 (N.D. Ill. 2015).

[106] *Browse-Wrap Agreement,* BLACK'S LAW DICTIONARY (10th ed., 2019).

[107] Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up To Be*?, 9 TUL. J. TECH. & INTELL. PROP. 173, 174 (2007).

[108] Indranath Gupta, *Are Websites Adequately Communicating Terms and Conditions Link in a Browse-Wrap Agreement?*, 3(2) EJLT 2 (2012).

[109] Vitacost.com, Inc. v. James McCants, 210 So.3d 761, 762-66 (Fla. Dist. Ct. App. 2017); Specht v. Netscape Communication Corp, 306 F.3d 17, ¶594-96 (2d Cir. 2002).

[110] Hubbert v. Dell Corporation, 359 III.App.3d 976, 982-84 (5th Dist. 2005); AvePoint, Inc. v. Power Tools, Inc.,981 F. Supp. 2d 496, 510-12 (W.D. Va., 2013).

[111] Dyer v. Nw. Airlines Corps., 334 F.Supp.2d 1196, 1200 (D.N.D. 2004); Pratt v. Heartview Foundation, 512 N.W.2d 675, 675-677 (N.D. 1994); Martens v. Minnesota Mining & Manu. Co., 616 N.W.2d 732, 732-740 (Minn. 2000).

> *agreement be enforced against the company or the Directors, especially when they are not signatories to such an agreement and nor they have authorized any employee of the company to sign any agreement on behalf of the company and no name of the company is even written in such type of agreement and even it is also not known as to who actually clicked the button 'I agree.' Under these circumstances, the enforceability of such a license is highly doubtful…So far as the legal enforceability of such Licence Agreements is concerned, in spite of the fact that it may fulfil all the requirements of a valid contract, such an agreement may not be enforceable[…]"*[112]

Therefore, considering the inconsistency and lack of certainty about the legal validity of clickwrap and browsewrap agreements and whether or not they can be enforced to the detriment of the promisee, the consent provided by children above the age of sixteen years should not be made ineffective only because they have not attained the age required by the Indian Contract Act for a valid contract. Nonetheless, steps to protect the interest of children have been considered hereinafter, if the enforceability of clickwrap or browsewrap agreements is given certainty by the Indian judiciary. Alternatively, emphasis should be laid upon joint decision making by parents and the child since joint consent requires that the principle of 'best interest of the child' be kept at the forefront. The best interests of the child should be the 'core legal principle' when undertaking any activity on behalf of the child.[113] The UN Committee on Rights of the Child regards best interests as a 'complex', 'flexible', and 'adaptable' concept, which is always the primary consideration.[114] As a general principle of law, parents can only lawfully exercise their rights and responsibilities within the parameters of their children's welfare with due weight given to the child's wishes in accordance with his/her age and maturity.[115] This is the underlying principle for the embargo against sharenting, which takes place either against or without consideration for the wishes of the child.

V. CONCLUSION: TOWARDS PROTECTING CHILDREN'S AUTONOMY

[112] Dcit (It) 3(1), Mumbai v. Gujrat Pipavav Port Ltd., (2017) ITA No. 7823/Mum/2010 (ITAT); Nitish Chandan, *Are ClickWrap Agreements Valid in India*, THE CYBER BLOG INDIA (May 30, 2017), https://cyberblogindia.in/clickwrap-agreements-valid-india/.

[113] EU Article 29 Working Party Opinion, *supra* note 9, at 4.

[114] U.N. Committee on the Rights of the Child, *General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration*, ¶ 6, U.N. Doc. CRC/C/GC/14(May 29, 2013), http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

[115] UNCRC, *General Comment No. 12*, *supra* note 68, ¶¶ 1, 28, 68, 92.

A big change in the daily activities of children has been seen because of the COVID-19 pandemic. Education and activities have increasingly moved to the digital space, making the right to data protection a necessity for online safety.

(A) Tackling the Sharents

Nowadays, children are spending more time with their parents and connected to the internet for education and entertainment alike. Specifically in the Indian context, news channels and other media are seen encouraging parents to send photographs and videos of their children, during the lockdown,[116] which serves as an impetus to the menace of sharenting. As can be seen through various legislations, parents are the gatekeepers of a child's personal information[117] and times like these demand that they take all necessary steps to protect their children from the negative consequences of sharenting. Additionally, national and international legislatures need to recognize that children are exposed to threats extending beyond child pornography, wherein some of these threats exist in their homes.

The GDPR regime marked the beginning of imposition of responsibility on intermediaries or data fiduciaries such as internet access providers, social media networks and search engines for privacy infringement.[118] Similarly, in India, the Information Technology Intermediary Guidelines, 2011 ("Intermediary Guidelines") require intermediaries to observe due diligence while discharging their duties. Interestingly, these Guidelines in themselves are a sufficient mechanism to reduce sharenting if they are modified to reflect separation of the identity of the child from that of the parents. One of the many duties of the intermediary is to inform the users to not display, upload, publish, transmit, or share any information that belongs to another person and to which the user does not have any right.[119] Further, no information shall be published that harms minors in any way[120] or has the ability to invade anyone's privacy.[121] Intermediaries have the power to ensure that sensitive information regarding the child is not published, by reasonably limiting the information shared by parents about their children. A separation of identity, legal and otherwise, of the child

[116] Ministry of Home Affairs, General Order, 40-3/2020-DM-I(A) (Mar. 24, 2020), https://prsindia.org/files/covid19/notifications/144.IND_Citizens_Guidelines_Lockdown_Mar_24.pdf.
[117] Stacey, *Sharenting*, *supra* note 32, at 871.
[118] GDPR, *supra* note 8, art. 2(4), 95/46/EC, 2016O.J. (L 119) 32.
[119] Information Technology (Intermediaries guidelines) Rules, 2011, Gazette of India, pt. II sec 3(i), Cl. 3(2)(a) (April 11, 2011).
[120] *Id.*, Cl. 3(2)(c).
[121] *Id.*, Cl. 3(2)(b).

from the parent is extremely necessary to safeguard the former's interests, as emphasised in this paper.

The first step to protect children's interests would have to be taken by the parents. Parents must facilitate and secure the child's consent and informational privacy. For children who are too young to understand the information in questions and/or the concept of consent, parents should refrain from over-sharing of their information or share it anonymously. Secondly, in any circumstance, parents should avoid sharing nude and semi-nude images or videos of the child. Such images can lead to significant harm to the child's dignity, reputation, mental health, and physical security.[122] Additionally, no sensitive personal information related to the child should be shared, unless necessary, even if the child consents to it.

A lot of parents bypass their child's digital privacy because of the child being a bread-earner. For instance, child artists, being unable to enter into contracts,[123] do not themselves consent to their wide popularisation. In their future as an adult, their choices could be very different from the lives their parents chose for them. Unfortunately, once a public figure, the person always remains a public figure, and is always susceptible to the media's eyes.[124] Nevertheless, parents should be made aware and be encouraged to set up alerts to track the appearance of information regarding their children and monitor responses and third-party changes to their disclosures.[125] Simultaneously, States need to facilitate the navigation of online privacy issues between parents and children. Measures should be adopted to ensure that intermediaries and individuals, including parents, take the concerns about child privacy seriously. The models created by France and Germany as elucidated above, should be followed to ascertain that the consent of children is respected. Educational institutes should be given the responsibility to inform children about their rights and the means to enforce them whenever breached. To assist children, special agencies should support children through various means of emotional, mental, and financial nature and represent them in legal matters, free of cost.

(B) Lowering of digital age of consent

[122] UNICEF, The State of World's Children, *supra* note 38, at 92.
[123] Indian Contract Act, *supra* note 1003, *supra* note 16, § 11.
[124] Sidis v. FR Pub. Corporation, 113 F.2d 806 (2d Cir. 1940).
[125] Nione Meakin, *The Pros and Cons of 'Sharenting'*, THE GUARDIAN (May 18, 2013, 2:00AM), http://www.theguardian.com/lifeandstyle/2013/may/18/pros-cons-of-sharenting.

In order to further strengthen the importance of consent and ensure that it is meaningful, the digital age of consent in India should be lowered to sixteen years. This is one step further than the observations made by the Delhi High Court[126] where the general practice of mandating thirteen years as the lower age limit in the case of social media was recognised. Children aging between twelve to seventeen years old have been observed to be aware of privacy risks that are associated with the internet and weigh them against the benefits of their actions[127], however, the age of sixteen years would be optimum as shown through the following studies.

In one such study of juveniles' competence to stand trial, Grisso and his colleagues compared youths aged eleven to seventeen to young adults aged eighteen to twenty-four. They found that juveniles aged younger than sixteen performed more poorly than adults on an assessment of the ability to process information related to making legal decisions and appreciation of the relevance of information to one's situation. However, sixteen- and seventeen-year-olds performed similarly to adults.[128] Consequently, Steinberg and colleagues have also noted that adolescents are just as capable of mature decision-making as adults, at least by the time they are sixteen, when it comes to reasoned decision-making.[129]

Therefore, the PDP Bill prior to its passage should be amended to reduce the age of eighteen years to sixteen years, below which a person would be defined as a child and would require parental consent but those above such age would be able to consent for themselves.

(C) Carve out provision under Indian laws and special regulations for children

Alternatively, the possibility that clickwrap and browse wrap agreements are held to be enforceable by the Indian judiciary, would necessitate circumventing the incapacity to contract of those above the age of sixteen years but not yet eighteen years. This can be achieved by effectuating a 'carve out' provision within the Indian Majority Act, 1875, for processing of their personal data in a manner similar to the saving clauses in Section 2.[130] This would ensure that the ability to provide

[126] K.N. Govindacharaya v. Union of India, W.P. (C) 3672/2012 (Aug. 23, 2013).
[127] Sonia Livingstone et al., *Growing Up in a Digital Age, supra* note21.
[128] Thomas Grisso, Laurance Steinberg et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants.*, 27(4) LAW & HUM. BEHAV. 333 (2003).
[129] Laurance Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop.",* 64(7) AM. PSYCHOL. 583, 592 (2009).
[130] The Indian Majority Act, No. 9 of 1875,INDIA CODE (1993), vol. 2, http://indiacode.nic.in.

consent by entering into a contract with online intermediaries or data fiduciaries would not be restricted to eighteen year-olds and above, since the PDP Bill would be exempt from the requirement of majority to contract. Thus, a special exception would be carved out from the prerequisite of majority as a condition to be fulfilled prior to consenting to a contract, only for the purposes of consent under Section 16 of the PDP Bill.

In addition to this, to make the digital space safer for children, all online intermediaries should mandatorily set out a list of child friendly standards. A comparison can be drawn to the existing mechanism under the COPPA, whereby a website or application which does not intend for children to be their target audience but may attract children to the services provided by them, will exclude children's data from being processed. "Target", a popular chain of stores in USA, recognizes the importance of protecting children through its privacy policy and it does not knowingly engage in activities that process the data of minors.[131] In such a scenario, there would be no necessity to provide consent since no data will actively be processed by the intermediary.

On the other hand, intermediaries directing services towards children must consider the risks posed to them due to processing of their data and ensure that the language used to communicate to them how their data can be accessed, is clear and simple.[132] Another model, which can be emulated to fit the Indian diaspora, is the draft "Age Appropriate Design Code" which has been presented before the UK Parliament.[133] It sets out fifteen standards of age appropriate design by providing default settings which ensure that children have the best possible access to online services whilst minimising data collection and use, by default. It also ensures that children who choose to change their default settings get the right information, guidance, and advice before they do so. For example, the Age Appropriate Design Code suggests that settings should be high privacy by default, location services and profiling should be off by default for children, and intermediaries should collect and retain only the minimum amount of personal data of children.[134]

Lastly, intermediaries should also ensure that the data belonging to children which has been processed, is not retained for longer than required for the use and delivery of a website, platform,

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131 TARGET BRANDS INC., https://www.target.com/c/target-privacy-policy/-/N-4sr7p?Nao=0, (last visited Aug. 9, 2020).

132 ITU & UNICEF, GUIDELINES FOR INDUSTRY, *supra* note 2, at 21.

133 *Age appropriate design: a code of practice for online services,* INFORMATION COMMISSIONER'S OFFICE3, https://ico.org.uk/media/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services-2-1.pdf(last visited Aug. 15, 2020).

134 *Id.* at 50-66.

product, service, or application. It is the duty of the intermediary to provide children with the means to correct or request the deletion of their data, as mandated under the PDP Bill.[135] The ability to access, correct and erase personal data is especially important for children, as data gathered during childhood might be processed later to determine access to services in adulthood.[136] This should be extended to data shared by the parents of the child as well. An example of a legalisation upholding the right to be forgotten or the right to deletion in the context of children, can be seen in California under the umbrella of the Business and Professions Code. It permits a minor who is a registered user of the operator's website, online service, online application, or mobile application to remove or, if the operator prefers, to request and obtain removal of any content or information posted.[137]

(D) System of joint consent

The authors concede that due to the cultural gap amongst various countries whose legislations have been referred to above, children in the Indian demographic may not have the same understanding of legal jargon and technicalities as those in more developed nations. However, it is still not in the best interest of the child for the parent to make decisions on his/her behalf. Instead, the concept of joint consent by parent and child should be implemented since children not only want to have an active role in making decisions about their online participation and in protection of their privacy, but also to see this as a shared responsibility of all the stakeholders involved.[138]

Therefore, it is time that countries such as India take an active step to remove the taboo associated with privacy and give it a much necessary place in its culture and laws, especially in relation to children.

[135] PDP Bill, *supra* note 56, § 20.
[136] UNICEF, Children's Online Privacy and Freedom of Expression, *supra* note 75, at 9.
[137] CAL. BUS. & PROF. CODE § 22580-225821, (West 2015).
[138] SONIA LIVINGSTONE, *supra* note 2121, at 8.

LEGISLATIVE COMMENT

A DILEMMA OF DISCRETION: REVISITING SECTION 376 (2) OF THE INDIAN PENAL CODE, 1860

*-Vikrant Dere & Sridattha Charan***

ABSTRACT

"That's the whole point of prosecutorial discretion in the judicial system. It's finding a just outcome in an individual case" – Andrew Thomas

Section 376 (2) of the Indian Penal Code provided that the Judge could, for only adequate and special reasons, which had to be stated in the judgment, impose a sentence of imprisonment of either description for a term lesser than ten years. This discretion provided to the judges was deleted by the Criminal Law (Amendment) Act, 2013. Even though it has been 7 years since the amendment, the authors believe that such removal of judicial discretion has widespread implications concerning the penal system prevalent in India. The authors will dissect the implications of removing such discretion with special emphasis on adolescent sex. First, the authors will discuss the need for judicial discretion and will emphasize its importance in the Indian judicial system. Secondly, the authors will illustrate the use of judicial discretion by the Supreme Court in various cases prior to the amendment. Last and most importantly, the authors will analyse the impact of the absence of judicial discretion with respect to crimes concerning adolescent sex. While the authors in no way seek to undermine the seriousness of the crime of rape or the punishment for the same, it is the opinion of the authors that such discretion provided to the judges has to be restored since each and every case has to be examined based on the facts and circumstances of the specific case. Such judicial discretion would be in consonance with the modern penal system.

I. INTRODUCTION

There was a growing agitation amongst the masses for the failure of the Government to provide a safe environment for women in India after the Nirbhaya incident in 2012. In response to this, the Central Government appointed a judicial committee headed by former Hon'ble Judge of the Supreme Court, Justice J.S. Verma to suggest necessary amendments to make laws against sexual offences more stringent.[1] Numerous suggestions given by the Justice J.S. Verma Committee,[2] came to be incorporated into the Criminal Law (Amendment) Act, 2013 (*hereinafter*, "**2013 Amendment**") which amended provisions concerning sexual offences in the Indian Penal Code, the Indian Evidence Act, and the Criminal Procedure Code.

Specifically, the 2013 Amendment removed the judicial discretion which was earlier vested in a Judge while trying the offence of rape under Section 376(2) of the Indian Penal Code.

In accordance with the pre-amended provision, the Judge would have the power to impose a sentence of imprisonment of either description for a term of less than ten years only for adequate and special reasons, which must be stated in the judgement.[3] However, it is imperative to note that the Verma Committee did not explicitly recommend the removal of discretion, rather, they recommended that the minimum sentence under Section 376(2) should be increased to 10 years. This implicitly ensured the removal of discretion.[4]

It would be apposite to reproduce the relevant portion under Section 376(2) of the Indian Penal Code as it stood prior to the Amendment:

> *"Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."*

** Final Year Students at the Symbiosis Law School, Pune.

[1] Justice J.S. Verma (Retired), REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, 1 (2013).

[2] *Id.*

[3] Section 376(2), Indian Penal Code, 1860, § 376(2), *amended by* The Criminal Law (Amendment) Act, 2013.

[4] *Supra* note 1, at 239.

However, after the said amendment, the Judge was no longer vested with such judicial discretion for rape cases and therefore, could not award lesser than the minimum sentence provided in the Code.[5] The following is Section 376(2) subsequent to the Amendment:

> *"shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."*

The authors, through this article, will dissect and scrutinize the amendment made specifically to Section 376(2) of the Indian Penal Code *firstly* by analysing the need for judicial discretion. *Secondly*, the authors will illustrate the use of such discretion by the courts using various judicial pronouncements. *Lastly,* the authors will discuss the implications of the amendment on cases concerning adolescent sex.

II. NEED FOR JUDICIAL DISCRETION

Judicial discretion is at the very core of the criminal justice system and it is responsible for safeguarding the interests of everyone in a functioning democracy.[6] It permits the judiciary to examine every case on an individual basis while balancing various factors to ensure justice is administered. Judicial discretion is granted to the courts out of recognition of individuality of cases, and as such, decisions should be based on the case's particular circumstances rather than a rigid application of the law.[7] Decisions made under this power have to be sound and not arbitrary. This means that such decisions have to be made based on what is right and equitable under the circumstances. Indeed, an abuse of discretion can be appealed.

The discretion, as was provided under Section 376(2) of the Indian Penal Code, was vested with the Judges to be provided only for adequate and special reasons. Judges, having a trained judicial mind,[8] are expected to act in a fair and unbiased manner.[9] Accordingly, in the authors' opinion, cases of misuse of discretion are a rarity. Removal of such discretion for the offence of rape

[5] *Supra* note 3.
[6] Rob Stary, *Essay: The Importance of Judicial Discretion*, SIGHT MAGAZINE (Nov. 21, 2018), https://www.sightmagazine.com.au/10894-essay-the-importance-of-judicial-discretion.
[7] Shri Gurbaksh Singh Sibbia & Ors. v. State of Punjab, (1980) 2 SCC 565 at 14.
[8] Sonu. v. Sonu Yadav, AIR 2021 SC 1950, 2021 Cri LJ 2464. at 11.
[9] P.D. Dinakaran v. Judges Inquiry Committee & Ors., (2011) 8 SCC 380, at 41.

mandates that judges cannot award a sentence of lesser than 10 years to the accused even if the case warrants a lesser punishment.

Furthermore, the need for judicial discretion under Section 376(2) was also highlighted in the 84th Law Commission Report. The report observed the following while stating that a minimum punishment would not be in consonance with the modern penal system which was adopted by the Supreme Court.[10]

> "*The circumstances in which the offence of rape is committed differ from case to case…….The discretion of the Court in the matter of punishment should not be fettered by prescribing a certain minimum sentence. If the sentence awarded is heavy or light, it can always be corrected by the appellate or revisional court.*"

The authors agree that the Amendment Act of 2013 ensured the protection of women's interests and well-being by widening the definition of rape and prescribing harsher punishments[11] apart from other legislative changes. Nonetheless, the authors are of the opinion that the removal of judicial discretion under Section 376 (2) by the Amendment Act wasn't warranted.

The authors would like to emphasize that the removal of discretion does not act as a deterrent from the commission of sexual offences and that the preservation of such discretion does not encourage the commission of sexual offences. The discretion only allows the Judges the opportunity to apply their mind in special cases with facts and circumstances which cannot be predicted or foreseen.

The authors further argue that preservation of such judicial discretion would not affect, first, the seriousness and gravity of the crime committed since such discretion would only be exercised in exceptional circumstances and would not be exercised in all cases concerning sexual offences. Secondly, the discretion would not affect the conviction of an accused when he's proven to be guilty of the crime since such discretion only concerns the punishment and not the conviction. Accordingly, the authors conclude that the Amendment Act of 2013 should have preserved discretion.

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[10] *Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence,* (Report No. 84) LAW COMMISSION OF INDIA, 11 ¶ 2.27 (April 1980).
[11] The Criminal Law (Amendment) Act, 2013, § 9, No. 10, Acts of Parliament, 2013 (India).

III. THE EXERCISE OF JUDICIAL DISCRETION BY THE COURTS PRIOR TO THE 2013 AMENDMENT

There have been numerous judicial pronouncements that highlight the use of such discretion by the Courts. There has not been a hard-and-fast rule that ensured a uniform application of judicial discretion under Section 376(2). Such exercise of discretion is completely dependent on the nature of the case and the facts and circumstances surrounding the crime.

In the case of *Baldev Singh & Ors. v. State of Punjab,*[12] both the appellants and victim got married (not to each other) and sought to bring an end to the dispute for the incident which took place 14 years prior to the appeal. The Court on grounds of such delay and the fact that the appellants had already undergone 3.5 years of imprisonment, considered it fit to award a sentence lesser than the minimum as provided under Section 376(2).

Furthermore, a similar view was taken in the case of *Ravindra v. State of Madhya Pradesh,*[13] by the Hon'ble Supreme Court. The crime had taken place 20 years prior and both the appellant and the victim were married (not to each other) and had entered into a compromise, wanting to bring the litigation to its end. This led to the Apex Court allowing the request for reduction of sentence on "adequate and special" grounds. The Court upheld the conviction of the accused but reduced the sentence to the period already undergone by the accused.

IV. IMPLICATIONS OF THE REMOVAL OF JUDICIAL DISCRETION ON CRIMES CONCERNING ADOLESCENT SEX

Under the Amendment Act of 2013 and the Protection of Children from Sexual Offences (hereinafter '**POCSO'**) Act, the age provided for children to give consent was raised from 16 years to 18 years.[14] Additionally, the age for consent under the Indian Penal Code[15] was also increased to 18 years. Most notably, this change in consensual age was not based the recommendation of the Verma Committee which formed the skeleton on the 2013 recommendation and the POCSO Act.[16]

[12] Baldev Singh & Ors. v. State of Punjab, (2011) 13 SCC 705.
[13] Ravindra v. State of Madhya Pradesh, (2015) 4 SCC 491.
[14] *Supra* note 11, The Criminal Law (Amendment) Act, 2013; The Prevention of Children from Sexual Offences Act, § 2 (d), 2012, No. 32, Acts of Parliament, 2012.
[15] Indian Penal Code, 1860, § 375.
[16] Independent Thought v. Union of India, (2017) 10 SCC 800.

The POCSO Act, while addressing the important issue of child sexual abuse, has simultaneously strengthened a protectionist and patriarchal control on adolescent sexuality. The age of consent set at 18 years provides an automated script of non-consent and any proof of consent given by adolescent girls through their testimony of consensual sexual activity is ignored. This criminalization by the law of adolescent sex, without providing any protection to couples close to each other in age aggravates the stigma prevalent against pre-marital sex.[17]

The Courts have also time and again opposed the criminalization of adolescent sex. In the case of *Sabari v. Inspector of Police, Belukurichi Police Station*,[18] the Madras High Court opined that there exists an urgent need for the legislature to re-examine the definition of 'Child' under POCSO and reduce the age to 16 years instead of 18. Such a view was taken in light of the report that the majority of the cases before the POCSO arise out of the relationships between adolescent boys and girls. Such liberal change in the said provision would exclude consensual bodily acts or sex between adolescents above the age of 16 years. However, if such a change does not get incorporated, the person above the age of 18 years will surely face minimum imprisonment of 10 years.[19]

Furthermore, in the case of *Vijayalakshmi v. State,*[20] the Court observed that a large array of cases filed under POCSO arise from the complaints filed by the families of the adolescents involved in the relationship.[21] In doing so, the POCSO fails to recognise relationships between teenagers and adolescents which can result in unfair imprisonment. Therefore, the Court quashed the criminal proceedings against the accused.

The recorded statistics emphasize the fact that adolescents are sexually active before the age of 18 years. The NFHS-4 (2015–16) records 11% of girls had their first sexual intercourse before the age of 15, and 39% before the age of 18.[22] According to these statistics, it is evident that consensual sex between adolescents is a real possibility and the legislature should endeavour to acknowledge it by providing a measure of discretion to the judges while adjudicating such cases.

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[17] Madhu Mehra & Amrita Nandy, *Why Girls Run Away to Marry, Adolescent Realities and Socio Legal Responses in India*, PARTNERS FOR LAW IN DEVELOPMENT 73 (2019) (hereinafter 'WHY GIRLS RUN AWAY TO MARRY').
[18] Sabari v. Inspector of Police, Belukurichi Police Station, (2019) 3 Mad LJ (Cri) 110 (hereinafter 'SABARI CASE').
[19] SABARI CASE, *supra* note 18, at 26.
[20] Vijayalakshmi & Ors. v. State & Ors., 2021 (1) MLJ (Crl) 494.
[21] WHY GIRLS RUN AWAY TO MARRY, *supra* note 14, at 64.
[22] *National Family Health Survey (NFHS-4)*, INTERNATIONAL INSTITUTE OF POPULATION SCIENCES 1, 158 (2015), http://rchiips.org/nfhs/nfhs-4Reports/India.pdf.

The authors believe that, in light of the 2013 Amendment, the removal of judicial discretion has a looming impact on rape or sexual assault cases concerning adolescents. The use of judicial discretion in such cases can be best illustrated through the case of *Mohd. Imran Khan v. State (Govt. of NCT)*.[23] The High Court had awarded a sentence of 5 years to the Appellants as compared to the prescribed minimum 7 years punishment by exercising their discretion under 376(2). The Court noted that almost 20 years had elapsed since the incident and that the prosecutrix had voluntarily accompanied the young Appellants to a hotel room in Meerut. The Supreme Court concurred with the order of the High Court.

It has been established that consent under POCSO is immaterial as the victim is a minor.[24] Recently, the Supreme Court has sought to examine whether POCSO Act can be used to punish adolescents for 'consensual' sexual relationships. In the said case, the 18-year-old man was accused of raping a 17-year-old girl while they were in a relationship in school. The man refused to marry the girl which led to the filing of the complaint. Despite the fact, that the girl in trial admitted that she was in a relationship with the accused, the trial court granted imprisonment of 10 years to the accused which was upheld by the Madras High Court.[25]

Therefore, it is evident that adolescents that engage in consensual sex are severely prejudiced. The only respite they had was the application of the judicial mind to the circumstances of the case and the subsequent discretion of the judges to provide a lenient sentence. However, such respite has been taken away by the Amendment Act of 2013.

V. CONCLUSION

First, the authors seek to invite the introduction of liberal provisions to the POCSO Act which would decrease the consensual age of sex from 18 years to 16 years. This would ensure the protection of adolescents who engage in consensual sex. Secondly, it is intended to introduce the concept of judicial discretion in the POCSO Act, specifically concerning the punishment prescribed for offences such as rape.

[23] Mohd. Imran Khan v. State (Govt. of NCT), (2011) 10 SCC 192.
[24] Premkumar H.M @ Swamy v. State of Karnataka, (2017) SCC Online Kar 2447; ABC v. State of Maharashtra Through PI Bharti & Anr., (2021) SCC OnLine Bom 517.
[25] *Supreme Court to study whether minors can be punished under POCSO for consensual sex*, THE HINDU (Mar. 30, 2021), https://www.thehindu.com/news/national/sc-to-study-whether-minors-can-be-punished-under-pocso-for-consensual-sex/article34200856.ece.

The liberal provisions, specifically the one concerning discretion, can be illustrated by examining the difference between the punishment for sexual assault under the POSCO Act and the Indian Penal Code. While Section 7 of the POSCO Act prescribes a punishment of imprisonment for not less than 3 years but which may not extend to five years,[26] the Indian Penal Code prescribes a punishment of minimum of one year of imprisonment,[27] thereby ensuring that the judge has the discretion to determine the punishment which is consistent with the facts of circumstances of such case.

While the authors in no way seek to discredit the testimony of victims or the severity of punishment for sexual crimes, the authors conclude that the facts of each case are unique and that the Court must apply its mind judiciously and be provided certain leeway to exercise discretion under statutory law.

It is pertinent to acknowledge the need for judicial discretion, especially in light of the growing number of rape cases between couples that are close to each other in age. We strongly condone the offence of rape, however, we believe it is necessary for the legislature to revisit these provisions to provide a lesser sentence in only 'adequate and special' cases.

A parallel can be drawn between the discretion exercised by judges in punishments concerning sexual offences and the death penalty. Interestingly, in the case of *Jagmohan Singh v State of Uttar Pradesh*,[28] the Supreme Court concurred with the idea of judicial discretion with respect to the death penalty for two main reasons. First, the discretion exercised would not be arbitrary in nature since each of the facts and circumstances are different and accordingly, an argument for discrimination cannot be made.[29] Second, the availability of appellate review ensures that even if the discretion was not exercised in the prescribed manner, such a decision can be referred to a higher authority.[30] Although these reasons were given in the context of death penalty, the authors believe that the same forms a strong case for the introduction of judicial discretion under the POCSO Act and its re-introduction into the Indian Penal Code.

[26] The Prevention of Children from Sexual Offences Act, 2012, § 7, No.32, Act of Parliament, 2012 (India).
[27] Indian Penal Code, 1860, § 354.
[28] Jagmohan Singh v State of Uttar Pradesh, (1973) 1 SCC 20; AIR 1973 SC 947.
[29] *Id.* at 27.
[30] *Id.*

CASE NOTE

THE RIGHT TO PRIVACY: THE CHAOS IN VIRENDRA KHANNA V. STATE OF KARNATAKA

*-Neha Maria Antony**

I. INTRODUCTION

Understanding the judgment *in Virendra Khanna v. State of Karnataka*[1] becomes especially potent when we consider privacy concerns and in the uncertain aftermath of *Faheema Shirin v. State of Kerala*[2] which declared the right to internet access as a fundamental right. Faced with a unique matrix of requiring the disclosure of passwords, and the legal questions of privacy combined with constitutional safeguards, the judgment in *Virendra Khanna* takes a shot at balancing these conflicting interests, but ultimately evolves a form that lets the right to privacy take a back seat to the State interest in an investigation.

II. THE FACTUAL MATRIX AND THE CORE ISSUES INVOLVED

The facts involve a situation where the Petitioner had been called on to supply the password to certain electronic devices and email accounts in relation to an ongoing investigation against him. There were claims that the Petitioner had refused to cooperate, and so the investigation authorities had sought to subject him to a polygraph test without complying with the procedural requirements as the Petitioner had not been informed, his consent had not been sought and he had also allegedly not been heard before the concerned court. The questions before the High Court revolved around: first, whether disclosure of such a password through a polygraph test sans consent would violate the right against self-incrimination and secondly, on the impact, or rather the restraints, put forth by the fundamental right to privacy of the Petitioner. Concerns also abounded as to the data itself within such devices or accounts, and the extent of the same beyond what might be required for the investigation. The court, however, reached the conclusion that the procedural requirements

* Fifth Year Candidate, B.A., LL.B., National University of Advanced Legal Studies, Kochi.
[1] Virendra Khanna v. State of Karnataka, W.P. No. 11759/2020 (GM-RES), Karnataka H.C.
[2] Faheema Shirin v. State of Kerala, AIR 2020 Ker 35.

laid out in decisions like *Selvi v. State of Karnataka*[3] had to be met and so the actions made in disregard of the same were untenable; it also evolved a set of curious guidelines which are to be reassessed on the touchstone of privacy

III. BLURRED LINES – VIRENDRA KHANNA AND PRIVACY

The right to privacy, which had been monumentally established in the *Puttaswamy*[4] judgment, has taken several hits over time. The court in *Virendra Khanna* recognizes that modern technology like smartphones are now the 'central device[s] for running the affairs of a person'[5] and the reasoning of the court starts off by recognizing that access to a smartphone has far-reaching consequences including access to data which is above and beyond that which is required for the investigation.

The judgment finds the present case to satisfy the three-fold test of legality, legitimate state aim, and proportionality and safely tucks it away under the exceptions clarified in *Puttaswamy*. Hence, the court makes a tradeoff, in holding that disclosure of data is what would be problematic and that the data may be legitimately used for the purposes of investigation.[6] The court draws many parallels between the data realm and the real world as seen when it compares the data gathered from a smartphone or email account, to a situation akin to the securing of a murder weapon and finds that the data by itself is not enough to prove the guilt of the accused.[7]

A particularly interesting aspect, with far-reaching consequences, is the court allowing for hacking by third parties or requiring the service provider to provide access on the refusal by the accused to cooperate. Though we have seen an increasing and alarming trend of external 'help' stepping in to crack open phones and *Apple v. FBI*[8] being a case in point, there is of course huge ramification as to the rights of the individual juxtaposed on the third party that does so at the behest of the investigative agencies. In *Virendra Khanna*, the court could have been inadvertently pushing for a quick leap to the hacking step, as all the intervening steps are mere decorations, to satisfy certain surface-level constitutional and legal obligations. In contrast, the decision in *Balu Gopalakrishnan v. State of Kerala*[9] may also be noted here, where the court directed sharing of anonymized data and

[3] Selvi v. State of Karnataka, 2010 (7) SCC 263.
[4] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[5] Virendra Khanna v. State of Karnataka, W.P. No. 11759/2020 (GM-RES), Karnataka H.C.
[6] *Id.* at ¶ 15.5.
[7] *Id.* at ¶ 13.5.
[8] Dave Lee, *Apple v The FBI – A Plain English Guide,* BBC, (Feb. 18, 2016), https://www.bbc.com/news/technology-35601035.
[9] Balu Gopalakrishnan v. State of Kerala, W.P.C. No. 84/2020, Kerala H.C.

only so long as consent was obtained from the citizens as to the possibility of such data being shared.

Also relying on the facts of the present case,[10] there is every possibility that the investigation authorities can raise claims of non-cooperation and jump to the 'hacking by third parties' stage. The issuance of a search warrant and bringing a distinction between the 'emergent circumstances' and 'during the regular ordinary course of the investigation'[11] would essentially be redundant because when it comes to data and the cyber world, there is nothing that prevents the investigating authorities from affixing 'emergent circumstances' on every situation considering the transient nature of data concerned and taking into account that the illegality of the search does not render any seizure as inadmissible.[12]

The contentious section 69(1) of the Information Technology Act,[13] is also briefly alluded to by the court in support of the idea that the providing of the password is legally supported in light of the existing provisions themselves.[14]

But then again, the court also looks at the case where the stance taken by the accused was considered which would result in a 'chaotic situation' where offences like cyber-crime, child pornography, etc. could never be investigated.[15] Does this consideration warrant the conclusion that the direction to provide a password would not amount to testimonial compulsion?

IV. PROCEDURE, CONSENT, AND THE EROSION OF THE JUDGMENT IN SELVI

The state raised the contention that the judgment in *Selvi*[16] could not be applicable in this case as the test was used for the 'limited purpose of unlocking the phone.'[17] Perhaps the most crucial consideration here is that there is nothing 'limited' when it comes to devices like smartphones or email accounts. To rely on the pivot in *Selvi*, the court considered the voluntariness and reliability of the material so collected. *Virendra Khanna* removing the element of voluntariness, and reliability is always questionable when it comes to malleable data like those stored in electronic devices and

[10] Virendra Khanna v. State of Karnataka, W.P. No. 11759/2020 (GM-RES), Karnataka H.C.
[11] *Id.*, at ¶ 12.1.
[12] *Id.* at ¶ 12.19.
[13] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).
[14] Virendra Khanna v. State of Karnataka, W.P. No. 11759/2020 (GM-RES), Karnataka H.C.
[15] *Id.* at ¶ 14.5.
[16] Selvi v. State of Karnataka, 2010 (7) SCC 263.
[17] Virendra Khanna v. State of Karnataka, W.P. No. 11759/2020 (GM-RES), Karnataka H.C.

cloud storage. Perhaps, if the true spirit of *Selvi* was invoked, then the guidelines made by the *Virendra Khanna* judgment would have ended in one line – if there is no consent, then there cannot be a polygraph test carried out forcibly on the accused. *Selvi* also noted the value of silence, as did the court in *Miranda v. State of Arizona*[18] and found that compulsory administration of the test 'impedes the right to remaining silent and offering substantive information.'

Even recognizing the decision in *Kathi Kalu*[19] which took the angle that fingerprints or handwriting could not change their intrinsic character, a password is slightly inconsistent with such a view. The contention that the password was nothing but an 'identification mark' of the accused by the service providers hosting his data and thus be ushered through by section 54A of the Code of Criminal Procedure,[20] is perhaps more than just slightly problematic. Unlike, say, an IP address, a password does not merely stop at identification. Particularly when it comes to the data stored on phones or computers, or accessible through cloud storage, there is no limit to the data that can be retrieved once access is gained.

Looking back at *Roe v. Wade*,[21] the solution lies in perhaps evolving a balance between privacy and state regulation. There is no doubt that investigative authorities are restricted by several provisions like Section 27 of the Evidence Act, [22]and that they should be allowed to at least benefit from modern commonalities like polygraph tests and narcoanalysis. But a free hand given to them would spell disaster and so this is where a line should be drawn. The line, so to speak, drawn by *Selvi* and clarified in *Puttaswamy*, has been blurred by the *Virendra Khanna* judgment, which goes back and forth between the considerations of privacy and negating the value given to consent and procedural requirements, which was such a core concern in *Selvi*. If through the guidelines evolved, the prosecution requests the court to issue the directions for disclosure, and the alleged accused refuses, an adverse inference may be drawn against him and the data can easily be retrieved by directing the same from the service providers or through 'experts'.

The case of *Planned Parenthood v. Casey*[23] considered the undue burden test and found that the State cannot make a law that may be too restrictive or burdensome on the individual's fundamental rights. The *Planned Parenthood* case offers an interesting benchmark for testing law and the relation

[18] Miranda v. State of Arizona, 384 U.S. 436.
[19] State of Bombay v. Kathi Kalu Oghad & Ors., 1961 AIR 1808.
[20] The Code of Criminal Procedure, 1974, No. 2, Acts of Parliament, 1974 (India).
[21] Roe v. Wade, 410 U.S. 113 (1973).
[22] The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).
[23] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

it has to individual rights and state interest. Here, the *Virendra Khanna* judgment could have gone a similar route, but the court essentially espouses a system where the accused is asked to cooperate and where the accused is free to refuse, but adverse inferences may be drawn, and there is still a way to force the accused to undergo such tests once the court grants an order for the same.

V. THE RIGHT TO BE FORGOTTEN AND INVESTIGATIONAL EFFICIENCY

Accepting the judgment would also bring in questions as to the data so collected and what ought to be done with it, considering that the right to erasure or the right to be forgotten, in a broader perspective arises. In the *Puttaswamy* judgment, Justice Kaul echoed the new reality - that humans may forget but the internet does not. The *Google Spain*[24] decision was the first critical landmark for the right to be forgotten and entities like Google now have dedicated systems to process removal requests and follow through with them. India too has witnessed a few cases, most notable being the *Dharmraj Dave v. State of Gujarat*[25] and *Vasunathan v. The Registrar General*,[26] cases which reveal a chaotic approach to both interpretation and application of this right. More recent decisions like that of *Jorawer Singh Mundy v Union of India*[27] highlight a positive tendency where the right to be forgotten has been successfully enforced. The Personal Data Protection Bill,[28] contentious in itself, provides for the right to erasure and the right to be forgotten. While the differences between the two might pose interesting questions for privacy and state interests, attention may now be redirected to another issue.

The systemic and infrastructural weaknesses aside, such data cannot be left untended in the hands of the authorities. So then, there may arise questions as to why such information should or should not be retained, and prioritization would again revolve around an individual's right to be forgotten and the state's interest to ensure investigational efficiency. In cases like *S and Marper v. UK*,[29] where the private interests of individuals superseded the 'disproportionate interference' by the State in retaining their fingerprint and DNA samples; and in *Uzyn v. Germany*[30] where there was held to be no violation of rights where surveillance via a GPS receiver in an accomplice's car; there is a distinct difference in the way the courts have been able to construe the facts as to favor either side. This

[24] Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González, C-131/12 (CJEU).
[25] Dharmraj Dave v. State of Gujarat, SCA No. 1854/2015, Gujarat High Court.
[26] Vasunathan v. The Registrar General, (2017) SCC OnLine Kar 424.
[27] Jorawer Singh Mundy v. Union of India, (2021) SCC OnLine Del 2306.
[28] The Personal Data Protection Bill, 2019, Bill No. 373, LOK SABHA SECRETARIAT (India).
[29] S and Marper v. United Kingdom, [2008] ECHR 1581.
[30] Uzyn v. Germany, Application No. 35623/05, ECHR.

is also an evident pitfall where legislations are unable to keep up with technological development and the limited foresight as to all the possible ways in which these techniques could infringe individual privacy concerns. Even in the present case, if the facts alone were considered, as is, the failure to follow through with the procedural requirements should have sounded alarm bells. Considering that the Petitioner in *Virendra Khanna* worked in event management, it is not perhaps impossible to think that a day may come when all that has transpired in the case, leads to his privacy or business prospects being hurt. The Personal Data Protection Bill or not, the core concerns have barely been scratched at in the Indian legal systems and it won't be long before the metadata of our lives becomes irreparably intertwined with the never forgetting internet.

VI. CONCLUSION: THE SLOW DEATH OF INDIVIDUAL PRIVACY

Time and time again, monumental judgments and their effects have been chipped away by subsequent judicial decisions or State action. Even now, the Rules framed under the IT Act show a tendency to lean towards the iron hand of the State over individual privacy concerns. Cleverly worded illusions are what we find in the Preamble to the Data Protection Bill and such legislative moves, which are aided by judgments along the lines of *Virendra Khanna* will allow for India to move into dangerous, uncharted territory, where the right to privacy might already be six feet under.

ARTICLE

MOBILE PHONE AND FINGERPRINTS: DISSECTING THE DILEMMA UNDER ARTICLE 20(3) OF THE CONSTITUTION OF INDIA

-Sumedha Tewari and Krisha Meswani [*]

ABSTRACT

Electronic devices have become a source of personal and professional information of the individual possessing it. In recent times, instances of authorities trying to overreach their limit and obtain information on individuals are increasing. This poses a potential conflict with the right to privacy vis-à-vis electronic devices in India and elsewhere in the world. One aspect which remains untouched in this technological dilemma is the question of self-incrimination based on electronic devices. Article 20 of the Constitution of India grants the right against self-incrimination to an individual accused of a crime, wherein he cannot be compelled to provide incriminating information against himself. However, there is uncertainty regarding whether this right may be applicable to the procurement of alphanumeric passwords and biometrics, including fingerprints and facial recognition, from the accused. In this paper, the authors aim to analyse the position of law with respect to compelling an accused person to provide the password or his biometrics to the State in order to unlock his electronic devices. This position will be examined in light of the right against self-incrimination and the right to privacy of the accused. For comparative analysis, the two different views on self-incrimination and privacy that have been adopted in the United States and United Kingdom are examined. In conclusion, a feasible solution is proposed keeping in mind the Indian political and socio-legal structure.

Keywords: self-incrimination, right to privacy, biometrics, decryption, Constitution of India.

I. INTRODUCTION

The growing prevalence of government agencies requesting fingerprints and other biometric details from the accused for unlocking their devices raises an important question of self-incrimination with respect to Article 20 of the Constitution of India. This discussion needs to

[*] Fifth Year Candidates, National Law University, Jodhpur.

be initiated if one wishes to develop the legal system in consonance with technological innovations. Before delving into the details of the legal issues surrounding compelling an accused person to decrypt his devices, it is important to understand how encryption works. The encryption used in mobiles phone today is indirectly a protective cover for their privacy. With respect to mobile phones and the content inside them, the purpose of putting a password or a fingerprint lock is necessary to protect one's privacy from interference by a third person.[1] An encryption key is used to decrypt an encrypted device.[2] When passwords or fingerprints are entered into a device, they trigger the encryption key and decrypt the information stored on the device.[3] People today heavily use these encryption keys in the form of passwords or fingerprint protection to protect their personal information.[4]

There is practically no difference between the use of biometrics and the use of alphanumerical passwords for the purpose of encryption today. The main purpose of biometrics is to serve as a protection against private information stored inside a mobile phone or a device.[5] If the biometrics entered into the device match that of the encryption, the device gets unlocked automatically, and if not, in most cases, it asks for an alphanumerical password which is used as an alternative to biometrics. The main purpose of using this biometric information is to prevent the users from undergoing the unnecessary hazard of remembering complex words or numbers.[6] When a person is asked to provide passwords or biometrics, the purpose of it is not to get the encryption key itself but to decrypt the encryption device and allow access to the information stored inside it.[7]

The aim of this article is to analyse the position of Indian law regarding compelled decryption of devices vis-à-vis the right against self-incrimination and the right to privacy. In order to

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[1] Vivek Mohan & John Villasenor, *Decrypting the Fifth Amendment: The Limits of Self-Incrimination in the Digital Era*, 15 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 11, 11 (2012).
[2] Michael Wachtel, *Give Me Your Password Because Congress Can Say So: An Analysis of Fifth Amendment Protection Afforded Individuals Regarding Compelled Production of Encrypted Data and Possible Solutions to the Problem of Getting Data from Someone's Mind*, 14 U. PITT. J. TECH. L. & POL'Y 44, 47 (2013) [hereinafter "WACHTEL"].
[3] *Id.* at 48-52.
[4]Brendan M. Palfreyman, *Lessons from the British and American Approaches to Compelled Decryption*, 75 BROOK. L. REV. 345, 350-51 (2009).
[5] Colin Soutar et al., *Biometric Encryption*, *in* ICSA GUIDE TO CRYPTOGRAPHY 1–2 (Randall K. Nichols ed., 1999), http://www.cse.lehigh.edu/prr/Biometrics/Archive/Papers/BiometricEncryption.pdf [https://perma.cc/EMH7-UY8X].
[6] Marco Tabini, *Open Sesame: How iOS 8 Will Unlock Touch ID's Power,* MACWORLD (July 22, 2014, 5:00 AM), http://www.macworld.com/article/2455474/open-sesame-how-ios-8-will-unlock-touch-ids-power.html [https://perma.cc/V2PF-5KQS].
[7] WACHTEL*, supra* note 2, at 48.

accomplish this, first, the authors introduce the current legal framework surrounding self-incrimination in India. Second, the paper will discuss two recent judgments of the Karnataka and Kerala High Courts. Third, foreign jurisdictions such as the US and the UK will be examined, dealing with the issue of compelling an accused to unlock his phone. Fourth, compelled decryption in the context of the right to privacy in India is examined. Finally, the paper concludes with recommendations on how the law may be shaped to balance the rights of the accused with the interests of the State.

II. RIGHT AGAINST SELF-INCRIMINATION: A COMPARATIVE ANALYSIS

(A) SELF-INCRIMINATION IN INDIA

The right against self-incrimination under Article 20 (3) of the Constitution protects an accused person from being compelled to "be a witness" against himself.[8] Similar to the Fifth Amendment of the Constitution of the United States ("US"),[9] this right protects an accused from being criminally prosecuted based on the evidence compulsorily obtained from him.[10] Presently, the issue of excluding passwords and biometrics from Article 20(3) has been dealt with by the judiciary. Before discussing these cases, this section will briefly summarise the history and relevant principles of the right against self-incrimination in India.

In *M.P Sharma v. Satish Chandra* ("MP Sharma"), the Supreme Court gave Article 20(3) a wide interpretation, thereby including all incriminating documents compulsorily obtained from the accused to be protected under it.[11] This wide interpretation of the right against self-incrimination was followed in subsequent cases. The Court in *Brij Bhushan v. State* held that providing thumb impressions or signature specimens would amount to furnishing evidence under Article 20(3).[12] Similarly, in the case of *Rajamuthu Filial v. Periyaswami Nadai,* the Court held that taking a thumb impression even for identification would be prohibitive under the Constitution.[13]

[8] INDIA CONST. art. 20, cl. 2.
[9] U.S. CONST. amend. V.
[10] Bram v. United States, 168 U.S. 532, 542 (1897); Rogers v. Richmond 6 365 U.S 534, 540–41 (1961).
[11] For this purpose, the court differentiated between compulsory obtaining of documents and search and seizure under Section 94 of the Code of Criminal Procedure, 1973, holding that the latter is not protected by any privilege. It was held that the phrase "to be a witness" means to "furnish evidence" and included not only oral, but documentary evidence as well. *See*, MP Sharma v. Satish Chandra, 1954 AIR 300 ¶10.
[12] Brij Bhushan v. State, AIR 1957 MPHC, ¶ 108.
[13] Rajamuthu Filial v. Periyaswami Nadai, AIR 1956 Mad 632.

In an effort to curb the absurdity resulting from the *MP Sharma* judgment, the Punjab and Haryana High Court, in *Pakhar Singh v. The State*, tried to differentiate between testimonial evidence and bodily or physical evidence. According to the Court, testimonial evidence is confined to oral statements or written words of testimonial character by the accused. Physical or bodily evidence constitutes "*exhibition of the body or of any identifying marks on it, for purposes of comparison with evidence produced at the trial*". The Court reiterated that only the former type of evidence from the accused is protected under Article 20(3).[14] The Supreme Court also tried to clarify the position laid down by *MP Sharma* through a historic and decisive nine-judge bench judgement of *The State of Bombay v. Kathi Kalu Oghad* ("Kathi Kalu Oghad"). The Court clarified the distinction between physical and testimonial evidence, thereby categorising fingerprinting and other specimens as "physical" evidence, implicitly non-testimonial in nature.[15] The Court reiterated the ratio of *MP Sharma*, including both oral and documentary evidence in the phrase "to be a witness"; however, with respect to documentary evidence, the Court stated that such evidence would be barred by Article 20 (3) only when it unfolds "contents of his own mind" and nothing else.

The question of self-incrimination with respect to tests like narcoanalysis came into question in *Srimati Selvi v. State of Karnataka* ("Selvi"). The Supreme Court, reiterating the importance of Article 20(3), stated that frequent reliance on evidence obtained from the accused compromises the diligent investigation.[16] The Court stated that any act which has a tendency to expose the accused to the criminal charge is said to come under the act of "being a witness against himself". Quoting *Selvi* and *Kathi Kalu Oghad,* the Court in *Ritesh Sinha v. State of UP* recently iterated that evidence in the form of fingerprints or voice samples does not come under Article 20(3) since these forms of physical evidence do not convey information based on personal knowledge.[17] The Court, making an important point, stated that such physical evidence is only used for identification and corroboration purposes and, therefore, cannot be considered "testimonial".[18]

The differentiation of physical and testimonial evidence in the Indian courts led to an array of confusion especially with regard to fingerprints and its usage. After the courts accepted the

[14] Tekchand J., *in* Pakhar Singh v. The State, AIR 1958 P H 294, 21.
[15] State of Bombay v. Kathi Kalu Oghad, AIR 1808, 1962 SCR (3) 10, 30-34.
[16] Smt. Selvi v. State of Karnataka and Ors., 2010(7) SCC 263, at 301.
[17] Ritesh Sinha v. State of UP, 2019 SCC OnLine SC 956, 21-26.
[18] *Id.*

inclusion of documentary evidence under Article 20(3),[19] there arose a problem with regard to the wider interoperation of the privilege. This problem was tried to be resolved by the Court in *Kathi Kalu Oghad* by dividing the evidence furnished by the accused to be physical or testimonial in nature. The type of oral or documentary evidence which did not furnish any personal information, capable of being altered, and furnished by relying on one's own volition, is not said to be testimonial in nature and thus is not included in the purview of Article 20(3). Statements do not need to be confessionary to be regarded as testimonial- they merely have to furnish a link in the chain of evidence to support a conviction. *Selvi* expanded this scope of testimonial nature to furnishing information based on personal knowledge, whether oral or documentary.[20] This approach to classification of evidence as testimonial or physical is being followed by Indian courts even today.[21] It prevents fingerprints, voice samples, and handwriting samples from being included under the privilege against self-incrimination.

The underlying reasoning behind this differentiation between physical and testimonial evidence has been the use of a person's cognitive skills and volition in making the statement or producing a document or performing any other act.[22] Another reasoning which can be said to have been guiding the judgements mentioned above is the aftermath of furnishing the evidence. Apparently, evidence procured only for identification purposes, which needs to be corroborated with other evidence in order to conclude or dispute a fact against the accused, need not come under Article 20(3). The reasoning behind this logic is the absence of the incriminatory nature of the evidence furnished "in itself". Only when the nature of the evidence is such that it leads to the incrimination of the accused or furnishes a link in the chain of evidence, in isolation from other evidence, can it be termed testimonial.

(B) THE PRESENT CONTROVERSY

In the context of unlocking mobile phones or other devices using passwords or biometrics of the accused, the State can compel the production of such passwords or biometrics under Section 91 of the Code of Criminal Procedure, 1973 ("CrPC"), which provides that:

[19] MP Sharma v. Satish Chandra, 1954 AIR 300.
[20] Smt. Selvi v. State of Karnataka and Ors., 2010(7) SCC 263, ¶180.
[21] State of UP v. Sunil, Special Appeal No. 248 [2003].
[22] State v. M Krishna Mohan, 2007(14) SCC 667; Smt. Selvi v. State of Karnataka and Ors., 2010(7) SCC 263; State of Bombay v. Kathi Kalu Oghad, AIR 1808, 1962 SCR (3) 10.

> "*[w]henever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.*"[23]

The investigating authorities may also require the production of passwords or biometrics under Section 69 of the Information Technology Act, 2000 ("IT Act"), which provides that:

> "*where the Central Government or a State Government or any of its officers specially authorised by the Central Government or the State Government, as the case may be, if satisfied that it is necessary or expedient so to do, in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence*" may "*direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.*"[24]

The above-mentioned provisions have been applied in two recent cases. First, the Karnataka High Court judgment in the case of *Virendra Khanna v. State of Karnataka* ("Virendra Khanna").[25] The case concerned the police compelling the accused to provide his mobile phone as well as email account password. The Court held that the investigating officer could ask the accused to furnish his password or biometrics for the purpose of accessing his devices. If the accused refuses to provide the password, the investigating officer can approach the Court for a search warrant under the CrPC. The Court also cited Section 69 of the IT Act, which gives certain officers the power to compel decryption. The investigating authority can also inform the accused of the possibility of prosecution if he fails to comply with the directions to provide his password or biometrics. The rationale of the Court behind not considering passwords and biometrics as testimonial evidence was that merely providing them would not amount to answering any questions of the investigating officer. Moreover, the data available on the device would have to be proved by the investigating agency in accordance with the law of evidence. The Court likened the providing of passwords and biometrics to "*finger printing and/or taking*

[23] CODE CRIM. PROC. § 91.
[24] Information Technology Act, 2000, § 69, No. 21, Acts of Parliament, 2000 (India).
[25] Virendra Khanna v. State of Karnataka, (2021) 3 AIR Kant R 455.

imprints of the shoes, soles and or taking sample of the clothes, biological samples, chemical samples, etc". The Kerala High Court, in the subsequent case of *P. Gopalakrishnan alias Dileep v. State of Kerala* ("Dileep"), followed the ratio and reasoning of the Karnataka High Court in holding that the prosecution has every right to seek that the accused hand over the mobile phones in question for the purpose of forensic examination by an agency identified by the Central Government.[26]

According to the authors, the reasoning employed by the courts in both *Virendra Khanna* and *Dileep* is flawed in light of the established law on self-incrimination in India. The Karnataka High Court in *Virendra Khanna* relied upon the *Kathi Kalu Oghad* judgment, which held that giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness" in Article 20(3). It is important to note that, in the context of the *Kathi Kalu Oghad* judgment, giving thumb impressions does not constitute self-incrimination only when such impressions are used for identification. In *Virendra Khanna*, biometrics were required for unlocking a phone to access the data within the phone and not for identification purposes, which would involve comparing the accused's biometrics to those already with the investigating agency. The Supreme Court of India held in *Kathi Kalu Oghad* that the phrase "to be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation.[27] The data in an accused's phone that is sought to be accessed by the police is something that shows his personal knowledge of facts. Moreover, it is important to keep in mind that *Kathi Kalu Oghad* judgment came out in 1961, long before the Supreme Court could have anticipated the advent of smartphones, how they are used to store personal data and how they can be unlocked using biometrics. Therefore, we believe that it is erroneous to apply the Supreme Court's statements regarding the taking of fingerprints not being covered under Article 20(3) to a situation decades later in a completely different context.

The *Virendra Khanna* judgment also conflicts with *Selvi*, wherein the Supreme Court held that the materials likely to lead to incrimination by themselves or "furnish a link in the chain of evidence" would be considered testimonial in nature and protected under Article 20(3).[28] The

[26] P. Gopalakrishnan alias Dileep v. State of Kerala, (2020) 9 SCC 161.
[27] State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808, ¶ 11.
[28] Selvi v. State of Karnataka, (2010) 7 SCC 263, ¶ 145.

Supreme Court found it acceptable to rely on testimonial evidence only for the purpose of identification or corroboration of already known facts. Applying the ratio of *Selvi* to the context of mobile phones, it would be permissible to use an accused's biometrics to unlock a smartphone if the investigating officer already knew of it and could pinpoint the documents inside the phone that were sought to be accessed. In such a case, usage of the accused's password or biometrics would not furnish a link in the chain of evidence but merely corroborate what the police knew already. This is very similar to the approach taken by numerous American courts as will be discussed in the following section. However, the courts in *Virendra Khanna* and *Dileep* make no mention of already knowing which documents were in accused's phones. This relatively different use of password protection under Article 20 of the Constitution of India is troubling and worrisome. The protection given under Article 20 to the accused with respect to this phone is not for the content inside, which may be testimonial and incriminating, but for the very act of producing the password, which is considered testimonial provided it is an alphanumeric one. This dichotomy is somewhat not fruitful for the present age since mobile phones have become a source of potential self-incriminating data, and fingerprints are not only used for identification. Compelling an accused to provide enforcement agencies access to a device which contains his personal information, thoughts, and intimate details of life is inherently contradictory to the right against self-incrimination. The courts should move away from this distinction between physical and testimonial evidence in order to avoid any coercion on individuals which forces them to reveal private contents of their lives.

Additionally, the Karnataka and Kerala High Courts likened the direction to provide password or biometrics for unlocking a phone to requiring the accused to produce a document.[29] In doing so, they failed to take into account the judgment in the case of *State of Gujarat v. Shyamlal Mohanlal Choksi* ("Shyamlal Mohanlal Choksi"), wherein the Supreme Court held that an accused may refuse to produce documents if they are covered under Article 20(3).[30] Moreover, the Kerala High Court, in *T. G. Mohandas v. State of Kerala* ("Mohandas"), held that compelling an accused to provide his mobile phone would amount to self-incrimination.[31]

Apart from the contradictions with other judgments, another very important factor is that content found in such mobile phones may cause an unintentional bias in the minds of law

[29] Virendra Khanna v. State of Karnataka, (2021) 3 AIR Kant R 455, ¶ 14.5.
[30] State of Gujarat v. Shyamlal Mohanlal Choksi, AIR 1965 SC 1251, ¶ 18.
[31] T. G. Mohandas v. State of Kerala, 2018 SCC OnLine Ker 568, ¶ 6.

enforcement agencies. This bias may not necessarily lead to the right conclusion. A person's WhatsApp chats or personal notes might have potential evidence which may or may not be relied upon.[32] Such intrusion may unnecessarily interfere in the impartial dispensation of justice and may hinder the path of acquittal for an accused, despite lacking concrete evidence for the same.

(C) SELF-INCRIMINATION IN THE UNITED STATES

In the United States, the right against self-incrimination is provided by the Fifth Amendment to the U.S. Constitution ["**Fifth Amendment**"], which states that "*No person shall be…. compelled in any criminal case to be a witness against himself*".[33] The Fifth Amendment has been applied in various cases dealing with the decryption of data on electronic devices, and some of these cases will be analysed to discern the position of law in the United States with respect to whether compelling a person to decrypt data or unlock their device falls under self-incrimination.

According to the case of *In re Grand Jury Subpoena Duces Tecum*,[34] a person must fulfil three conditions to claim protection under the Fifth Amendment:

- The information disclosed must be testimonial in nature
- The person in question must be compelled to provide it
- The information must be incriminatory in nature

The first case to hold that the compelled production of documents might violate the Fifth Amendment was *Boyd v. United States* (1886) ("Boyd"),[35] wherein the State issued subpoenas for the defendant's business invoices during an investigation and proceeded to use the invoices against him in the trial.[36] The U.S. Supreme Court held that it was unconstitutional to compel a defendant to produce private papers as it would be equivalent to compelling him to be a witness against himself. Thus, the Court regarded compelled documents as a substitute for an individual's testimony against himself.[37]

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[32] A2Z Infraservices Ltd. v. Quippo Infrastructure Ltd., SLP(C) No. 8636/2021.
[33] U.S. CONST. amend. V.
[34] *In re* Grand Jury Subpoena Duces Tecum, 670 F.3d 1335 (2012), ¶ 4.
[35] Boyd v. United States, 6 S.Ct. 524 (1886).
[36] Andrew J. Ungberg, *Protecting Privacy Through A Responsible Decryption Policy,* 22(2) HARV. J. L. TECH. 537, 542 (2009), http://jolt.law.harvard.edu/articles/pdf/v22/22HarvJLTech537.pdf.
[37] Efren Lemus, *When Fingerprints Are Key: Reinstating Privacy to the Privilege Against Self-Incrimination in Light of Fingerprint Encryption in Smartphones* 70(2) SMU L. REV. 533, 546 (2017), *available at* https://scholar.smu.edu/cgi/viewcontent.cgi?article=4690&context=smulr [hereinafter "LEMUS"].

Subsequent cases, however, have substantially narrowed the protection provided by the Fifth Amendment, putting a greater emphasis on the nature of the evidence and whether it is testimonial instead of the compulsion aspect of it. Testimonial evidence has been held to include such evidence that, implicitly or explicitly, relates a fact or discloses information; the Fifth Amendment only protects forced production of evidence that involves "no intrusion upon the contents of the mind of the accused".[38] The courts drew a distinction between testimonial evidence and physical evidence, such as putting on a shirt,[39] or compelling an accused to provide blood samples.[40] In the latter case, the Court held that the Fifth Amendment only "*protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.*"[41]

These cases, along with others, provided rulings on individual instances of compelled evidence and whether they might be considered self-incriminatory; however, they did not lay down definitive standards or tests for what should be considered testimonial evidence. The foundation of modern jurisprudence on the Fifth Amendment is widely considered to be *Fisher v. United States* ("Fisher").[42] The case concerned documents relating to the tax returns of the accused, which had been transferred to their attorneys. The Internal Revenue Service ("I.R.S.") required the attorneys to produce these documents. The Court held that the documents did not belong to the clients as they had been prepared by the accountants, not the clients, and therefore, could not contain any testimonial declarations. The Fifth Amendment protects a person only against being incriminated by his own compelled testimonial communications.[43] The case hinged on the fact that the papers demanded through the subpoena were not the defendants' "*private papers*", which are provided immunity under *Boyd*. The Court does not deal with the question of the constitutionality of such papers in an accused possession.

Fisher marked the Court's shift from a broader, originalist approach in *Boyd* to a more delineated view of self-incrimination and also laid down the doctrine of production that is followed by American courts to this day. The Fifth Amendment does not protect the contents of papers

[38] Doe v. U.S., 487 U.S. 201, 219 (1988).
[39] Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021, 252-253 (1910).
[40] Schmerber v. California, 384 U.S. 757, 87 S.Ct. 1951, 18 L.Ed.2d 1178, 765(1966) [hereinafter "SCHMERBER"].
[41] *Id.* at ¶ 3.
[42] Fisher v. United States, 425 U.S. 391 (1976); Robert Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 71(1) VA. L. REV. 1, 4-8 (1987).
[43] *Id.*

that a suspect may have previously created.[44] The case also mentioned the doctrine of foregone conclusion which has been used in multiple contemporary cases, as will be discussed further in the article.

1. *Act of Production and Foregone Conclusion*

As mentioned above, *Fisher* led to the creation of a new doctrine by the U.S. Supreme Court for evaluating the testimonial nature of evidence. *Fisher* has already shown that pre-existing documents that are created voluntarily do not fall under the ambit of the Fifth Amendment. The doctrine of production deals not with the contents of such documents but with the compelled act of producing them, typically through a subpoena. According to this doctrine, the very act of producing such documents may be considered testimonial in nature as the accused in such a case would effectively be testifying to the existence, possession and authenticity of such documents as well as the belief that the documents are what is required by the subpoena.[45]

While *Fisher* marked the origin of the production doctrine, it was elaborated upon and further developed in the case of *United States v. Hubbell* ("Hubbell").[46] The case involved the defendant providing various documents to the Independent Counsel as a part of a plea bargain. These documents were used against the defendant in a separate, unrelated prosecution. The Court held that the act of producing subpoenaed documents had a compelled testimonial aspect because the act as well as a respondent's compelled testimony regarding whether he had produced all the required documents, "may certainly communicate information about the documents' existence, custody, and authenticity." The Court also held that derivate use of a testimonial act to obtain evidence in a criminal trial is also protected by the Fifth Amendment.

Hubbell also expanded upon the doctrine of foregone conclusion, an exception to the doctrine of production, which had previously found a single mention in *Fisher*:

> "*The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these*

[44] Laurent Sacharoff, *What Am I Really Saying When I Open My Smartphone? A Response to Orin S. Kerr,* 97 Tex. L. Rev. 63, 65 (2019), https://texaslawreview.org/wp-content/uploads/2019/04/Sacharoff-TLRO-V97.pdf [hereinafter "SACHAROFF"].
[45] Seo v. State of Indiana, 148 N.E.3d 952; James G. Thomas, *The Act of Production Doctrine*, NEAL & HARWELL (Feb. 14, 2017), https://www.nealharwell.com/blog/the-act-of-production-doctrine/#_ftn3.
[46] United States v. Hubbell, 120 S.Ct. 2037.

circumstances by enforcement of the summons no constitutional rights are touched. The question is not of testimony but of surrender."[47]

According to this doctrine, an act may be compelled by the State if all of the testimony implicit in the act of production is a foregone conclusion.[48] It essentially means that an accused cannot testify what the government already knows. This doctrine was used in *Fisher* as the I.R.S. could confirm the existence and authenticity of the documents in possession of the defendants' lawyers, independent of any involvement by the defendants. *Hubbell* reached the opposite conclusion, holding that the State could not independently confirm the existence of the documents; therefore, their production by the defendant had a testimonial aspect. The exception would only apply if the government could show that it was aware of the location, existence, and authenticity of the purported evidence with *reasonable particularity*.[49]

The position of law in the U.S. regarding compelled decryption is that it has a testimonial character. The most common method of applying existing case law on the Fifth Amendment to contemporary cases involving compelled decryption is by analogising identifying documents in response to a subpoena to revealing the combination to a wall safe to a prosecutor, which might involve the use of mental faculties and could be considered testimonial, as opposed to surrendering the key to a strongbox, which could be considered a purely physical act.[50]

There are two approaches that have been adopted by the courts when it comes to applying the existing case law to figure out whether an individual may be compelled to reveal the password to his device by the State. The first is that the State need only show that the defendant knows the password to his device.[51] This approach has been adopted by courts in numerous cases.[52]

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[47] Fisher v. United States, 425 U.S. 391 (1976), ¶ 14.
[48] Aloni Cohen & Sunoo Park, *Compelled Decryption and The Fifth Amendment: Exploring the Technical Boundaries,* 32 (1) HARV. J. L. TECH. 169, 182 (2018), https://jolt.law.harvard.edu/assets/articlePDFs/v32/32HarvJLTech169.pdf.
[49] United States v. Hubbell, 120 S.Ct. 2037, ¶ 6; NATIONAL ASSOCIATION OF CRIMINAL DEFENCE LAWYERS, *Compelled Decryption Primer* (Apr. 14, 2020) [hereinafter "NACDL"].
[50] CONGRESSIONAL RESEARCH SERVICE, *Catch Me If You Scan: Constitutionality of Compelled Decryption Divides the Courts* (Mar. 6, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10416 [hereinafter "CONGRESSIONAL RESEARCH SERVICE"].
[51] Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97(4) TEX. L. REV. 33 (2018) 771-775.
[52] State v. Pittman, 300 Or. App. 147. This case, however, was reversed by the Supreme Court of Oregon in State v. Pittman, 367 Or. 498. The latter case held that the State cannot compel a defendant to disclose the password to their phone as the action would provide incriminating testimonial evidence. A court order compelling such disclosure can only be used if the State can prove beyond reasonable doubt that it already knows the information that the testimonial aspects of the act will communicate. This case further shows the that trend in recent American cases is to favour the protection of civil liberties as opposed to earlier cases that placed a considerably low burden on states in such instances; Missouri v. Joanthony Johnson, 576 S.W.3d 205 (2019).

One of the more prominent cases is *United States v. Spencer* ("Spencer"),[53] which dealt with the presence of child pornography on the defendant's electronic devices, including a smartphone and a laptop. The government sought to compel the defendant to decrypt these devices to obtain the required evidence of child pornography. According to the District Court for the Northern District of California, a rule that the government can never compel the decryption of a password-protected device would lead to absurd results. The Court considered the identification of specific files on the hard drive to be beyond the scope of the Fifth Amendment. It also set aside the reasonable particularity test laid down by *Hubbell*, stating that the appropriate standard to be used instead should be that of "*clear and convincing evidence*" that the defendant's ability to decrypt the concerned device is a foregone conclusion.[54] This significantly lowers the burden on the state as compared to identifying specific files with reasonable particularity.[55]

This approach was followed by the Supreme Court of New Jersey in the case of *State* v. *Andrews*.[56] The Court held that, since the State had been able to prove that the defendant could unlock the phone, the issue of compelling the defendant to do so was one of surrender, not testimony.[57]

The second view is that the State should be able to prove that it already knows that the defendant has the required files on his device, along with being able to identify such files with reasonable particularity.[58] This view has been advanced by Laurent Sacharoff and followed in various cases, wherein the doctrine of production is applied to the act of producing an unlocked or decrypted device using two analogies. The first analogy equates entering the password to unlock the device to the physical act of handing over documents. The second analogy draws a parallel between files on the smartphone and the documents ultimately produced.[59] This view of the Fifth Amendment protections places a far greater burden on the State than the previous one. In the case of *Seo v. State*, it was held that:

> "*a suspect surrendering an unlocked smartphone implicitly communicates, at a minimum, three things: (1) the suspect knows the password; (2) the files on the device exist; and (3) the suspect possessed those files.*

[53] United States v. Ryan Spencer, 2018 WL 1964588 (2018).
[54] *Id.* at 3.
[55] NACDL, *supra* note 49.
[56] State v. Andrews, 243 N.J. 447 (2020).
[57] *Id.* at 7.
[58] SACHAROF, *supra* note 44, at 64.
[59] *Id.* at 68.

> *And, unless the State can show it already knows this information, the communicative aspects of the production fall within the Fifth Amendment's protection. Otherwise, the suspect's compelled act will communicate to the State information it did not previously know—precisely what the privilege against self-incrimination is designed to prevent.*"[60]

When it comes to compelling decryption by taking the defendant's biometrics specifically, the approach of the courts is split between treating it as a merely physical act and giving it a testimonial nature. The recent trend, however, leans towards treating it as being violative of the Fifth Amendment.[61] The cases that treat the use of biometrics as a physical act argue that providing fingerprints is equivalent to "using the body as evidence",[62] which is permitted under the Fifth Amendment. While acknowledging that the use of biometrics is a grey area between purely physical and testimonial evidence, the Supreme Court of Minnesota, in the case of *State* v. *Diamond*[63] nevertheless concluded that it fits more into the category of physical evidence because the fingerprint itself is physical evidence and not evidence of the mind's thought processes. The State's use of the defendant's fingerprint was considered to be like a "test" to gather physical characteristics, akin to collecting a blood sample or standing in a line-up. This position echoed that of *Commonwealth* v. *Baust*.[64] Lately, however, the tide has turned in favour of regarding the unlocking of devices using biometrics as testimonial evidence.[65] In the *Matter of Residence in Oakland, California*,[66] the Court specifically differentiated the use of biometrics for unlocking a phone differs from submitting fingerprints, blood samples or DNA swabs as it serves the same purpose as a password, which most cases considered to be testimonial evidence, including the abovementioned ones that treat biometrics as physical evidence. Moreover, unlocking a device using fingerprints is different from merely submitting fingerprints to the state as the act confirms that the defendant had ownership or control of the device and provides access to the defendant's private information.

These contrasting approaches show that there is no fixed law yet when it comes to the decryption of devices, whether it is protected by the Fifth Amendment and whether the use of

[60] Seo v. State, 148 N.E.3d 952 (2020), at 957.
[61] NACDL, *supra* note 49.
[62] Schmerber v. California, 384 U.S. 757 (1966) at 763.
[63] State v. Diamond, 2018 WL 443356 (Minn. 2018).
[64] Commonwealth v. Baust, 89 Va. Cir. 267 (Va. Cir. Ct. 2014).
[65] Seo v. State, 148 N.E.3d 952; Matter of Residence in Oakland, California, 354 F. Supp. 3d 1010, 1016 (N.D. Cal. 2019); In Re Application for a Search Warrant, 236 F. Supp. 3d 1066 (N.D. Ill. 2017).
[66] Matter of Residence in Oakland, California, 354 F. Supp. 3d 1010, 1016 (N.D. Cal. 2019).

biometrics to unlock a phone may be considered testimonial evidence. It remains up to the US Supreme Court or Congress to resolve the issue once and for all.[67] Both sides have compelling arguments in their favour. The advocates of the *clear and convincing evidence* test believe that impractical to expect the government to pinpoint files on a defendant's encrypted device, considering how difficult it is to obtain access to stored contents of a mobile phone due to modern technology.[68] According to WhatsApp, one of the most popular messaging applications in India, it is impossible for anyone other than the sender and receiver to access the data shared on that platform.[69] However, the privacy concerns of the State being authorised to compel a person to unlock their smartphone should not be taken lightly. So far, the only certainty is that compelling a defendant to unlock or decrypt their devices is not a purely physical act and may be covered by the Fifth Amendment unless the courts see fit to consider the knowledge of decryption a foregone conclusion.

(D) SELF-INCRIMINATION IN THE UNITED KINGDOM

The United Kingdom takes a very different approach to compelled decryption than the United States. Presently, British law allows statutory powers to serve written notice on persons or organisations, requiring them to disclose decrypted information under certain circumstances. The primary statute that authorises the government to compel data decryption is the Regulation of Investigatory Powers Act 2000 ("RIPA").[70]

Part III of the RIPA deals with "Investigation of Electronic Data Protected by Encryption etc." It applies inter alia in situations where the protected information has come into the possession of any person by means of the exercise of a statutory power to seize, detain, inspect, search or otherwise interfere with documents or other property or the exercise of any statutory power to intercept communications.[71] This section requires the State to obtain the encrypted information legally in order to compel decryption.

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[67] CONGRESSIONAL RESEARCH SERVICE, *supra* note 50.
[68] 48 N.J. Prac. Series s 8:15, § 8:15. Encrypted cell phone pass codes—The foregone conclusion exception to the Fifth Amendment— In general.
[69] BS Web Team, *Understanding WhatsApp and its end-to-end encryption for privacy, security*, BUSINESS STANDARD (SEPT. 28, 2020), https://www.business-standard.com/article/technology/understanding-whatsapp-and-its-end-to-end-encryption-for-privacy-security-120092800620_1.html.
[70] Regulation of Investigatory Powers Act 2000 (United Kingdom).
[71] Regulation of Investigatory Powers Act 2000 (UK), § 49.

While Section 49(1) lays down the conditions under which the State may compel a person to decrypt data, Section 49(2) places limitations on the State for requiring such decryption. According to this section, the decryption key must be in possession of the person on whom notice is served, and the decryption must be in the interest of national security, prevention or detection of crime or the economic well-being of the UK.[72] An important requirement under this sub-section is that the compelled decryption be proportionate to the objective it seeks to achieve. Thus, it can be said that the statute provides for a kind of balancing test in which the interests of the State in having access to the decrypted information are weighed against the interests of the individual who is being compelled.[73] The sub-section also requires that the statutory authorities compel decryption as a last resort, only if it is not "reasonably practicable" to obtain the information in any other manner.

Part III of RIPA does not provide any right against self-incrimination. However, this right is explicitly found in Section 14 of the Civil Evidence Act 1968.[74] There are very few cases that have covered the self-incrimination aspect of compelling decryption. One of them is the case of *R* v. *S and A*.[75] The case involved two individuals who were suspected in an anti-terrorism investigation. They were served a notice under Section 53 of the RIPA to decrypt certain files on their laptop. The Court of Appeal ruled against the defendants. The Court held that the defendants could not invoke the privilege against self-incrimination by likening the act of compelling the defendants to reveal the key to collecting physical, non-testimonial evidence such as blood and urine samples. According to the Court, the encryption key that would provide access to the data existed independent of the defendants' will. The Court also made reference to the case of Brown v. Stott[76] to state that the privilege against self-incrimination was not an absolute right but subject to qualifications and limitations. As mentioned before, the British approach to self-incrimination differs from the American one because British law balances privilege with legitimate public interest.

It is interesting to note that the Court, in *R v. S and A*, drew a parallel to the American case, in *Re Boucher* ["Boucher"],[77] to state that some acts of production, such as fingerprints and blood

[72] *Id.*
[73] Brendan M. Palfreyman, *Lessons from the British and American Approaches to Compelled Decryption*, 75(1) BROOK. L. REV. 345, 365 (2009), https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1265&context=blr.
[74] Civil Evidence Act 1968, c. 64, § 14 (Eng.).
[75] R v. S and A.,[2009] 1 WLR 1489.
[76] Brown v. Stott, [2001] 2 WLR 817.
[77] In re Boucher, [2007] WL 4246473, 16.

samples, do not fall under self-incrimination. Boucher reached the opposite verdict, however, in holding that "*[s]ince the government is trying to compel the production of the password itself, the foregone conclusion doctrine cannot apply. The password is not a physical thing. If Boucher knows the password, it only exists in his mind. This information is unlike a document, to which the foregone conclusion doctrine usually applies, and unlike any physical evidence the government could already know of. It is pure testimonial production rather than physical evidence having testimonial aspects.*"

Considering the verdict of the abovementioned case wherein the Court has ruled against considering compelled decryption as self-incrimination, it is clear that the position of law in the UK tilts in favour of the State and against civil liberties. The British courts use the same analogy of a set of locked drawers and key to extend the right against self-incrimination to compelled decryption, reaching the opposite conclusion in most cases.

2. GOING BEYOND THE WARRANT: MOBILE PHONES, FINGERPRINTS AND THE RIGHT TO PRIVACY

It is a settled position of law that Sections 93(b) and (c) of the CrPC can be used against anyone, including the suspects, witnesses and the accused,[78] which makes the issuance of a warrant against unlocking the cell phones a fundamental breach of right to privacy. Under Section 93(b), the investigating authorities must know what item they are searching for, even if they do not know where it can be found. Under Section 93(c), the authorities do not even have to have knowledge about the items they are searching for and their possession. Therefore, issuances of warrants for unlocking a phone of any person, including the accused under this, can lead to a fundamental breach of privacy.

Indian jurisprudence has always followed the concept of privacy through time.[79] With the advent of the digital era, new challenges are being posed to our personal privacy every day. Privacy has not been expressly provided as a right in Part III of the Constitution. The Supreme Court has adopted a technique similar to the American Constitution and has adopted the right to privacy as a fundamental right under Article 21 of the Constitution, enumerating it as "right

[78] *See generally* V.S Kuttan Pillai v. Ramakrishnan & Ors., 1980 AIR 185.
[79] S Basu, *Policy-Making, Technology and Privacy in India*, 6 INDIAN J. L. & TECH. 65, 71-72 (2010).

to be let alone"[80] The right to privacy against unnecessary intrusion by the police was highlighted by Justice Subba Rao in *Kharak Singh v. State of UP*.[81]Right to privacy, though not enshrined in the Constitution, has always been developing as a jurisprudence through the Supreme Court, even though the courts were less willing to import it as a fundamental right earlier. [82]

Despite Indian jurisprudence being less developed in terms of the history and origin of privilege against self-incrimination, a close look at other jurisdictions, such as the Fifth Amendment of the US, gives us a hint that privacy has been one of the driving factors of the drafters while creating this right for the accused.[83] Justice Goldberg in *Murphy v. Waterfront commissioner of New York Harbour*,[84] while pointing out one of the fundamental values embedded in the Fifth Amendment, declared that "*our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life*"[85] is one of the values which are to be observed by the State. Scholars have also suggested that "*self-incrimination is nothing but an intrusion on someone's privacy*", as a justification for the right against self-incrimination.[86] Even if it's not regarded as the sole essence, the right to privacy is still one of the basic principles on which the self-incrimination right is based.[87]

In India, much before the question of right to privacy under Article 20(3) arose, the Court in *Maneka Gandhi v. Union of India*[88] stated that Article 20 should be read in consonance with Article 21 of the Constitution, protecting life and dignity of an individual accused. In *Selvi*, the Court iterated that "*An individual's statement to make a statement is a product of its private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges and penalties*".[89] This statement is in consonance with the reasoning of self-incrimination given in *Murphy v. Waterfront*. The Supreme Court, in *K.S Puttaswamy v.*

[80] Rajagopal v. State of Tamil Nadu, 1995 AIR 264.
[81] Kharak Singh v. The State of Uttar Pradesh and Others, AIR 1963 (SC) 1295.
[82] M P Sharma and Others v. Satish Chandra, District Magistrate, Delhi and Others, AIR 1954 (SC) 300.
[83] David Dolinko, *Is There A Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1090, 1107 (1986) [hereinafter "DOLINKO"].
[84]Murphy v. Waterfront Commissioner of New York Harbour, 378 U.S. 52 (1964).
[85] *Id* at 55.
[86] DOLINKO, *supra* note 83, at 1107.
[87] Couch v. United States, 409 U.S. 322, 327 (1973);
[88] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[89] Smt. Selvi v. State of Karnataka and Ors., 2010 (7) SCC 263, ¶ 225.

Union of India ("Puttaswamy"), has explicitly stated that right to privacy is a fundamental right of every person under Article 21 of the Constitution.[90]

In any jurisdiction, a warrant to compel decryption of a device is overly broad and based on outdated case laws – it gives unfettered access to the law enforcement agencies.[91] In *Puttaswamy*, the Court observed that mobile phones and other devices today store a myriad of personal information which, if given to law enforcement agencies, can cause a serious breach of their right against self-incrimination and their right to privacy,[92] which is nothing but the control we have on the information about ourselves.[93] Mobile phones contain private data of individuals, including their thoughts, family details, bank details, whereabouts, conversations etc which can lead to a breach of privacy if accessed by agencies.[94] When a person puts a fingerprint or a passcode into his device containing this information and details, he is essentially securing the information and the content and making a decision to not share it with the world.[95] Any warrant issued by the court, which compels an individual to unlock his mobile phone, essentially leads to opening up this vast personal data to the enforcement agencies. This means that his decision to protect some personal details about himself, which he did not wish to share with the world, is not respected anymore. This unfettered access to a person's personal life raises substantial questions on the privacy aspect of such compulsion.

Allowing the courts to issue a warrant for search and seizure of the mobile phones of a person means that the individual has to give up his personal information to the law enforcement agencies. The warrants issued here may relate to some form of item to be searched. In the cell phone, there is no guarantee that only that particular item will be searched, and all other information in the mobile phone will be unassessed by the agencies. The investigating authorities have the power to go well beyond the warrant and dwell into the personal life of an individual, which can cause his privacy right to be breached fundamentally.[96]

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[90] Retired J. K.S Puttaswamy v. Union of India (2017) 10 SCC 1, ¶ 320.
[91] Thomas Fox-Brewster, *Feds Walk into a Building, Demand Everyone's Fingerprints to Open Phones*, FORBES (Oct. 16, 2016), http://www.forbes.com/sites/thomasbrewster/2016/10/16/doj-demands-mass-fingerprint-seizure-to-open-iphones/#2e3eec98d9d2 [https://perma.cc/5TMQ-WADB].
[92] Retired J. K.S Puttaswamy v. Union of India, (2017) 10 SCC 1, 512.
[93] Robert S. Gerstein, *Privacy and Self-Incrimination,* 80 ETHICS 87, 89 (1970).
[94] *Id.*
[95] Jack Linshi, *Why the Constitution Can Protect Passwords but Not Fingerprint Scans*, TIME (Nov. 6, 2014), http://time.com/3558936/fingerprint-password-fifth-amendment/ [https://perma.cc/SFR7-Q649].
[96] LEMUS, *supra* note 37.

(E) INFORMATIONAL PRIVACY AND SELF-INCRIMINATION

One of the major issues that remains unresolved today is that of informational privacy with respect to the right against self-incrimination, as discussed above. The Supreme Court of India has reiterated in *Puttaswamy* that Article 21 encompasses the right to informational privacy specifically,[97] which means that any form of information related to a person is not to be shared with public or private institutions without his consent. For an accused, this aspect of privacy remains questionable, especially when compelled decryption of his phone is not considered to be inconsistent with this right.

According to Alan Westin, the father of modern privacy law, informational privacy is described as the "*claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.*"[98] It is essentially the relationship between the accumulation and dissemination of data, technology, and the legal and political issues surrounding them.[99] This information need not be especially sensitive to quality under informational privacy.[100] The type of information under this right may include biometrics, DNA, blood type, etc. While the authors agree that encompassing all these types of information under the purview of the privilege against self-incrimination would definitely make the investigation and criminal procedure futile to an extent as a lot of it counts as physical evidence needed for the identification purposes, the scope of fingerprints specifically should not be undermined in conceptualising the powers it grants to law enforcement agencies against an accused. Fingerprints, biometrics and retinas are a source of encryption in mobile devices, and the courts and law enforcement agencies should exercise caution while collecting this information and not grant unimpeded access to the contents of one's mobile phone or other gadgets that are protected through these biometrics.

The American Constitution does not contain a right to privacy, and the U.S. Supreme Court has dealt with the issue of informational privacy in multiple cases without explicitly confirming whether such a right exists or not.[101] The right ties in with the Fifth Amendment as it protects the personal information of people, including those accused of a crime, which may contain

[97] Retd. Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.
[98] ALAN WESTIN, PRIVACY AND FREEDOM 5-7 (Athenum 1967).
[99] *Id.* at 7.
[100] *Privacy and the NII: Safeguarding telecommunications Related to Personal Information*, 1995 USDOC 2.
[101] Timothy Azarchs, *Informational Privacy: Lessons from Across the Atlantic*, 16 (3) J. CONST. L. 808, 812 (2014).

incriminating details about the crime committed. This was noted in the abovementioned *Boyd* case, wherein the Court noted that the government is not entitled to seize a man's private books and papers.[102] An accused does not forfeit his indefeasible right to personal security, personal liberty and private property merely by being convicted of an offence and should have the same right to privacy as any other citizen. Privacy is usually not the primary concern in cases involving self-incrimination; however, the importance of an individual's right to privacy in the digital age should not be ignored. This is especially due to the fact that most people contain extremely personal information on their phones, and there is no way to forcibly unlock the phone and sort through the information to only see what is relevant to the State without violating the accused's privacy.

3. BALANCING NATIONAL INTERESTS WITH PERSONAL LIBERTY: CASE FOR INDIA

The content of a mobile phone, no matter how personal and private, can currently be accessed by law enforcement agencies because lawmakers have failed to keep themselves up to date with the ever-evolving technology. Their approach is based on outdated case laws from a time period when fingerprints were only used for identification purposes. It is high time India updates its laws to keep pace with the increasing use of technology and the exchange of information online. The approach of most American courts in considering compelled decryption to be self-incrimination is ideal for the protection of civil liberties. While there is still some debate regarding whether the use of biometrics should be included under such compelled decryption along with alphanumeric passwords, it is clear from the arguments above that it is the act of unlocking the phone by compulsion that should be protected under the laws against self-incrimination and not the method of unlocking the phone. Both alphanumeric passwords and biometrics serve the same purpose: to unlock a phone. Therefore, the latter should not be treated as any different to the former just because it involves a physical act. Otherwise, it may be used as a loophole by law enforcement officers to bypass the protections provided for passwords. As stated in *Seo*, the State can avoid compelled decryption of a defendant's smartphone by unlocking it using external products or even with the help of the smartphone's manufacturers. And if the State requires the information for purposes other than prosecution,

[102] Boyd v. United States, 6 S.Ct. 524 (1886), 630.

it can compel decryption and also avoid self-incrimination by providing immunity to the owner of the smartphone.[103]

However, India could also stand to gain by borrowing from the British approach of not making the privilege against self-incrimination an absolute right. While the British approach of compelling decryption in the interest of national security, prevention or detection of crime or the economic well-being of the country is a little extreme, India could create its own criteria for the same and also require that it be used proportionately and as a last resort. India is also no stranger to carving out exceptions to fundamental rights. In the words of Das J., "*social interest in individual liberty may well have to be subordinated to other greater social interests.*"[104] Section 69 of the IT Act already contains numerous reasons under which the State may require decryption of a device such as "*sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence*". National security is usually a common reason used to limit fundamental rights. In the case of *Kartar Singh v. State of Punjab*, the Supreme Court decided upon the validity of certain sections of the Terrorist and Disruptive Activities (Prevention) Acts ("TADA") that dealt with the validity of a confession made to a police officer and *inter alia* ran afoul of the constitutional protection against self-incrimination. The main concern was to prevent torture to extract confessions. The Court held that the legislature may make separate provisions for certain classes of people using the principle of legislative classification under Article 14 of the Constitution. Such a classification must be scientific, rational and depend on "*some real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification is made.*"[105] The Court, in the given case, considered terrorists to be a separate class of people due to the aggravated and incensed nature of their offences and upheld the validity of the provisions of TADA, along with providing certain safeguards to ensure that the law is not abused.

In a similar manner to the one explained above, the Indian Parliament may create or amend legislation relating to national security to compel decryption using biometrics in certain cases, especially since it does not involve causing physical harm to the accused and the benefits to the State far outweigh the privacy concerns for the defendant. The effectiveness of this model

[103] Seo v. State, 148 N.E.3d 952 (2020).
[104] Gopalan v. State of Madras, A.I.R. 1950 S.C. 27, 250.
[105] Kartar Singh v. State of Punjab, (1962) 2 S.C.R. 395, ¶ 139

cannot be construed outright; however, the U.K. legislation is a good example of such law being enforced with restrictions. One of the main objectives to be kept in mind should be minimal usage of such legislations/amendments and proper restrictions which curtail the power of law enforcement agencies. This will prevent any misuse of the same. At this juncture, reference may be made to *Puttaswamy*, which lays down certain guidelines for reasonably restricting an individual's fundamental rights. According to the Supreme Court, a law interfering with fundamental rights must be in pursuance of a *legitimate State aim*, and it must be enacted based on a rational connection between the object sought to be achieved and the consequences of the law. Most importantly, the measures enacted under such a law "*must be necessary to achieve the object and must not infringe rights to an extent greater than is necessary to fulfil the aim*".[106] Within the context of the right to privacy, it can be inferred from the judgment that even if a law breaches an individual's right to privacy, there should be adequate safeguards to ensure that the data consequently collected is only used for its authorised purpose. Keeping in mind that there are multiple examples of police in India forcing individuals to unlock their phones,[107] it is very important to enact legislation that prevents law enforcement agencies from unlocking an accused's mobile phone without his consent through fingerprints or password. The main focus here should be to revamp the interpretation of what constitutes an "evidence against himself" or "content of one's mind" in the context of Article 20 of the Constitution of India.

4. CONCLUSION

In light of recent events, it becomes necessary that law enforcement authorities keep a check on the amount of information they can gather through an electronic device. A person's mobile phone today is not just used for communication but for keeping personal thoughts and communicating feelings. It can be considered a personal diary of sorts. Moreover, it has financial and potentially incriminating information as well, which may or may not be true based on the context. In such cases, using this information, which is basically the content of a person's mind, against him in a court of law would go against the right against self-incrimination. Thus, it is important for lawmakers to rectify the position of law regarding compelled decryption of devices in the context of the *Virendra Khanna* and *Dileep* judgments. India needs a law that

[106] K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1, ¶ 1324.
[107] *IFF assisted in sending a legal notice to the Hyderabad Police Commissioner regarding search of mobile phones for keywords such as 'ganja'*, INTERNET FREEDOM FOUNDATION (Oct. 29, 2021), https://internetfreedom.in/iff-assisted-in-sending-a-legal-notice-to-the-hyderabad-police-commissioner-regarding-search-of-mobile-phones-for-keywords-such-as-ganja/.

protects the privacy and right against self-incrimination of an accused while simultaneously balancing national interests by not making these rights absolute.

BOOK REVIEW

THE DICHOTOMY OF ADVERSARIAL AND INQUISITORIAL SYSTEMS VIS-À-VIS CIVIL LITIGATION: DAMASKA VERSUS THE TRADITIONALIST VIEW

-Avantika Tewari[*]

ABSTRACT

Traditionally, justice systems have been broadly categorized as either adversarial or inquisitorial. While the former stem from the English Common Law System, the latter have existed primarily in civil law jurisdictions premised on Roman legality. Adversarial trials can be conceptualized as a kind of contest between the litigants, with both of them striving hard to facilitate an outcome in their favour. On the contrary, the inquisitorial trial model involves a neutral inquiry, spearheaded by court officials, as opposed to the litigating parties and their legal representatives. While adversarial trials place more reliance on live oral testimony, their inquisitorial counterparts rely more upon written statements. In recent decades, the adversarial-inquisitorial dichotomy has been subjected to disintegration for the most part. As a consequence, it becomes imperative to reflect upon how this dichotomy, as understood traditionally by various scholars can be understood more efficaciously via Professor Mirjan Damaska's revolutionary thesis in his book titled 'The Faces of Justice and State Authority: A Comparative Approach to the Legal Process'. Thus, this paper serves as a review of the utility and relevancy of the core concepts adduced in Damaska's book, such as hierarchical and coordinate officialdoms vis-à-vis policy implementing and conflict resolving states. The author utilizes India as a case study to demonstrate how the country's civil litigation system can be better understood through Damaska's four-cell grid.

Keywords: Systems of justice; adversarial; inquisitorial; trial litigation.

[*] Fourth Year Candidate, National Law School of India University, Bengaluru.

I. INTRODUCTION

Comparative legal scholars across the globe have broadly categorized justice systems as either adversarial or inquisitorial. While the former stems from the Common Law System as it originated in England, the latter traces its heritage to Roman Law and exists primarily in civil law jurisdictions premised on Roman legality.[1] Despite being similar , the two systems are fundamentally different from each other.

Adversarial trials can essentially be understood as a type of competition between majorly two contestants, i.e., the parties to the litigation, with both of them endeavouring to emerge victorious.[2] Ideally, the parties should have nearly identical bargaining powers with the courtroom acting as a 'level-playing field'. The emphasis is on fair disposal of the dispute. Thus, no party to the adversarial litigation ought to be accorded advantages via differential treatment.

Further, the adversarial trial model favours live oral testimony on the part of witnesses as a means of presenting evidence. Counsels representing the litigating parties extract evidences from witnesses, via a series of questions that elicit responses from the witnesses.

Most importantly, adversarial trials are characterized by the adjudicators/judges playing a fairly limited role. It is the sole province of the lawyers to call the requisite witnesses and ascertain the specific evidence that they are to provide. Additionally, lawyers demarcate the issues significant at the trial.[3] Thus, if we envisage an adversarial trial as a game, the judges are relegated to the position of passive referees, judging whether the competitors are displaying compliance with the game's rules, while the lawyers are the athletic contestants controlling the match's direction.

In stark juxtaposition, the inquisitorial trial model encompasses a non-partisan inquiry, both conducted and controlled by court officials, as opposed to the litigating parties and their legal representatives. While adversarial trials place more reliance on live oral testimony, their inquisitorial counterparts rely more upon written statements. It is the judge that conducts the questioning in inquisitorial courtrooms, in case live witness testimony is taken.

Assuming a much more active role in determining the pre-trial accumulation and analysis of evidence, the weightage assigned to such evidence in terms of credibility and reliability, the

[1] TFT Plucknett, *The Relations Between Roman Law and English Common Law down to the Sixteenth Century: A General Survey*, 3(1) THE UNIVERSITY OF TOR. L. J. (1939) 24.
[2] Ellen E Sward, *Values, Ideology and the Evolution of the Adversary System*, 64(2) IND. L. J. (1989) 302.
[3] *Id.*

inquisitorial judge becomes the ultimate fact-finder in a case. The legal representatives of the litigating parties on the other hand play a comparatively marginal role.

Historically, the inquisitorial model has held sway across various jurisdictions in Continental Europe and nations whose current legal systems, directly or indirectly have been considerably inspired from the continental European systems, such as China, Korea, Japan, erstwhile USSR, Soviet bloc socialist countries, etc.[4] The adversarial model on the contrary has seen its genesis in the United Kingdom (UK) and its former colonies, including but not limited to the United States of America (USA), India,[5] Singapore, Australia, Nigeria and Tanzania.[6]

In the recent decades, this dichotomy has been subjected to disintegration for the most part, as countries whose legal justice systems have remained rooted in the inquisitorial trial model for several years have commenced the adoption of some or various attributes of adversarial systems, such as Argentina, Chile, Peru, Panama and Venezuela. Likewise, the UK and France are countries that have undergone a transition from adversarial to inquisitorial.[7]

However, purely adversarial or inquisitorial systems are practically myths and have attained reality only in theory so far. In light of the erasure of the dividing lines that have historically separated adversarial and inquisitorial systems, this paper attempts to *first*, analyse how different scholars have traditionally understood the aforementioned dichotomy and the system they seem to favour; *secondly*, scrutinize Mirjan Damaska's denouncement of the dichotomy and his characterization of legal justice systems (primarily civil); and *thirdly*, posit the author's own analysis of which of the two conceptualizations of procedural systems is more relevant in the modern era, with the use of India as an example.

[4] Janet Ainsworth, *Legal Discourse and Legal Narratives: Adversarial versus Inquisitorial Models*, 2(1) LANGUAGE AND LAW / LINGUAGEM E DIREITO (2015) 3.
[5] *See*, Code of Civil Procedure 1908, Order VI, rule 15A; Order VIII, rule 3; Order XI, rule 1; Order XII, rule 1; Order XX, rule 17; Order XLIV, rule 3.
[6] *Id.*
[7] *Id.*

II. ADVERSARIAL V. INQUISITORIAL SYSTEMS: THE SCOPE OF THE PRINCIPLES OF NATURAL JUSTICE

Before delving into the manner in which these principles pan out in adversarial and inquisitorial proceedings, it is essential to briefly capture their definitions. In this section, the author shall look at the three cardinal principles of natural justice, which are as follows:

(i) *Nemo Debet Esse Judex Propria Causa* – This principle advocates for the prevention of any and every individual from becoming a judge in their own cause.[8] Thus, no one having vested interests in a matter should be permitted adjudicate the same, given that their presence clouds the fairness of the outcome.

(ii) *Audi Alteram Partem* – Much like its predecessor, this principle necessitates the delivery of any verdict only after all parties involved have been provided with a reasonable opportunity to present their side.[9] Non-compliance with this standard vitiates the sanctity of the adjudicatory proceeding and thus invalidates the final decision.

(iii) *Reasoned Decision* – This principle was devised and evolved in order to maintain the quality of the adjudication itself.[10] It requires for every decision to be made reasonably and with the minimization of arbitrariness.

As mentioned in the introductory section, adversarial litigation in essence is a competition between the parties involved, in pursuit of emerging victorious against the other. On the contrary, inquisitorial trials are judge-driven and accordingly place constraints on party autonomy. In light of this characterization of adversarial and inquisitorial trials, it is the opinion of the author that the principles of *audi alteram partem* and *reasoned decision* operate distinctly to an extent under both the categories.

In adversarial systems, oral testimony is more often than not obtained as an inalienable part of reaching a fair decision, as it aids the realization of *audi alteram partem* to the fullest extent possible.[11] All litigants involved should be accorded a fair hearing, wherein they receive complete information

[8] PROFESSOR YASHOMATI GHOSH, TEXTBOOK ON ADMINISTRATIVE LAW 180 (1st ed., Lexis Nexis 2015).
[9] *Id.*
[10] *Id*; VS Chauhan, *Reasoned Decision: A Principle of Natural Justice*, 37(1) JOURNAL OF THE INDIAN LAW INSTITUTE (1995) 92-104
[11] Bertus de Villiers, *The State Administrative Tribunal of Western Australia – Time to End the Inquisitorial/Accusatorial Conundrum*, 37(2) THE UNIVERSITY OF WESTERN AUSTRALIA L. REV. (2014) 188.

of the charges against them and an adequate chance to adduce their defence against a thoroughly reasoned, proposed action.

In inquisitorial systems, the aim of a trial is to uncover the truth in concomitance with what the presiding judge deems fit.[12] *Prima facie*, supporters of adversarial systems might cite the role essayed by the discretion of the judge in inquisitorial adjudication as unfettered and vulnerable to arbitrariness. However, the author believes that such criticisms overlook the efficacy of a judge's active involvement in the conduction of the trial.

The witnesses to be heard and their order is determined by the judge in an inquisitorial trial, as opposed to the parties and their lawyers deciding the same in adversarial litigation.[13] Given that the aim of each party in an adversarial trial is to emerge victorious over the other, the significance of uncovering the truth tends to disappear in the midst of incessant vituperations in such trials. The manner of cross examination of the opponent's witnesses often ends up being marred by prejudice, in addition to the potential concealment or fabrication of evidence by both parties.

As a passive spectator, there is little that a judge can do to remedy such biased conduction of adversarial proceedings and has to display reverence to party autonomy. In an inquisitorial setting however, there exists greater flexibility for judges to manage the trial fairly, by treating all witnesses on par and obtaining requisite evidence in furtherance of reaching the truth of the matter,[14] as opposed to the mere facilitation of one party's victory over the other. Owing to the prevention of individuals acting as judges in their own cause, the final verdict of an inquisitorial trial shall be more thoroughly reasoned and based on all relevant evidentiary material, in juxtaposition with its adversarial counterpart.

When the two systems are viewed through the lenses of 'open impartiality'[15] and 'fair and impartial spectator', it becomes evident that inquisitorial proceedings are more likely to culminate in the delivery of better reasoned and exhaustive verdicts. Amartya Sen propounds the concept of open partiality as a qualified version of the closed impartiality in John Rawls' 'original position'.[16] While

[12] *Id.*
[13] United Nations Office on Drugs and Crime, 'Adversarial v Inquisitorial Legal Systems' (UNODC, May 2018) <https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html> 2 July 2022.
[14] Justice Sudhansu Dhulia, *Role of Courts in the Administration of Criminal Justice*, UTTARAKHAND JUDICIAL & LEGAL REVIEW 8.
[15] Amartya Sen, *Open and Closed Impartiality*, 99(9) THE JOURNAL OF PHILOSOPHY (2002) 445.
[16] JOHN RAWLS, A THEORY OF JUSTICE 11 (2nd ed. Harvard University Press 1999); AK Upadhyay, *Rawlsian Concept of Two Principles of Justice*, 54(3&4) INDIAN JOURNAL OF POLITICAL SCIENCE (1993) 388-397.

Rawls envisages impartial adjudication only at the hands of the individuals who are members of the focal group impacted by such adjudication, Sen advocates for decision-making that involves unbiased spectators.[17] These spectators are disinterested in the matter being adjudicated and given that they do not comprise the focal group, their assessment of issues transcends the local conventions of thought.[18]

III. THE ADVERSARIAL V. INQUISITORIAL DICHOTOMY AS TRADITIONALLY CHARACTERIZED BY SCHOLARS

Professor Jolowicz posits that "*We must recognise that the most that can be said is that some systems are more adversarial-or more inquisitorial-than others. There is a scale on which all procedural systems can be placed, at one end of which there is the theoretically pure adversary system and at the other the theoretically pure inquisitorial.*"[19]

While Jolowicz believes that a purely adversarial or inquisitorial simply don't exist, he never categorically discards the dichotomy between the two. He in fact seems to be a staunch advocate of the inquisitorial system as he contemplates satisfactory answers to the questions of "*whether the adversarial system is well adapted to be anything more than a satisfactory dispute resolution system, and whether dispute resolution is all that we want of our courts in the twenty-first century.*"[20]

Highlighting the shortcomings in the adversarial trial model, Jolowicz opines that judges have no obligation to determine the truth in such trials and that the tool of cross-examination, touted by prominent scholars like John Henry Wigmore as being the best facilitator for the revelation of truth, is merely capable of revealing falsities as opposed to the concealed truth. He also refers to Justice Bingham's landmark verdict in the case of *Air Canada v. Secretary of State for Trade*,[21] wherein the significance of eliciting the truth and not merely resolving the dispute between the litigants in a trial was highlighted.[22]

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[17] AMARTYA SEN, THE IDEA OF JUSTICE 136. (Harvard University Press 2009).
[18] *Id.* at 133.
[19] JA Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52(2) THE INTL. AND COMP. L. Q. (2003) 281.
[20] *Id.* At 283.
[21] [1983] 2 AC 394. (A majority of the prominent airlines across the world alleged that a British Government minister had urged the British Airports Authority to illicitly raise the landing fees at the London Heathrow Airport. The petitioners requested the revelation of certain documents in this regard, for which public interest immunity was claimed by the Secretary of State. The Court of Appeal and the House of Lords ruled in favour of the respondent, reasoning that the disclosure of the documents in question wasn't necessary to dispose of the case at hand.)
[22] *Id.*

Professor William Van Caenegem takes a more neutral approach towards the adversarial-inquisitorial dichotomy, as he goes on to point out the advantages and disadvantages in both the systems.[23] He states that while common law jurisdictions have denied the grant of more investigative powers to adjudicators, their civil law counterparts have accorded judges a more authoritative position in the pre-trial and trial stages respectively.[24]

Caenagem further elaborates upon why a stringent adherence to the approach in common law countries with adversarial systems doesn't facilitate the achievement of substantive justice,[25] as litigants with absolute control over the accumulation of evidence and subsequent selection might culminate in non-acquaintance of the judge with relevant facts, culminating in detriment to a just cause of the party with lesser bargaining power.[26] Furthermore, well-resourced litigants could twist the rules of civil procedure and evidence so as to prejudice their weaker counterparts.

On the contrary, the civilian or inquisitorial trial model imposes an obligation upon a court of law to discover the truth, thereby laying emphasis on substantive justice.[27] While a greater judicial involvement might minimize the occurrence of outcomes premised on incomplete evidence, the civilian systems do have a bearing on the autonomy of civil litigants that are free to ascertain the parameters of the relevant dispute in adversarial systems.[28]

Additionally, the civilian justice system might assume the attributes of the common law - adversarial systems if the adjudicators undertake an immensely scrupulous approach to fact finding, with the trial becoming a drawn-out process instead of a single-staged battle.[29] This can lead to the potential imposition of greater litigation costs on the parties involved, the employment of time-inflationary tactics by judges and ultimately delays across the justice delivery framework.[30]

Thus, Caenagem avoids the landmine of painting one system as superior to the other and recommends for social and political priorities, legal tradition and efficiency considerations to be taken into consideration during the incorporation of adversarial or inquisitorial elements into a country's civil procedure.[31]

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[23] William Can Caenegem, *Adversarial Systems and Adversarial Mindsets: Do We Need Either?*, 15(2) BOND L. REV. (2003) 111-122.
[24] *Id.* at 116.
[25] *Id.* at 117.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at p. 118.

Justice David F Jackson QC, like the aforementioned scholars never advocates for the reconceptualization or denouncement of the adversarial-inquisitorial dichotomy, despite acknowledging that "*the practical differences between the systems have diminished over time. It is unlikely that 'the twain shall meet', but their operations today have many similarities and, in the future, are likely to have more*."[32] Ultimately, Justice Jackson opines that both systems are best viewed as products of the societies wherein they exist and function, and their respective successes are contingent on the honesty and sincerity of the individuals administering them.

Professor John H Langbein, much like Professor Jolowicz posits that the adversarial and inquisitorial procedural systems are often portrayed as being diametrically opposite to each other, when in reality they share several commonalities, except in the aspect of fact-finding.[33] However, after undertaking a comparative analysis of the inquisitorial civil procedure in Germany with the adversarial system in the USA, Langbein demonstrates that the German system is more efficient and produces better verdicts due to the presence of judicial quality checks such as peer evaluation and promotion, that encourage adjudicators to perform the role of a fact finder to the best of their ability.[34]

IV. THE ADVERSARIAL V INQUISITORIAL DICHOTOMY AS RE-CONCEPTUALIZED BY MIRJAN R DAMASKA IN 'THE FACES OF JUSTICE & STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS'

Professor Damaska commences his views on the adversarial – inquisitorial dichotomy by pointing out that it is only in recent years that that the aforementioned distinction has been made

[32] David F. Jackson QC, *Adversarial and Inquisitorial Systems*, MEDICOLEGAL (Mar. 2009), 1, https://medicolegal.org.au/wp-content/uploads/2018/04/185.pdf. (Justice Jackson's approach towards understanding the adversarial-inquisitorial dichotomy is fairly similar to Caenegem, as he believes that the two models are influenced by the societies in which they exist and operate, and that they depend immensely on honest administrators for their efficient functioning. For arriving at this conclusion, he examines the Australian and French systems of civil and criminal litigation.)

[33] John H Langbein, *The German Advantage in Civil Procedure*, 52(4) THE UNIVERSITY OF CHIC. L. REV. (1985) 823-866.

[34] *Id.* at 850.

synonymous with the contrast between the Anglo-American justice systems (*common law*, *adversarial*) and the Continental justice systems (*civil law*, *non-adversarial or inquisitorial*).[35]

His understanding of the adversarial and non-adversarial trial models in civil litigation is fairly similar to the that of the aforementioned scholars in Part I, as he states that "*the adversarial mode of proceeding takes its shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. The non-adversarial mode is structured as an official inquiry. Under the first system, the two adversaries make charge of most procedural action; under the second, officials perform most activities.*"[36]

He then remarks that the two categories of procedural justice systems are only certain in terms of their core meaning, beyond which lies the sphere of uncertainty. This uncertainty stems from adversarial and inquisitorial systems into each other, whose association with the concepts of 'contest' and 'inquest' is flimsy at best. The dichotomy is further muddled by the addition of native modifications at the hands of lawyers in the common law and civil law justice systems. As a consequence, the criteria for the incorporation of specific characteristics into adversarial and non-adversarial systems remain ambiguous.[37]

Damaska is of the opinion that the eradication of this ambiguity via conceptualizing the two models as the successors of historical systems that can be traced to the English and Continental traditions respectively is a Sisyphean task, since the fundamental commonalities of the models are dynamic and lack stability.[38] He instead advocates for the detachment of the two procedural models from historical contingencies and the observation of actual systems to crystallize the forms of justice into identifiable patterns.[39] Thus, Damaska posits procedural archetypes to facilitate the recognition of the constituent elements of even the most diverse procedural systems across the globe.

He adduces two classificatory principles – the **'adjudicatory purpose' on the horizontal axis** (*X axis*) and the **'judicial authority's structure' on the vertical axis** (*Y axis*). The interaction of two principles produces four kinds of procedural archetypes, as evidenced in this table:[40]

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[35] MIRJAN R DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 3 (1st ed. Yale University Press 1986) (hereinafter "DAMASKA").
[36] *Id.*
[37] DAMASKA, *supra* note 18, at 4.
[38] *Id.* at 5.
[39] *Id.*
[40] *Id.* at 181.

	Policy Implementing (PI)	**Dispute Resolving (DR)**
Hierarchical Officialdom (HO)	(*PI*, *HO*)	(*DR*, *HO*)
Coordinate Officialdom (CO)	(*PI*, *CO*)	(*DR*, *CO*)

The **axis denoting the judicial authority's structure** comprises two ideals indicating the fashion in which adjudicators should function. The **'hierarchical' ideal** is fairly similar to the inquisitorial systems of civil procedure in civil law jurisdictions, wherein judges assume their positions in a hierarchy and render their verdicts on convoluted legal norms that are largely inaccessible to the ordinary populace. Written evidence is accorded great significance in trials under this system, which are themselves fragmentary for the most part.

On the other hand, the **'coordinate' ideal** bears an uncanny resemblance to common law decision-making procedures, wherein community standards are prioritized over legal norms and live oral testimony assumes a critical role. The elected judges share a close relationship with their constituencies and render judgements primarily in single, uninterrupted sessions.

As per Damaska, **judicial authorities across the globe operate for the materialization of broadly two purposes** (*X axis)*, the **effectuation of policies and the resolution of disputes or conflicts respectively**. Further, it is an **'activist' state** that will view law as a purposive tool[41] for the achievement of public goals and will strive towards ensuring welfare, civic cooperation and harmony.[42] Thus, courts of law that are a part of activist states will characterize legal disputes as merely a small portion of a much bigger social issue and aim towards securing substantive and not just procedural justice via the conduction of public inquests.[43]

In contrast, **'reactive' states** will not go above and beyond for the securing of public welfare.[44] They will restrict themselves towards maintaining a legal framework within which all citizens are

[41] *See*, Brian Bix, *Natural Law: The Modern Tradition*, THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 12 (2004). (This article authored by Bix sheds light on the views of Lon Fuller, one of the most prominent Modern Natural Law Theorists, who posited that law is a purposive tool devised to achieve public order and welfare. Fuller also adduced the 'eight principles of legality', which are essentially procedural safeguards against an authoritarian government attempting to achieve evil ends.)
[42] DAMASKA, *supra* note 18, at 182.
[43] *Id.* at 183, 184-185.
[44] *Id.* at 205-206.

able to exercise their autonomy and thereafter endeavour to pursue their individual rights. Hence, judicial authorities in such states operate merely as non-partisan resolvers of disputes and act upon suits filed by litigants, while being oblivious to the final outcome. This indicates that reactive courts of law will prioritize contests and not inquests.[45]

Most importantly, Damaska cautions against the characterization of the structures of judicial authorities as absolutes, i.e., functioning only for dispute resolution and not policy effectuation and vice-versa.[46] He acknowledges that jurisdictions seeming to fall squarely under either of the four procedural archetypes produced by the grid might coincidentally still reflect characteristics of another archetype. He further posits that policy implementation necessitates the employment of inquests while conflict settlement requires an adversarial approach.

V. IS DAMASKA'S THESIS RELEVANT IN MODERN TIMES?

In light of the aforementioned discussion in Parts II and III, the author believes that Professor Damaska's thesis is immensely relevant and useful for analytical purposes in the world we currently live in.

Damaska has rendered exceptional guidance towards identifying and thereafter categorizing procedural forms with considerable accuracy. In the process of positing a grid to produce the four procedural archetypes of *hierarchical policy implementation*, *coordinate policy implementation*, *hierarchical conflict resolution*, and *coordinate dispute resolution*, he has carefully side-stepped the pitfalls of myopically classifying civil justice systems merely as adversarial and inquisitorial.

If we contextualize the grid in context of the Indian state and its justice system, we can broadly categorize it as a reactive state with a coordinate judicial structure that operates primarily for the resolution of conflicts (*India is usually termed as having an adversarial trial model*)[47] with some rare instances of the courts of law taking *suo moto cognizance* and the Indian Government striving hard for welfare of the general populace.

[45] *Id.* at 209.
[46] *Id.* at 12.
[47] Ankita Chakrabarty and Dipa Dube, *The Quest for Truth in Criminal Justice – Revisiting the Malimath Committee Recommendations*, 46 & 47 IND. J. OF CRIMINOLOGY (2018-19) 2.

The most compelling evidence of the aforementioned claim can be found in Parts III and IV of the Constitution of India. Part III envisages various fundamental rights whose infringement by the state (*and in a few cases by private entities*) entitles the affected individual to approach the courts and accordingly pursue their rights. While this Part is justiciable or legally enforceable and has been declared to be an inalienable aspect of the Basic Structure of the Constitution,[48] Part IV of the Indian Constitution remains non-justiciable in courts of law.

It is important to note that while the Preamble to the Constitution obligates the Government of India "*secure to all its citizens:* ***JUSTICE****, social, economic and political;* ***LIBERTY*** *of thought, expression, belief, faith and worship;* ***EQUALITY*** *of status and of opportunity; and to promote among them all* ***FRATERNITY*** *assuring the dignity of the individual and the unity and integrity of the Nation*;"[49] and Part IV enshrines principles that are "*fundamental in the governance of the country*",[50] both of them cannot be enforced and even if the Indian Government fails to apply them while drafting laws, they would not be held accountable for it.

While the Indian judiciary is predominantly adversarial, it is necessary to acknowledge the few occasions wherein courts have integrated some aspects of the inquisitorial system into the process of adjudication. In the case of *Ram Chandra v. State of Haryana*,[51] the Supreme Court of India rendered criticism against the utilization of a purely adversarial trial model in courtrooms to prevent the excessive dependence of litigants with lesser bargaining power and fewer resources that are unable to afford the best legal representation available in the country.

In the case of *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (Dead) through Legal Representatives*,[52] the Supreme Court stated that the ascertainment of truth should be the guiding factor in the duration of the trial, which is a major aspect of inquisitorial systems. Another

[48] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 [1442].

[49] IND. CONST. 1950, Preamble.

[50] IND. CONST. 1950, part IV, art. 37. (Application of the principles contained in this Part - The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.)

[51] AIR 1981 SC 1036 [2]. (The appellants were tried and subsequently convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 for having murdered Dunni. While Mange was acquitted by the Punjab and Haryana High Court on appeal, Ram Chander's conviction and punishment was upheld by the Court. Allowing the appeal, the Supreme Court held that criminal courts can deliver justice effectively only if the presiding adjudicator actively partakes in the trial instead of being a passive spectator.)

[52] 2012 (3) SCALE 550 [31, 32]. (The appellant contends that she is the sole owner and thus, exclusive possessor of the suit property. Her ownership of this property was never contested by the respondent, her brother. Nevertheless, he evicted the appellant from her own property for nearly 20 years by suppressing pertinent material from the Court, thereby abusing the legal procedure. The Supreme Court allowed the appeal and quashed the Bombay High Court's verdict in favour of the respondent and highlighted the significance of truth in the judicial process.)

landmark verdict of the Supreme Court in the case of *Bandhua Mukti Morcha v. Union of India*[53] saw the utilisation of the inquisitorial elements in Article 32 of the Indian Constitution,[54] wherein the Court itself appointed two commissioners to investigate the petitioner's claims, which was an organization working towards the eradication of bonded labour in India. Discarding the respondent's arguments challenging the petition to be invalid for its lack of procedural conformity with the Code of Civil Procedure, 1908,[55] and the Supreme Court Rules, 1966,[56] the Court ruled in the favour of the petitioner.

VI. CONCLUSION

The author commenced the paper by rendering a brief background of adversarial and inquisitorial systems, primarily in relation to civil litigation. Thereafter, the paper dealt with the conceptualizations of the adversarial-inquisitorial dichotomy in accordance with the views of Professor (s) Jolowicz, Caenegem and Langbeim, and Justice Jackson in Part I. It also highlighted the preference or neutral approach taken by the aforementioned scholars towards the two systems.

Part II of the paper looked at and analysed Professor Damaska's reconceptualization of the adversarial-inquisitorial dichotomy into four procedural archetypes - *hierarchical policy implementation*, *coordinate policy implementation*, *hierarchical conflict resolution*, and *coordinate dispute resolution*.

Lastly, in Part III, the author adduced their views with regards to Damaska's thesis, opining the same to be relevant, and characterized India primarily as a reactive state with a coordinate judicial structure, that operates predominantly for dispute resolution. The author also elaborated upon some of the rare instances wherein inquisitorial elements where incorporated into the process of adjudication by the Supreme Court of India.

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[53] AIR 1984 SC 802. (Treating the letter written by the petitioner organization as a writ petition within the ambit of Article 32, the Supreme Court held that the inability of the downtrodden to afford legal aid shouldn't act as a bar to them receiving justice. The petitioners were involved in this public interest litigation (PIL) to effectuate the release of bonded labourers working in stone mines and quarries in Faridabad, Haryana.)

[54] IND. CONST. 1950, part III, art. 32. (Remedies for enforcement of rights conferred by this Part:
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.)

[55] The Code of Civil Procedure 1908, Order XXVI (except rules 13, 14, 19, 20, 21, 22).

[56] The Supreme Court Rules 1966, Order XLVI.