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**INDEX**

BEYOND NEUTRALITY: ASSESSING THE IMPLICATIONS OF PROVIDING BELLIGERENT MATERIALS IN THE RUSSIA-UKRAINE CONFLICT AND TWAIL PERSPECTIVES.....	4
THE HIDDEN COSTS OF RESOURCE NATIONALISM: (MIS) UNDERSTANDING AND (MIS) MANAGING THE LEGAL AND ECONOMIC IMPLICATIONS OF RESOURCE NATIONALISM ON INDIGENOUS POPULATION .....	39
ACHIEVING BETTER BRAND PROTECTION IN THE E-COMMERCE SECTOR THROUGH HARMONISATION OF TRADEMARK AND COMPETITION LAW .....	63
UNFINISHED LIBERATION: THE HALFWAY JOURNEY OF TRANSGENDER MARRIAGE AND ADOPTION RIGHTS.....	82
THE SUPREME COURT'S RESPONSE TO INTERNET SHUTDOWNS: A HOLE IN THE DOUGHNUT OF RIGHTS.....	102
STATE OF PUNJAB V. PRINCIPAL SECRETARY TO THE GOVERNOR OF PUNJAB: THE JUDICIARY'S FINALE IN GOVERNOR'S CONSTITUTIONAL CONCERTO.....	118
SETTLEMENT AGREEMENTS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016: AN EGRESS FOR FINANCIAL DEBTORS?.....	130
THE MELD MODEL, RENT, AND THE CONSTITUTIONAL SEPARATION OF POWERS IN INDIA: BUILDING ON THE CASE FOR TAKING STATUTES SERIOUSLY IN INDIAN CORPORATE LAW ADJUDICATION.....	170
THE 50% RESERVATION CEILING: A HINDRANCE TO EQUALITY AND 'TRANSITIONAL JUSTICE'. 203	

## ARTICLE

**BEYOND NEUTRALITY: ASSESSING THE IMPLICATIONS OF  
PROVIDING BELLIGERENT MATERIALS IN THE RUSSIA-UKRAINE  
CONFLICT AND TWAIL PERSPECTIVES**

*Anay Mehrotra & Amritansh Shara\**

## ABSTRACT

*Western nations have consistently supplied Ukraine with weapons since the commencement of the conflict in February 2022. This behaviour raises questions about their commitments to neutrality. Surprisingly, such states have not provided an explicit legal rationale for these transfers, leaving legal experts and commentators to speculate on the matter and argue that such actions align with the obligations of neutral states. This article critically examines and assesses the arguments in favour of 'qualified neutrality' that have emerged in response to this complex situation, with the goal of determining which of these arguments, if any, are the most compelling and legally sound. The article delves into the evolving discourse surrounding the concept of 'qualified neutrality' and its applicability in states supporting the victims of aggression. By analysing the various legal grounds presented by scholars and commentators, the article seeks to comprehensively evaluate these arguments. This article contributes to a deeper understanding of the evolving nature of neutrality in modern conflicts and the legal interpretations that could justify deviations from traditional neutral duties. Its aim is to shed light on the legal complexities surrounding arms transfers to countries facing aggression and, in turn, provide valuable insights into the evolving landscape of international law within the context of the Russia-Ukraine conflict.*

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## I. INTRODUCTION

Russia invaded Ukraine on February 24, 2022, an action that was unequivocally condemned by the UN General Assembly (UNGA) as an “act of aggression.”<sup>1</sup> This event has reignited a long-standing debate regarding the intricate connection between the concept of neutrality and aggression. In this context, there are arguments positing that neutrality should be subject to a “qualified” interpretation;<sup>2</sup> when faced with aggression. This interpretation would allow neutral states to provide assistance to the victim countries. The states that use aggression to help out the victim state should be able to maintain their neutral status under this qualified interpretation.

Neutrality, as it pertains to international law, is a meticulously organised framework designed to govern the interactions between states involved in wars on a global scale, referred to as belligerents, and those states that uphold a state of peace called neutrals.<sup>3</sup> Its primary objective is to manage conflicts and prevent their escalation.<sup>4</sup> This framework confers distinct rights and responsibilities upon both belligerent and neutral states.<sup>5</sup> Notably, neutrals are under the obligation to refrain from supplying ammunition, warships, or any materials to the belligerent states.<sup>6</sup>

However, following the Russian invasion of Ukraine, the West, for example EU, has given €1.85 billion<sup>7</sup> for furnishing the Ukrainian Armed Forces [UAF] with lethal armed gear. This allocation is made possible through Council Decision Common Foreign and Security Policy 2002/238 and

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<sup>1</sup> G.A. Res. 377(V), (Nov. 3, 1950).

<sup>2</sup> Baty, T., *Qualified neutrality*, 28(1)AM. J. INT'L L.134,135 (1934).

<sup>3</sup> WILLIAM H. BOOTHBY & WOLFF HEINTSCHEL VON HEINEGG, *THE LAW OF WAR: A DETAILED ASSESSMENT OF THE US DEPARTMENT OF DEFENSE LAW OF WAR MANUAL* 371, 376 (Cambridge University Press, 2018).

<sup>4</sup> *Id.* at 372.

<sup>5</sup> *Id.*

<sup>6</sup> Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, U.S.T.S. 540 [hereinafter “Hague Convention V”].

<sup>7</sup> Giovanna Maletta & Lauriane Héau, *Funding Arms Transfers Through the European Peace Facility*, 1, STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, (June, 2022) <https://www.sipri.org/publications/2022/policy-reports/funding-arms-transfers-through-european-peace-facility-preventing-risks-diversion-and-misuse>.

the European Peace Facility, signifying a noteworthy shift from its earlier policy stances.<sup>8</sup> The Western nations *in toto* have reportedly provided approximately \$8.2 billion in ammunition to the UAF.<sup>9</sup> Even countries with historically reticent stances on arming regions embroiled in armed conflicts, such as Germany, have shifted their positions.<sup>10</sup> Furthermore, nations like the Republic of Ireland and Austria, which have traditionally proclaimed their military neutrality, have chosen to offer non-lethal equipment instead of lethal military support.<sup>11</sup>

Given the absence of clear justifications from the states that have been providing arms to Ukraine, legal scholars and analysts have endeavoured to rationalise these actions under different principles of international law. Against this background, in Section II we will explore the enduring relevance of neutrality in the context of the conflict. We will also give a brief summary of the conventions where neutrality was identified.

Section III delves into traditional neutrality principles, such as impartiality and non-participation, while also examining the various thresholds of involvement in international armed conflicts. Additionally, it provides an analytical perspective on strict neutrality within the context of this conflict.

Moving on to Section IV, our focus shifts to the concept of qualified neutrality. This section delves into contemporary practices and ongoing debates regarding qualified neutrality, while also considering the viewpoint of Jackson on this subject. It offers a comprehensive justification for the argument in favour of qualified neutrality from an international standpoint, taking into account key legal aspects, including Common Article [CA] 1 of the Geneva Conventions, self-defence principles, the supply of arms to Ukraine, and the controversy surrounding countermeasures.

In Section V, the focus will shift to analysing the outcomes resulting from the actions carried out during the Russia-Ukraine conflict. This part of the document will delve into the notion of co-

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<sup>8</sup> 'Council Decision (CFSP) 2022/809 of 23 May 2022 amending Decision (CFSP) 2022/338 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force' (2022) OJ L 145, 24.5.2022, p. 40–41.

<sup>9</sup> *Ukraine weapons: What arms are being supplied and why are there shortages?*, BBC (May 14, 2024), <https://www.bbc.com/news/world-europe-62002218>.

<sup>10</sup> *Germany to send battle tanks to Ukraine, angering Russia*, AL JAZEERA (Jan. 25, 2023), <https://www.aljazeera.com/news/2023/1/25/germany-to-send-leopard-2-tanks-to-ukraine>.

<sup>11</sup> *Padraic Halpin, Ireland to consult public on military neutrality in wake of Ukraine war*, REUTERS (April 5, 2023, 8:12 PM), <https://www.reuters.com/world/europe/ireland-consult-public-military-neutrality-wake-ukraine-war-2023-04-05/>.

belligerency and carefully assess the involvement of the USA in this particular conflict. Additionally, it will explore the matter of providing aid and assistance in the context of state responsibility.

Lastly, Section VI of the paper will systematically delve into the concept of neutrality through the lens of Third World Approaches to International Law. This section aims to elucidate the specific stance adopted by India and South Asian countries and the resultant implications on the ongoing Russia-Ukraine conflict.

## II. ASSESSING THE VIABILITY OF THE LAW OF NEUTRALITY: IS IT STILL RELEVANT?"

Professor Scott Shapiro and Oona Hathaway contend that neutrality has become obsolete due to non-use or the emergence of new customary laws, a concept known as “desuetude.”<sup>12</sup> However, we believe that this argument is not correct. Before debating, we will first present the foundations of neutrality and then proceed with our argument.

Neutrality operates as a binary system,<sup>13</sup> definitively classifying a state as either a belligerent actively engaged in international armed conflicts, or a neutral.<sup>14</sup> Since 1949, the Geneva Conventions, specifically Common Article 2,<sup>15</sup> define belligerent status. States that don't hold belligerent status are automatically regarded as neutral, without any formal declaration. However, a neutral state's support for a belligerent can become so intertwined with the belligerent's operations that its neutral status may change to belligerent. This framework's foundational principles revolve around impartiality and non-participation.<sup>16</sup>

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<sup>12</sup> Markus Krajewski, *Neither neutral nor party to the conflict?*, VÖLKERRECHTSBLOG (Mar. 9, 2023), <https://voelkerrechtsblog.org/neither-neutral-nor-party-to-the-conflict/> [hereinafter ‘Krajewski’].

<sup>13</sup> ALFRED P. RUBIN, *Remarks by Alfred Rubin*, 67(5) AM. J. INT'L L. 164–166 (1973).

<sup>14</sup> *Id.*

<sup>15</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Common Article 2, Aug. 12, 1949, 75 UNTS 287.

<sup>16</sup> Christopher Greenwood, *The Concept of War in Modern International Law*, 36(2) INT'L & COMP. L.Q. 283, 306 (1987).

Neutrality is chiefly governed by two treaties established during the Second Hague Peace Conference on October 18, 1907,<sup>17</sup> to which both Russia and Ukraine are signatories. These conventions are the “Convention (V) Respecting the Rights and Duties of Neutral Powers in Case of War on Land,”<sup>18</sup> pertaining to the responsibilities of neutral nations in times of ground-based military conflicts, and “Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War,” focusing on naval warfare.<sup>19</sup>

The principles of neutrality find legal recognition in a variety of instruments. Notably, they are enshrined in Customary International Law (CIL), which is further affirmed by the International Court of International Justice (ICJ) in its advisory opinion on the legality of nuclear weapons.<sup>20</sup> Furthermore, these principles are also addressed in the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea,<sup>21</sup> the 2009 Manual on International Law Applicable to Air and Missile Warfare,<sup>22</sup> and Articles 39 to 48 of the 1923 Hague Rules of Air Warfare.<sup>23</sup>

Now moving on to the debate, we believe that the position of “desuetude” is not correct for the following reasons.

First, a difference of perspective emerges concerning the conditions that result in the termination of a treaty’s validity under customary law.<sup>24</sup> However, there is no definitive proof that CIL triumphs treaty provisions.<sup>25</sup> The Fifth Hague Convention’s limited membership, with most nations joining in the early 20<sup>th</sup> century, does not necessarily indicate its obsolescence. Some countries have become parties to it after World War II, and Ukraine, for instance, joined the treaty

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<sup>17</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

<sup>18</sup> Hague Convention V, *supra* note 7.

<sup>19</sup> Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 205 Consol. T.S. 395 [hereinafter “Convention XIII”].

<sup>20</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep 226 (July 8).

<sup>21</sup> LOUISE DOSWALD-BECK, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, (Cambridge University Press, 1995).

<sup>22</sup> HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 109 (Cambridge University Press (2013)).

<sup>23</sup> H.M. Hanke, *The 1923 Hague Rules of Air Warfare*, I.R.R.C. 12, 26 (1991), <https://international-review.icrc.org/sites/default/files/S0020860400071370a.pdf>.

<sup>24</sup> Krajewski, *supra* note 13.

<sup>25</sup> Rebecca Crootoof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41, Y.J.I.L. 238, 244 (2016), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2602&context=law-faculty-publications>.

as recently as 2015.<sup>26</sup> Additionally, in the period since the 1990s, there has been a lack of consistent adherence to a singular pattern in state practice. The fact that the concept of neutrality appears in numerous military manuals from various countries serves as compelling evidence that highlights the widespread and enduring importance of this aspect of international law pertaining to armed conflicts.<sup>27</sup> Thus, the convention's validity remains undiminished, supported by the number of parties and recent accessions.

Second, it is crucial to comprehend that at the turn of the 20<sup>th</sup> century war as a means of international engagement had not yet been universally proscribed when examining the historical context in which the notion of neutrality first arose. During this period, there existed a relatively unrestricted "*ius ad bellum*" or the right to engage in war.<sup>28</sup> Hence, it was crucial to establish legal regulations distinguishing those engaged in an armed conflict and those maintaining a neutral stance. This significance was evident in the first judgment of the Permanent Court of International Justice (PCIJ), known as "The S.S. Wimbledon."<sup>29</sup> The case centred on denial of passage through Germany's Kiel Canal for the ship Wimbledon which was carrying munitions for Poland during its war against Russia, citing reasons of neutrality. The Court recognised that states could indeed observe neutrality. But in this particular case it ruled against Germany, citing the Treaty of Versailles as the basis for allowing passage.<sup>30</sup> Therefore, historically the courts have also recognised neutrality.

Third, despite the adoption of the United Nations Charter (UN Charter) introducing some alterations to the concept of neutrality in specific scenarios, there is no evidence in the Charter's text or its drafting history to suggest an intention to completely eliminate neutrality in international law.<sup>31</sup> Numerous treaties also operated on the assumption of preserving neutrality. For example, the 1929 Geneva Convention on Prisoners of War introduced the concept of neutral "protecting powers," provisions for repatriation and medical treatment in neutral nations, and the

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<sup>26</sup> *Ukraine joins The Hague Conference*, HCCH (Dec. 5, 2003), <https://www.hcch.net/de/news-archive/details/?varevent=87>.

<sup>27</sup> MICHAEL N. SCHMITT, *TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS* 250 (Cambridge University Press 2017).

<sup>28</sup> JAMES UPCHER, *NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW* 37 (Oxford University Press 2020).

<sup>29</sup> *The SS 'Wimbledon'* (U.K. v. Ger.), Judgment, 1923 PCIJ Series A no 1 (Aug. 17).

<sup>30</sup> Treaty of Peace between the Allied and Associated Powers and Germany, art 381, June 28, 1919, 13 AJIL Supp. 151.

<sup>31</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Aug. 12, 1949, 75 UNTS 31.

establishment of a central tracing cell for convicts of the conflict in neutral states.<sup>32</sup> Similarly, the 1929 Convention on the Wounded and Sick included clauses related to assistance societies and medical units from neutral countries.<sup>33</sup> Many bilateral treaties contained neutrality clauses as well, like the 1926 Treaty of Berlin<sup>34</sup> between Germany and the Soviet Union, which obligated the parties to maintain neutrality if the other was under attack. Even the 1928 Kellogg-Briand Treaty,<sup>35</sup> though flawed, did not entirely rule out neutrality. It bound only the signatory parties and did not require them to support victimised states or take action against states violating the pact. Instead, it allowed states to “remain aloof.”<sup>36</sup> Some of these shortcomings would be partially addressed in the UN Charter.

Fourth, when examining state practices, the inability of sanctions to deter Italy’s aggression against Ethiopia in 1935-36 and the annexation of Austria by Germany in 1938 raised doubts about the effectiveness of the League of Nations’ collective security framework.<sup>37</sup> In response to these developments, in 1936, the Scandinavian nations, along with Belgium, the Netherlands, Spain, and Switzerland, collectively issued a joint declaration effectively repudiating the application of Article 16 from the League’s Covenant.<sup>38</sup> Two years later, the Benelux and Scandinavian countries proclaimed that “*given the prevailing circumstances and the practices observed in recent years, the sanctions system has assumed a non-mandatory character.*”<sup>39</sup> This historical context underscores the significance of state practice regarding neutrality, particularly in response to the perceived inadequacies of the League of Nations’ collective security framework.

Now, turning to the Russia-Ukraine crisis, the principle of neutrality is invoked when a state refrains from participating in an International Armed Conflict (IAC). States bound by these

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<sup>32</sup> Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 75 UNTS 135.

<sup>33</sup> *supra* note 10.

<sup>34</sup> Treaty of Berlin (German-Soviet Treaty of Friendship, Neutrality and Non-Aggression Pact), Apr. 24, 1926, Berlin, Germany.

<sup>35</sup> General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, Paris, France

<sup>36</sup> Wright, Quincy, and Clyde Eagleton, *Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War*, 24 PROC. AM. SOC’Y. INT’L L. 79 (1930).

<sup>37</sup> The Editors of Encyclopaedia Britannica, *Italo-Ethiopian War 1935-1936*, BRITANNICA. (July 20, 1998), <https://www.britannica.com/event/Italo-Ethiopian-War-1935-1936>; The Editors of Encyclopaedia Britannica, *Anschluss*, BRITANNICA, (July 20, 1998) <https://www.britannica.com/event/Anschluss>.

<sup>38</sup> Hans J. Morgenthau, *The Resurrection of Neutrality in Europe*, 33(3) THE AM. POL. SCI. REV. 473, 486 (1939).

<sup>39</sup> *Id.*

principles are under a legal obligation to uphold them and cannot capriciously ignore or breach their neutrality obligations without expecting a reaction from the conflict's involved parties.<sup>40</sup> In the present conflict, marked by increased duration and intensity of hostilities, the application of neutrality is imperative. States abstaining from participation in this conflict are legally mandated to adhere to these neutrality principles, ensuring a fair and impartial stance. In the following section, we will investigate the crisis from two different angles: the conventional viewpoint of neutrality and the modified interpretation of neutrality, which has been endorsed by the USA.

### III. TRADITIONAL NEUTRALITY PRINCIPLES IN THE RUSSIA-UKRAINE CONFLICT: IMPARTIALITY, NON-PARTICIPATION, AND BEYOND

Under this section we will analyse the provision of arms and ammunition from the lens of traditional neutrality. First, we will prove that there exists an IAC and second, western countries which have given arms to Ukraine have violated strict neutrality.

#### *A. Thresholds of Involvement: Analysing Neutrality in International Armed Conflicts*

In an IAC, there is no conventional requirement for a formal declaration or the mutual acknowledgment of war among the involved States.<sup>41</sup> The crucial determinant is whether the situation has escalated to the point of an IAC. Common Article [‘CA’] 2 of the four 1949 Geneva Conventions provides a definition, stating that an IAC includes “*declared war or any other armed conflict that may arise between two or more States, even if the state of war is not recognized by one of them.*”<sup>42</sup> As per the 1960 ICRC Commentary on Article 2 of Geneva Convention III, armed conflicts are defined as any disagreement between the armed forces of two states, irrespective of whether one side

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<sup>40</sup> Kubo Mačák, *A matter of principle(s): The legal effect of impartiality and neutrality on States as humanitarian actors*, 97 (897-898) I.R.R.C. 157 (2016), [https://international-review.icrc.org/sites/default/files/irc\\_97\\_1-2-7.pdf](https://international-review.icrc.org/sites/default/files/irc_97_1-2-7.pdf).

<sup>41</sup> Roger Bartels, *The classification of armed conflicts by International Criminal Courts and Tribunals*, 20(4) INT. CRIM. LAW REV. 595, (2020).

<sup>42</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Common Art 2, Aug. 12, 1949, 75 UNTS 287.

acknowledges the existence of a state of war. This classification is unaffected by variables including the magnitude of the participating forces, the duration of the conflict, or the intensity of violence.<sup>43</sup>

Moreover, as stated in the 2020 Commentary of the ICRC, the qualification of a conflict as armed does not depend on the minimum intensity of the forces employed by the involved parties. In a similar vein, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has provided clarification that an IAC is considered to have transpired whenever “*states employ armed force against one another*.”<sup>44</sup> In essence, the threshold for an IAC is relatively minimal, and typically, a single deliberate attack by a State is adequate to establish it.

The central concern under consideration is the delineation of the point at which offering support to a belligerent within an IAC results in the assisting State assuming the role of a participant in that conflict. This topic is addressed in the second edition of the Handbook of IHL authored by Sir Christopher Greenwood.<sup>45</sup> There is a suggestion that endorsing the military actions of a third party should generally be regarded as an act of war for the assisting state, provided that there is a clear and significant correlation, especially in terms of temporal and spatial vicinity, with those actions that cause damage to the adversary.<sup>46</sup> Merely engaging in cooperative activities, such as arms production or providing general support to the armed forces, would not suffice to establish this connection. Greenwood further noted that financial, political, and intelligence support would not yield a similar result.<sup>47</sup>

From this standpoint, the genesis of the IAC involving Ukraine and the Russian Federation can be traced back to 2014.<sup>48</sup> This period was distinguished by the Russian military’s support for separatist forces in Donetsk and Luhansk and the annexation of the Crimean Peninsula. The situation underwent a significant escalation on February 23 and 24, 2022,<sup>49</sup> when Russian armed forces, with the assistance of Belarus, launched an attack and subsequently invaded Ukraine.

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<sup>43</sup> ICRC, <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-2/commentary/1960?activeTab=undefined>, (last visited Sep. 27, 2023)

<sup>44</sup> Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>45</sup> DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, (4<sup>th</sup> ed. 2021).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Jeffrey Mankoff, *Russia’s War in Ukraine: Identity, History, and Conflict*, INSS (Apr. 26, 2022), <https://inss.ndu.edu/Publications/View-Publications/Article/3010403/russias-war-in-ukraine-identity-history-and-conflict/>.

<sup>49</sup> *Id.*

Consequently, it is a valid argument that at least since February 23-24, the armed hostilities have reached a level of significant intensity and an anticipated duration that would ordinarily call for States not directly engaged in the conflict to adhere to neutrality.<sup>50</sup>

*B. Strict Neutrality Analysing the Conflict from the Traditional Neutrality*

The core concept of neutrality, deeply ingrained in international law, aims to foster peaceful coexistence between non-belligerent states and those embroiled in armed conflicts. This framework enables continued trade and interaction while avoiding direct participation in hostilities. Neutral states bear specific obligations outlined in the 1907 Hague Convention V and Hague Convention XIII,<sup>51</sup> which govern land and naval warfare neutrality. These principles of neutrality are upheld by neutral states through the following key duties:

First, the duty of abstention is clearly outlined in both the Hague Convention V (Convention V) and the Hague Convention XIII (Convention XIII), stipulating that states which are neutral must refrain from providing “*munitions of war or supplies*”<sup>52</sup> and “*warships, ammunition, or war material*” to belligerent parties.<sup>53</sup> This prohibition explicitly addresses the delivery of goods and services associated with military activities. Therefore, forms of support extraneous to the actual conduct of hostilities, such as financial assistance or non-military products and services, do not fall within the scope of neutral obligations in the realm of general international law.<sup>54</sup>

The prohibition encompasses “*weapons strictu sensu*” referring to items explicitly designed to cause harm to enemy soldiers or damage enemy property.<sup>55</sup> However, there is some uncertainty regarding the scope of this prohibition. While some scholars argue that a state should refrain from delivering items primarily or exclusively designed for military purposes, others propose a broader

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<sup>50</sup> Peter Lawrence, *Russia's War in Ukraine: State Patriotism or Economic Gain?*, 9(2) J.L. OF GLOB. FAULT. 199 (2022), <https://www.jstor.org/stable/48713462>.

<sup>51</sup> Hague Convention V, *supra* note 7.

<sup>52</sup> *Id.* at Art. 2, 5.

<sup>53</sup> Convention XIII, *supra* note 20, at Art 6.

<sup>54</sup> Havana Convention on Maritime Neutrality, Article 16(2), Feb. 20, 1928, 135 L.N.T.S. 187.

<sup>55</sup> DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, 576 (3rd ed. 2013).

interpretation, including substantial financial support provided to a state's military.<sup>56</sup> This dichotomy can be seen from the example of Switzerland<sup>57</sup> and Japan<sup>58</sup> that despite its traditional neutrality in past practice, they provided humanitarian aid to Ukraine.

Second, neutral states do not have the responsibility to proactively impede their citizens from extending assistance to hostile factions beyond their territorial confines. Within the framework of traditional neutrality law, the freedom to engage in commercial trade remains intact, permitting private individuals and companies to export weapons and military equipment on behalf of belligerents, as stipulated in Article 7 of both Convention V and XIII.<sup>59</sup> Additionally, states do not breach their neutrality obligations if their nationals voluntarily join a belligerent's armed forces, as long as recruitment activities do not take place on their own territory.<sup>60</sup> This exemption extends to individuals offering their services to belligerent entities via online means.<sup>61</sup>

Recent developments, such as SpaceX's provision of Starlink satellites to Ukraine for coordinating unmanned drone attacks on Russian targets, introduce new complexities.<sup>62</sup> Some scholars argue that the boundary between governments and private corporations may no longer hold under customary international law.<sup>63</sup> They contend that modern state practices blur the lines between state and private enterprises, implying that states must not only prohibit arms exports by private entities but also exercise due diligence to ensure private entities within their jurisdiction do not supply belligerents with militarily valuable items like Starlink.<sup>64</sup> Hence, the onus is on neutral states to ensure that such support does not compromise neutrality.

Third, it is not the responsibility of neutral states to prohibit the hostile utilisation of communication stations or apparatus, including cyber communication systems. Provided that

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<sup>56</sup> Eric Castren, *The Present Law of War and Neutrality*, 85 *Annales Academiae Scientiarum Fennicae* 474 (1954).

<sup>57</sup> *Id.*; Marcel Berni, *Why Switzerland Will Stick to Neutrality*, *LAWFARE* (May 14, 2023, 10:00 AM) <https://www.lawfaremedia.org/article/why-switzerland-will-stick-to-neutrality>.

<sup>58</sup> *Japan offers comprehensive assistance for Ukraine*, *THE JAPAN TIMES*, (May 19, 2023) <https://www.japantimes.co.jp/2023/05/19/special-supplements/japan-offers-comprehensive-assistance-ukraine/>.

<sup>59</sup> Hague Convention V, *supra* note 7, at Art 17; Convention XIII, *supra* note 20, at Art 6.

<sup>60</sup> SHANE DARCY, *TO SERVE THE ENEMY: INFORMERS, COLLABORATORS, AND THE LAWS OF ARMED CONFLICT*, (Oxford Academic, 21 Nov. 2019).

<sup>61</sup> Hague Convention V, *supra* note 7, at Art 4, 5.

<sup>62</sup> Amanda Macias & Michael Sheetz, *Pentagon awards SpaceX with Ukraine contract for Starlink satellite internet*, *CNBC* (June 1, 2023, 12:54 PM), <https://www.cnb.com/2023/06/01/pentagon-awards-spacex-with-ukraine-contract-for-starlink-satellite-internet.html>.

<sup>63</sup> *supra* note 56.

<sup>64</sup> *Id.*

these communication facilities were established before hostilities commenced and are not used exclusively for military purposes or are open for public use, they fall under the exception, in unity with Article 8 of Convention V.<sup>65</sup> Nevertheless, experts suggest that the belligerent use of such communication infrastructure, like SpaceX's Starlink satellite constellation, may convert related enabling assets into legitimate military targets.

Last, while neutral states can impose additional restrictions and prohibitions, they must do so impartially and without discrimination against any of the belligerents, as stipulated by Article 9 of both Hague Convention V and XIII.<sup>66</sup> This impartiality does not necessitate that restrictive measures have equal effects on all belligerents or that they be designed with such intent. Neutral states must acquiesce to belligerent states when the latter's forces undertake repressive measures against neutral subjects who provide hostile assistance, as specified in Article 7 of Convention V.<sup>67</sup>

Considering all these points, the ongoing conflict in Ukraine highlights the intricate nature of upholding neutrality principles, going beyond direct involvement in hostilities. Actions like offering intelligence support for targeting adversary military objectives and dispatching armed forces to an aggressor state can encroach upon the obligation of impartiality. Western states, in an effort to avoid clear breaches of impartiality, have refrained from deploying their own armed forces to the Ukrainian conflict. Nevertheless, they encounter difficulties in striking a balance between their commitments and their neutral status. The imposition of unilateral sanctions against Russia, alongside weapons exports and intelligence sharing in support of Ukraine, may appear to conflict with these neutral obligations, raising questions about the evolving landscape of neutrality law.

#### IV. QUALIFIED NEUTRALITY

The contentious debate over the law of neutrality can be divided into two camps: the proponents of "traditional neutrality" (as argued above) and advocates of "qualified neutrality." In the contemporary landscape, qualified neutrality allows neutral states to consider factors related to the right to wage war and differentiate between belligerents, even without United Nations Security

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<sup>65</sup> Hague Convention V, *supra* note 7, at Art 18; Convention XIII, *supra* note 20.

<sup>66</sup> *Id.* at Art 9; Convention XIII, *supra* note 20, at Art 9.

<sup>67</sup> Hague Convention V, *supra* note 7, at Art 9.

Council (UNSC) measures superseding neutrality rules.<sup>68</sup> USA, a leading practitioner of non-belligerency during World War II, strongly supports qualified neutrality in the conflict. The USA's Department of Defence Law of War Manual acknowledges that UN Charter and UNSC decisions can qualify rights and obligations under neutrality law.<sup>69</sup> Additionally, the report highlights that regional and collective self-defence agreements might supersede a nation's obligation to remain impartial and refrain from engaging in armed conflicts, as stipulated by customary neutrality law.<sup>70</sup> This approach aligns with both legal and policy considerations.

However, it's important to assess how this doctrine is being applied. A two-fold method is proposed: first, to determine the contemporary position of qualified neutrality through state practice, and second, to identify the original purpose of the doctrine.

#### *A. Contemporary Practice and Debates Surrounding Qualified Neutrality*

The ongoing discussion revolves around the concept of "qualified neutrality" and its relevance in supplying weaponry to Ukraine. Although many nations may not explicitly employ the term "qualified neutrality" in their statements, their actions clearly connect the supply of arms to Ukraine with its Right to Self-Defence [RSD].

In the UNSC deliberations, numerous countries expressed their support for Ukraine's RSD and the provision of military aid. For instance, France committed to providing military assistance to Ukraine while emphasizing its RSD.<sup>71</sup> The Baltic and Nordic States collectively pledge to bolster

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<sup>68</sup> Congressional Research Service, *International neutrality law and U.S. Military Assistance to Ukraine*, CRS REPORTS (April 26, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10735/3>.

<sup>69</sup> *Department of Defense Law of War Manual*, US DEPARTMENT OF DEFENSE, (July 31, 2023), <https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF>.

<sup>70</sup> *Id.*

<sup>71</sup> United Nations Security Council (UNSC) Provisional 9256 (8 February 2023) S/PV.9256, 13.

Ukraine's military capabilities, citing its RSD.<sup>72</sup> Norway backs Ukraine's request for aid in its legitimate RSD,<sup>73</sup> and the USA underlines the UN Charter's recognition of the inherent RSD.<sup>74</sup>

At the national level, several countries view the supply of weapons to Ukraine as a response to its ongoing war and its inherent RSD. To illustrate, Germany is providing military support to Ukraine to bolster its capacity for legitimate RSD against Russian aggression.<sup>75</sup> The primary objective of Greece is to enhance the operative capacity of the UAF, ultimately ensuring the protection of Ukrainian sovereignty following the Russian invasion. Italy's parliamentary resolution authorises the transfer of military equipment to empower Ukraine in exercising its lawful RSD.<sup>76</sup> In a similar vein, Luxembourg maintains its substantial aid to Ukraine, enabling the country to assert its legitimate RSD,<sup>77</sup> as is done by Romania.<sup>78</sup> Additionally, U.S. Public Law 117-118 grants the U.S. President the authority to provide defence articles to Ukraine, either as loans or leases, to safeguard civilian populations from the Russian military invasion.<sup>79</sup>

Another set of nations focuses on providing non-lethal materials, such as body vests and helmets. New Zealand offers direct financial support for non-lethal military aid, while Austria permits the transit of weapons and military gear through its territory.<sup>80</sup> Moreover, Poland has received authorization from Ireland, Israel, Japan, and South Korea to export howitzers to Ukraine.<sup>81</sup>

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<sup>72</sup> United Nations Security Council (UNSC) Provisional 9269 (24 February 2023) S/PV.9269, 29.

<sup>73</sup> United Nations Security Council (UNSC) Provisional 9126 (7 September 2022) S/PV.9126, 16-17.

<sup>74</sup> *Id.* at 12.

<sup>75</sup> Greece Ministry of Defence, Reply 3503/18378 to the Greek MPs on the matter of sending defensive materiel to Ukraine (18 May 2022).

<sup>76</sup> Ahmet Gencturk, *Italian parliament approves extension of arms support to Ukraine*, ANADOLU AJANSI (Feb. 8, 2024), <https://www.aa.com.tr/en/europe/italian-parliament-approves-extension-of-arms-support-to-ukraine/3131761>.

<sup>77</sup> *Government statement on the occasion of the war of aggression against Ukraine launched by Russia a year ago*, MINISTRY OF FOREIGN AND EUROPEAN AFFAIRS, DEFENCE, DEVELOPMENT COOPERATION AND FOREIGN TRADE (Feb. 2024, 2023)

[https://mae.gouvernement.lu/en/actualites.gouvernement%2Ben%2Bactualites%2Btoutes\\_actualites%2Bcommuni ques%2B2023%2B02-fevrier%2B24-declaration-gouvernement-guerre-ukraine.html](https://mae.gouvernement.lu/en/actualites.gouvernement%2Ben%2Bactualites%2Btoutes_actualites%2Bcommuni ques%2B2023%2B02-fevrier%2B24-declaration-gouvernement-guerre-ukraine.html) .

<sup>78</sup> *The Ministry of National Defence Offers Support to the Ukrainian Armed Forces*, Ministry of National Defence (Feb. 27, 2022), [https://english.mapn.ro/cpresa/5580\\_the-ministry-of-national-defence-offers-support-to-the-ukrainian-armed-forces](https://english.mapn.ro/cpresa/5580_the-ministry-of-national-defence-offers-support-to-the-ukrainian-armed-forces).

<sup>79</sup> Ukraine Democracy Defense Lend-Lease Act, Pub. L. No. 117-118, 136 Stat. 1184 (2022).

<sup>80</sup> Emile Donovan, *Is Ukraine's love letter to NZ the most effective form of propaganda*, STUFF (Sep. 5, 2023, 11:30 PM), <https://stuff.com.nz/world/300963718/newsable-is-ukraines-love-letter-to-nz-the-most-effective-form-of-propaganda>.

<sup>81</sup> Vanessa Gera, *Poland is done sending arms to Ukraine, Polish leader says as trade dispute escalates*, AP (Sep. 21, 2023, 11:51 PM), <https://apnews.com/article/poland-ukraine-weapons-russia-war-trade-dispute-5e2e7a194b5238b86c160f0f4848b4f3#:~:text=Prime%20Minister%20Mateusz%20Morawiecki%20said,Russian%20aggression%20in%20the%20region>.

The interpretation of this alternative approach can lead to two separate interpretations. On the one hand, it might uphold previous resolutions that permitted non-lethal military aid. On the other, this practice could be seen as conflicting with the emerging ‘benevolent/qualified’ exception, as the law of neutrality might be viewed as restricting potential military assistance. However, it is difficult to identify precise statements that clearly express these positions backed by legal evaluations and a thorough examination of the law of neutrality.

In contrast, states adhering to the ‘strict’ approach have placed significant importance on the law of neutrality. A prime example is the Swiss Federal Council's report on neutrality, which underscores that such law prohibits the direct transfer of war material. Consequently, Switzerland is unable to provide war material to either Russia or Ukraine.<sup>82</sup> This stance has also led to specific outcomes, including the rejection of requests to permit the re-export of military equipment to Ukraine, except in cases where the equipment contains minor components manufactured in Switzerland. Moreover, the law of neutrality has been cited as a rationale for refusing requests pertaining to the supply of non-lethal weapons or the clearance of military aircraft transit carrying such equipment destined for Ukraine.<sup>83</sup>

Notably, while Russia expressed its objections, it didn't frame these objections within the context of neutrality. This specific legal framework was not explicitly mentioned in Russia's statements at the United Nations. The complete content of the confidential diplomatic note sent by Russia to the USA on April 14, 2022,<sup>84</sup> in response to the increased quality of supplied military materials, remains undisclosed. In this document, Russia allegedly accused the allies of violating stringent principles regulating the transfer of armaments to conflict zones, according to rumours. Nevertheless, it remains uncertain whether Russia explicitly alleged infringements of the law of neutrality. Analysing the reasons behind Russia's decision not to engage with states on the basis of this law, this decision might be influenced by various factors, including the perceived insignificance of neutrality, constraints related to Russia's characterization of its armed attack as a ‘special military

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<sup>82</sup> SWISS FEDERAL COUNCIL, RAPPORT DU CONSEIL FÉDÉRAL EN RÉPONSE AU POSTULAT 22.3385 DE LA COMMISSION DE POLITIQUE EXTÉRIEURE DU CONSEIL DES ÉTATS DU 11 AVRIL 2022, (2022).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

operation,’ or geopolitical considerations, considering Russia’s limited ability to enforce its rights as a belligerent against neutral states.

This observed state practice highlights important advancements regarding the idea of “qualified neutrality.” Even if the phrase itself is not explicitly used, numerous states justify their backing and supply of arms to Ukraine by referencing Ukraine’s RSD, frequently invoking international law and the UN Charter to support their actions.

### *B. Jackson’s View of Qualified Neutrality*

Robert Jackson, an influential figure as a Supreme Court Justice and Nuremberg Tribunal prosecutor, introduced the concept of qualified neutrality during his address at the Inter-American Bar Association Conference in Havana.<sup>85</sup> This doctrine emerged as a response to the limitations of traditional neutrality, which he believed hindered the preservation of international peace and security. Traditional neutrality was essentially a binary stance, requiring states to abstain from providing aid or taking action to assist nations facing aggression. Jackson’s perspective aligns with the core mission of the UN – to uphold global security and peace.<sup>86</sup>

Recent debates surrounding the US’s provision of substantial military aid totalling \$9.1 billion<sup>87</sup> to Ukraine, along with their involvement in enhancing Ukrainian military capabilities through training, stem from the US government’s use of qualified neutrality as a justification. The argument put forth by the US authorities is that their military assistance aims solely to support Ukraine’s self-defence<sup>88</sup> and in doing so, maintain international security and peace.

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<sup>85</sup> Hague Convention V, *supra* note 7, at Art 10.

<sup>86</sup> *Address of Robert H. Jackson, Attorney General of the United States at the First Conference of the Inter-American Bar Association*, DEPARTMENT OF JUSTICE (Mar. 27, 1941), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf>.

<sup>87</sup> Patrick Jackson, *Ukraine War: US approves \$2.6bn in aid for Ukraine and allies*, BBC (Sep. 9, 2022), <https://www.bbc.com/news/world-europe-62832881>.

<sup>88</sup> The Associated Press, *Expanded U.S. training for Ukraine forces begins in Germany*, NPR (Jan. 16, 2023, 12:59 AM), <https://www.npr.org/2023/01/16/1149372572/expanded-us-training-for-ukraine-forces-begins-in-germany>.

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It is imperative to recognise the substantial discrepancy that exists between the traditional concept of neutrality, defined as a binary notion, and the intricacy of qualified neutrality, suggesting an approach that is nearly neutral. In order to employ this doctrine as a justification for actions taken by states, an additional legal framework must be present within the UN's legal framework. The concept of an aggressor-victim relationship emerged following the UN Charter's adoption. In 1941, Jackson initially introduced this doctrine arguing that justification could be found for any conflict. However, ever since the UN Charter was ratified, the only legitimate justification for armed conflict has been self-defence.

Hence, it is critical that the application and understanding of the qualified neutrality doctrine are consistent with the tenets delineated in the UN Charter. During periods of strife, the principal aim of the international community is to minimise losses of life, facilitate the resolution of conflicts, and encourage the peaceful settlement of disputes. A state may legitimately justify military assistance or intervention under the pretext of qualified neutrality, as long as it complies with the conditions specified in the UN Charter. The UN charter, through Article 1, unequivocally declares the organization's mission: to guarantee and maintain global peace and security, in addition to executing collaboratively efficacious approaches to pre-empt and eradicate threats to peace. Activities conducted through UN channels are considered impartial, as they symbolise the combined resolve of member states of the UN to safeguard worldwide peace and security.<sup>89</sup>

Qualified neutrality hinges on the condition that measures taken to uphold global peace and security while preserving a nation-state's neutral status occur within the framework of the UN. The reason for this is that the endeavour to achieve worldwide peace and security entails substantial political ramifications. The UN being an international organisation, assumes a pivotal function in evaluating the impartiality of a state as it strives to achieve this goal. Before taking action, member nations must notify the UN and obtain its approval. The absence of endorsement or validation from the UN regarding a state's actions as an impartial and objective endeavour to preserve worldwide peace and security introduces an intrinsic danger of undermining the perception of neutrality. Therefore, by adhering to the requisite standards of qualified neutrality and meeting the necessary criteria, a nation can ensure that its efforts remain legitimate and do not compromise its neutral status.

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<sup>89</sup> SC Res. 678, Iraq-Kuwait, (Nov.29, 1990).

*C. Justifying the Qualified Neutrality Argument*

The concept of “qualified neutrality,” initially introduced by Robert Jackson, aligns with the fundamental goal of the UN to uphold global security and peace. Given the existing diversity in how different states interpret and implement this concept, it should ideally be the predominant approach. However, for state actions to be legitimately justified, it necessitates the presence of an additional legal basis within both the UN and the international legal framework.

*i. CA 1 of the Geneva Conventions*

A legal obligation analogous to the one mentioned in the context of IHL is contained in CA 1. It imposes a proactive obligation to ensure and uphold IHL observance in all situations on the parties to these Conventions.<sup>90</sup> Each state is obligated to fulfil its duty of due diligence by implementing essential measures or employing all feasible methods to prevent or mitigate violations of IHL that are reasonably foreseeable.<sup>91</sup> Within its advisory opinion concerning the construction of a wall in the occupied Palestinian Territory, the ICJ reaffirmed this affirmative obligation. Additionally, it declared that the duty outlined in CA 1 is universally applicable to high contracting parties of the Geneva Conventions, neutral states included.<sup>92</sup> The main aim of this requirement is to avert conflicts from escalating into severe and inhumane situations.

The core inquiry emerges: Can the military assistance rendered by the US be deemed as a satisfactory discharge of its due diligence duty under IHL? Should the response be affirmative, the

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<sup>90</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Art. 1, Aug. 12, 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Art. 1, Aug. 12, 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Art. 1, Aug. 12, 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Art 1, Aug. 12, 1949, 75 UNTS 287.

<sup>91</sup> Theodor Meron, *The Geneva Conventions as Customary Law*, 81(2) AM. J. INT'L L. 348, 363 (1987).

<sup>92</sup> Advisory Opinion on the Legal Consequences of Construction of a Wall in Palestinian Occupied Territory, Advisory Opinion, 2004 I.C.J. GL No 131, at ¶158 (July 9, 2009).

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subsequent inquiry pertains to the extent to which said military aid complies with the stipulations outlined in CA I of the Geneva Conventions.

Ukraine has formally requested NATO, which includes the EU and the US, for support in defending its territory against Russian aggression.<sup>93</sup> Ukraine argues that Russia has blatantly violated both international law and IHL. Russia's attacks on Ukraine have indisputably resulted in numerous casualties, the destruction of civilian structures, and significant war damage.<sup>94</sup> It is important to emphasise that a breach of IHL is a necessary condition for actions to be considered as humanitarian-related or falling under the scope of IHL.<sup>95</sup>

Hence, in the event that an impartial entity decides to intervene, its primary objective should be the prevention or cessation of IHL violations. On the condition that the assistance is authentically humanitarian in nature, we contend that a state may maintain its neutrality while supporting one of the belligerent parties.

CA I of the Geneva Conventions doesn't prescribe specific actions that third parties must take to ensure respect for IHL, prevent violations, or penalise those responsible for such violations. However, it raises the question of whether this includes military assistance or whether such support contradicts the objective of upholding IHL.

As per the Military and Paramilitary Activities in and against Nicaragua, in *Nicaragua v. United States of America*, it is impermissible for third states to incentivise a state to engage in warfare that violates IHL.<sup>96</sup> Consequently, the duty to abstain from promoting such behaviour also carries with it the obligation to hinder the prolongation of armed conflicts.<sup>97</sup> Regrettably, CA 1 implies a more stringent requirement for contracting parties. The term 'ensure' signifies that each nation has an

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<sup>93</sup> Leonid Polyakov, *Defense Institution Building in Ukraine at Peace and at War*, 17(3) CONN. 92, 108 (2018), <https://www.jstor.org/stable/26934693>.

<sup>94</sup> European Council, *Ukraine: Declaration by the High Representative on behalf of the EU on Russian atrocities committed in Bucha and other Ukrainian towns*, CONSILIUM (April 4, 2022, 9:50 AM), <https://www.consilium.europa.eu/en/press/press-releases/2022/04/04/ukraine-declaration-by-the-high-representative-on-behalf-of-the-eu-on-russian-atrocities-committed-in-bucha-and-other-ukrainian-towns/>.

<sup>95</sup> NILS MELZER & ETIENNE KUSTER, *NEW IHL HANDBOOK: INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION*, 98(901) I.R.R.C. 353, 353 (2016).

<sup>96</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgement, 1986 I.C.J. 14, 104 (June 27) [hereinafter "Nicaragua"].

<sup>97</sup> Raymond T. Yingling & Robert W Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 401-402 (1952).

affirmative duty, commensurate with its capacity and resources, to take necessary actions to avert abuses of IHL.<sup>98</sup>

According to the US, the extensive civilian casualties resulting from Russian attacks on maternity hospitals, schools, and shopping areas provide ample evidence of Russia's blatant IHL violations, justifying the U.S.'s intervention.<sup>99</sup> Furthermore, the obligations specified in CA I have an "*erga omnes*" character, meaning that states share a collective responsibility and may be held accountable if they fail to fulfil this obligation.<sup>100</sup>

However, the question remains whether this article justifies a third state's provision of military assistance to a party it perceives as a victim of aggression.

In the context of IHL, such action might be considered as direct participation in hostilities as it significantly bolsters the enemy's military capabilities in the conflict. For this reason, IHL practices generally limit CA I measures to non-combatant alternatives, including sanctions, trade embargoes, retaliation, and other non-violent strategies.<sup>101</sup> This approach is evident in the actions of EU states and other nations, which have imposed trade and economic embargoes, frozen the assets of Russian billionaires, and terminated trade and business agreements with Russia.<sup>102</sup> These measures highlight states' recognition of their responsibilities to uphold and guarantee respect for IHL. They also emphasise the significance of preserving neutrality by refraining from expanding the geographic scope of the conflict and thereby mitigating further harm.

## *ii. Supply of Arms Self-Defence: A Legal Analysis for Qualified Neutrality*

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<sup>98</sup> Francois Bugnion, *The Geneva Conventions of 12 August 1949: From the 1949 Diplomatic Conference to the Dawn of the New Millennium*, 76(1) INT. AFF. (RL. INST. OF INT. AFF. 1944) 41, 45 (2000).

<sup>99</sup> Judah Ari Gross, *Israeli legal experts condemn Ukraine invasion, say it's illegal under international law*, THE TIMES OF ISRAEL (Feb. 27, 2022, 12:43 PM) [https://www.timesofisrael.com/liveblog\\_entry/israeli-legal-experts-condemn-ukraine-invasion-say-its-illegal-under-international-law/](https://www.timesofisrael.com/liveblog_entry/israeli-legal-experts-condemn-ukraine-invasion-say-its-illegal-under-international-law/).

<sup>100</sup> *supra* note 93.

<sup>101</sup> Alexandra Prokopenko, *How Sanctions have changed Russian Economic Policy*, CARNEGIE POLITIKA (May 9, 2023) <https://carnegieendowment.org/politika/89708>.

<sup>102</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 89, (Jun. 8, 1977), 1125 U.N.T.S. 3.

Under Article 21 of Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) it is acknowledged that self-defence carried out in accordance with the Article 51 of UN Charter can be considered justifiable and not in violation of international law.<sup>103</sup> This implies that such violations might be justified if a victim state, while exercising its RSD as outlined in Article 51 of the UN Charter, unintentionally encroaches upon the rights of an aggressor state.<sup>104</sup>

The central question at hand revolves around whether neutral states providing military assistance to Ukraine are effectively engaging in collective self-defence on Ukraine's behalf. If this is indeed the case, their actions might not be considered improper. Ukraine has called upon other nations to participate in a collective self-defence effort, but as of now, third-party states have not overtly taken part in hostilities or explicitly declared their actions as being in the name of "collective self-defence." Notably, no nation has officially notified the UNSC of its intent to take action in compliance with Article 51 of the UN Charter.<sup>105</sup>

Provision of arms to Ukraine, which can be viewed as a potential act of force, remains a topic of ongoing debate. In this discussion, a comparison is made between arming Ukraine and the support and training provided by the US to Nicaraguan contras.<sup>106</sup> The court held that the financial assistance provided to the contras constituted an act of force, whereas support to the contras in and of itself did not satisfy the necessary elements to be classified as such.<sup>107</sup> Hence, the determination of whether supplying armaments to the victim of an aggressor constitutes a use of force against the aggressor remains ambiguous.<sup>108</sup>

However, we believe this legal concern is not well-founded and warrants careful consideration.

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<sup>103</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, art 21, (Nov. 2001), Supplement No. 10 (A/56/10) [hereinafter 'ARSIWA'].

<sup>104</sup> LORAND BARTELS & FEDERICA PADDEU, *EXCEPTIONS IN INTERNATIONAL LAW*, (Oxford University Press, 2020).

<sup>105</sup> Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-belligerency, and the Use of Force*, LIEBER INSTITUTE WEST POINT (Mar. 7, 2022), <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force>.

<sup>106</sup> *Id.*

<sup>107</sup> Nicaragua. *supra* note 97.

<sup>108</sup> *Id.*

First, the involved states have not formally communicated with the UNSC under Article 51 of the UN Charter.<sup>109</sup> While not mandatory, this omission is significant, especially considering their recent notifications to the SC in other self-defence cases.<sup>110</sup>

Second, the argument based on the “*maiores ad minus*” principle seems to contradict the fundamental purpose of Article 51 of the UN Charter, which provides an exemption from the prohibition on the use of force outlined under Article 2(4). As a result, specific academics have expressed scepticism regarding whether the right to participate in armed conflict in the name of collective self-defence reasonably disadvantages a single party in an IAC,<sup>111</sup> particularly in the absence of established precedent supporting such an approach.<sup>112</sup>

Third, it is essential to note that the states providing military support to Ukraine do not explicitly invoke the notion of collective self-defence in the current situation. Poland is the only state that seems to make a clear reference, suggesting that assisting Ukraine aligns with the principles of collective self-defence against an aggressor who violates the fundamental principles of the UN Charter.<sup>113</sup> Conversely, several other states explicitly reject the applicability of collective self-defence in this context. For example, the German State Secretary has asserted that the assistance provided does not meet the threshold for invoking collective self-defence.<sup>114</sup>

### *iii. Exploring the Legal Implications of Providing Military Aid in Armed Conflicts: The Controversy of Countermeasures*

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<sup>109</sup> Kai Ambos, *Will a state supplying weapons to Ukraine become a party to the conflict and thus be exposed to countermeasures?*, EJIL:TALK! (Mar. 2, 2022), <http://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-countermeasures>.

<sup>110</sup> Nick van der Steenhoven, *Conduct and Subsequent Practice by States in the Application of the Requirement to Report under UN Charter Article 51* 242, TAYLOR & FRANCIS ONLINE (Nov. 20, 2019), <https://www.tandfonline.com/doi/full/10.1080/20531702.2019.1690333>; James A. Green, *The Article 51 Reporting Requirement for Self-Defense Actions*, 55 Vir. J. Intl. L., 563 (2015).

<sup>111</sup> JAMES UPCHER, NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW (Oxford University Press 2020); CONSTANTINE ANTONOPOULOS, NON-PARTICIPATION IN ARMED CONFLICTS: CONTINUITY AND MODERN CHALLENGES TO THE LAW OF NEUTRALITY (Cambridge University Press 2022).

<sup>112</sup> Luca Ferro & Nele Verlinden, *Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties*, 17(1) CHINESE J. INT'L L. 15, (2019).

<sup>113</sup> United Nations Security Council (UNSC) Provisional 3000 (6 August 1991) S/PV.3000, 21.

<sup>114</sup> Deutscher Bundestag, *Statement by State Secretary in the Federal Foreign Office, Susanne Baumann in Response to a Written Parliamentary Question*, Drucksache 20/1918, 39 (May 20, 2022), <https://dserver.bundestag.de/btd/20/019/2001918.pdf>.

Scholars argue that providing military aid to Ukraine, although it conflicts with neutrality laws, can find justification under the principle of countermeasures.<sup>115</sup> This perspective is founded on *erga omnes* obligations<sup>116</sup> related to acts of aggression, allowing states aside from the victim to lawfully take countermeasures in response to the aggressor's actions. These countermeasures might result in the aggressor state losing certain privileges under neutrality laws.

For this justification to be valid, specific conditions must be met. The military aid should aim at stopping the ongoing aggression and should adhere to necessity and proportionality.<sup>117</sup> Additionally, the requirement to notify the intent to take these measures might be waived in urgent situations. This approach aligns with Article 41(1) of ARSIWA, mandating states to cooperate in ending severe violations of peremptory norms.<sup>118</sup>

However, it is crucial to note that this idea isn't universally accepted, and not all states choose to respond to this wrongful act through countermeasures. While theoretically appealing, it hinges on the contentious question of whether states other than the victim state can lawfully take countermeasures in cases involving violations of *erga omnes*. Moreover, the states providing military aid have not explicitly labelled it as countermeasures, making it more of a scholarly construct than a well-established solution rooted in state practice.

Notably, there is widespread agreement that countermeasures cannot compromise the UN Charter or other obligations imposed by pre-emptive principles of general international law, which prohibit the use of force or the threat thereof. The aforementioned comprise of the prohibition against aggression and the fundamental principles of IHL. Despite the potential illegality of the military aid provided to Ukraine, employing countermeasures, including collective countermeasures, would not be an acceptable course of action.

In essence, even though qualified neutrality isn't currently applicable in this situation, and neither the UNSC nor the UNGA has passed any resolutions regarding this issue, the US may still have

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<sup>115</sup> Pearce Clancy, *Neutral Arms Transfers and The Russian Invasion of Ukraine*, 72 INT. COMP. LAW. Q. 527, 533 (2023).

<sup>116</sup> *Barcelona Traction, Light and Power Company, Limited (Belg. v. Sp.)*, Judgment, [1970] ICJ Rep 3, ¶34 (February 5).

<sup>117</sup> Andrew Clapham, *On War*, LIEBER INSTITUTE WEST POINT (Mar. 5, 2022), <https://lieber.westpoint.edu/on-war/>.

<sup>118</sup> *Id.*

other means to legitimise its military support. However, as we have seen above US can't justify its act under CA 1, collective self-defence and collective countermeasure.

## V. CONSEQUENCES

As seen above, the acts of the countries are not justifiable. The countries providing arms will face the following consequences.

### *A. Co-Belligerency and Role of USA*

The aid given by the United States of America (USA) to Ukraine has sparked discussions concerning the potential co-belligerent status of the USA in the conflict between Russia and Ukraine. Clarifying the relationship between neutrality and the concept of co-belligerency is of the utmost importance. The Fourth Geneva Convention distinguishes co-belligerent states from neutral and belligerent states, highlighting that being neutral does not equate to being a co-belligerent. Even though co-belligerency involves taking sides, it is not the same as neutrality.<sup>119</sup>

Two primary arguments support the USA's denial of co-belligerent status in the Ukraine-Russia conflict. Initially, it contends that its participation is for the solitary purpose of aiding Ukraine in the defence of its territory, while maintaining its own neutrality.<sup>120</sup> Furthermore, it posits that co-belligerency is governed by Article 1 of the Constitution, which mandates that Congress issue a declaration of war.<sup>121</sup>

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<sup>119</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Art. 4 ¶2, Aug. 12, 1949, 75 UNTS 31.

<sup>120</sup> Peter S. Konchak, *U.S. and Allied Involvement in the Russo-Ukrainian War: The Belligerent Status of NATO States and Its Implications*, OPINIO JURIS (Jul. 20, 2022), <http://opiniojuris.org/2022/07/20/u-s-and-allied-involvement-in-the-russo-ukrainian-war-the-belligerent-status-of-nato-states-and-its-implications/>.

<sup>121</sup> *Id.*

We believe that the first argument, adhering to strict neutrality implies that any direct involvement in hostilities would categorise a neutral or non-participating party as a co-belligerent or ally.<sup>122</sup> Nevertheless, indirect involvement has gradually resulted in the revocation of neutral status, particularly when a state that is neutral extends material aid to a belligerent without directly engaging in hostilities.

As an example, during the Iraq-Iran War Kuwait, initially a neutral state, faced accusations of offering substantial assistance to Iraq, which ultimately led to the loss of its neutral status.<sup>123</sup> It's crucial to emphasise that co-belligerency hinges on the subjective perception of the conflicting parties, and according to IHL, targeting an object or facility that provides a military advantage is deemed legitimate.<sup>124</sup> The USA has actively provided Ukraine with financial, logistical, and military aid, both independently and through NATO.<sup>125</sup>

This assistance represents a unique occurrence of active participation in hostilities. The USA aid, which consists of specialised combat training and weaponry, is intended to strengthen the Ukrainian military's capacity to repel Russian aggression. It is crucial to emphasise that this aid is reciprocal, as it is in response to the request put forth by President Zelensky to the US and other EU countries.

The USA presents a second argument regarding the necessity of a formally issued declaration of war. This argument suggests that, especially in consideration of the UN Charter, an official announcement of war is not an obligatory prerequisite. This stance is different from the stance adopted by the USA through the Vietnam War, when it argued that a formal declaration of war was no longer essential in modern international law.<sup>126</sup>

Nevertheless, we believe that the USA should consider the possibility of a reversal of the situation, which would unmistakably establish its status as a co-belligerent. Since the USA's support for Ukraine contains elements of co-belligerency, IHL permits Russia to view the USA as a legitimate

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<sup>122</sup> JAMES UPCHER, *NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW* (Oxford University Press 2020).

<sup>123</sup> UN, SG. S/18582, Letter dated 12 January 1987 from the Chargé d'affaires of the Permanent Mission of Kuwait to the United Nations addressed to the Secretary-General.

<sup>124</sup> Shannon Bosch, *The International Humanitarian Law Notion of Direct Participation in Hostilities – A Review of the ICRC Interpretive Guide and Subsequent Debate*, 17(3) Pot. Elec. L. J., (2014), <https://ssrn.com/abstract=2554365>.

<sup>125</sup> *Id.*

<sup>126</sup> Department of State Bulletin, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 Dep't St. Bull. 480 (1966), [https://calhum.org/files/uploads/program\\_related/TD\\_US\\_Participation\\_in\\_VN.pdf](https://calhum.org/files/uploads/program_related/TD_US_Participation_in_VN.pdf).

party. In addition to international legal norms and the qualified neutrality doctrine, the USA, in its capacity as a neutral third party, ought to exercise more prudence when delineating the extent of its assistance. This prudence should be guided by IHL, the specialised legal framework that regulates armed conflicts.

*B. Aid and Assistance Under ARSIWA*

State responsibility becomes relevant when one State can be held accountable for aiding another State's unlawful activities. In this context, two provisions from the ARSIWA are pertinent and have evolved into well-established principles in CIL.

The first relevant provision is Article 16 of the ILC's ARSIWA.<sup>127</sup> As stated in this article, a state that intentionally and being fully aware of the circumstances surrounding the act in question provides assistance to another state in the commission of an unlawful act. In such cases, the state is liable for its own actions. Furthermore, the aforementioned action would be considered unlawful if executed by the state that is extending aid. The ICJ affirmed the customary status of this article in its 2007 decision regarding the Bosnian Genocide.<sup>128</sup> The case involving the USA provides clear evidence of the intentional supply of weapons to Ukraine. This is evident in the contrasting approach taken by the USA, which differs from its actions during the Vietnam War. Additionally, the application of the doctrine of qualified neutrality itself implies that the USA was well aware of its actions and their implications.

The second basis for holding States accountable for their provision of military assistance to Russia lies in Article 41(2) of the ARSIWA.<sup>129</sup> This provision prohibits a state from validating a circumstance that results from a severe breach of a mandatory standard as lawful or from providing assistance to maintain such a circumstance. The wrongful use of force and breaches of IHL committed by Russia are categorised as peremptory norms.

It is crucial to emphasise that if any action of Ukraine is deemed unlawful by the ICJ in the future, this does not imply that states supplying military aid to Ukraine are legally responsible for all of Ukraine's actions. According to state responsibility, they can be held accountable solely for the

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<sup>127</sup> ARSIWA, *supra* note 107, Art 16.

<sup>128</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Her. v. Ser. & Mon.), Judgment, ICJ GL No 91, (Feb. 26).

<sup>129</sup> ARSIWA, *supra* note 107, Art 41(2).

contribution of their aid to Ukraine's underlying wrongful conduct.<sup>130</sup> This differentiation is vital, particularly in cases where Ukraine may seek to exercise its right to take countermeasures against these States or request assistance from other States in this regard. Countermeasures must be proportionate to the wrongful conduct they aim to address.<sup>131</sup> This distinction also plays a significant role in determining the extent of reparations owed to Ukraine due to the military aid provided to Russia by assisting States.<sup>132</sup>

States providing military aid would be held jointly and severally responsible for Russia's unlawful actions only if their aid constitutes an essential and integral component of Russia's wrongful operations. This might be applicable in cases of jointly planned operations or scenarios where the wrongful conduct could not have occurred without the involvement of the aid. Nevertheless, establishing responsibility on this basis is considerably more challenging compared to the application of Articles 16 or 41.

## VI. NAVIGATING QUALIFIED NEUTRALITY: SOUTHEAST ASIA'S RESPONSE TO THE UKRAINE CONFLICT THROUGH A TWAIL LENS

Southeast Asia's varied reactions to Russia's incursion into Ukraine become more evident when viewed through the prism of "Third World Approaches to International Law" (TWAIL). TWAIL is a critical perspective that scrutinises law from the standpoint of previously colonized and economically disadvantaged nations, underscoring the often unequal and unjust power dynamics inherent in global legal systems.<sup>133</sup> Southeast Asian responses to the Ukraine crisis are shaped not only by their distinct geopolitical considerations but also by their position within global power dynamics and the principles of TWAIL. In this section, we will look into the position adopted by India (A) and then the stance taken by other South Asia countries (B).

<sup>130</sup> ARSIWA, *supra* note 107, Art 16.

<sup>131</sup> ARSIWA, *supra* note 107, Art 51.

<sup>132</sup> ARSIWA, *supra* note 107, Art 31.

<sup>133</sup> Makau W. Mutua, *What is Twail?*, American Society of International Law, PRO. OF THE ASIL ANN. MEET. 31, 38 (2000).

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*A. India's Position on the Question of Neutrality Under International Law*

In recent state practice, India has not consistently invoked the UN Charter in justifying its military actions, particularly in response to cross-border terrorism incidents like the surgical strikes of 2016<sup>134</sup> and the Balakot strikes of 2019.<sup>135</sup> Instead, India has primarily emphasised the need to protect its citizens from terrorist threats and prevent further attacks. This departure from explicitly invoking the UN Charter raises questions about India's adherence to the concept of qualified neutrality.

As stated above qualified neutrality suggests that states may justify military assistance or intervention under certain conditions while remaining neutral in a conflict. However, this justification typically hinges on compliance with the principles outlined in the UN Charter. Since the UN Charter unequivocally declares the organization's mission to guarantee and maintain global peace and security, adherence to its principles is crucial in justifying military actions under qualified neutrality.

The absence of explicit invocation of the UN Charter in India's recent state practice raises concerns about its adherence to the principles of the Charter, particularly regarding the use of force and the maintenance of global peace and security. Without aligning military actions with the conditions specified in the UN Charter, such as invoking Article 51 on the right to self-defence or seeking approval from the UN Security Council, India's actions may fall short of qualifying for the concept of qualified neutrality.

Furthermore, India's lack of involvement in the Russia-Ukraine crisis highlights a broader strategy of strategic neutrality. While India has not explicitly articulated this approach, it appears to refrain from entanglement in conflicts beyond its immediate region. This strategic neutrality implies a cautious stance towards military intervention, which may be at odds with the concept of qualified neutrality without clear adherence to the UN Charter's principles. Therefore, India's recent state

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<sup>134</sup> *Transcript of Joint Briefing by MEA and MoD (September 29, 2016)*, MINISTRY OF EXTERNAL AFFAIRS GOVERNMENT OF INDIA (Sept. 29, 2016), [https://www.mea.gov.in/media-briefings.htm?dtl/27446/Transcript\\_of\\_Joint\\_Briefing\\_by\\_MEA\\_and\\_MoD\\_September\\_29\\_2016](https://www.mea.gov.in/media-briefings.htm?dtl/27446/Transcript_of_Joint_Briefing_by_MEA_and_MoD_September_29_2016).

<sup>135</sup> Srinivas Burra, *Use of Force as Self-Defence against Non-State Actors and TWAAIL Considerations: A Critical Analysis of India's State Practice*, 24 AN. YK. OF INT'L L. 106, (2018).

practice suggests a nuanced approach to neutrality in international conflicts, possibly invoking principles not explicitly stated in international discourse.

*i. India's Strategic Neutrality*

This is the historical context in which India's stance on the question of self-defence and neutrality has emerged and developed. The maintenance of the stand of neutrality by India in the recent conflict between Russia and Ukraine also stems from the same. When Russia invaded Ukraine on 24 February, President Putin addressed the nation and explained the reasons behind his "special military operation."<sup>136</sup> Russia has justified its actions taken in the territory of Ukraine by citing historical reasons.<sup>137</sup>

However, *de jure*, Russia has justified the actions by claiming them to constitute an exercise of collective self-defence enshrined under Article 51 of the UN Charter. In pursuance of this, Russia sent a letter to the Security Council explaining that it exercises self-defence.<sup>138</sup> The additional requirement for the exercise of collective self-defence is a request from the victim state for the assistance.<sup>139</sup> Russia had fulfilled this prerequisite by relying upon the provisions of recently concluded separate treaties of friendship, cooperation, and mutual assistance between Russia, Donetsk, and Luhansk.<sup>140</sup>

India had adopted a stance of strategic neutrality in the Russia-Ukraine conflict. This is evident as it has repeatedly abstained from voting on various UNGA resolutions concerning the conflict. This adoption of a middle path rather than taking sides seems plausible in the backdrop of historical ties between India and Russia. Furthermore, this neutral stance aligns with the policy of non-alignment of which India has been one of the founding fathers.

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<sup>136</sup> President of Russia, *Address by the President of the Russian Federation*, (Feb. 24, 2022, 6:00 AM), <http://en.kremlin.ru/events/president/news/67843>.

<sup>137</sup> Kristen De Groot, *Putin's motivation behind the attack on Ukraine*, PENN TODAY (Feb. 24, 2022), <https://penntoday.upenn.edu/news/putins-motivation-behind-attack-ukraine>.

<sup>138</sup> United Nations Security Council (UNSC) General 2022/154 (Feb. 24, 2022) S/2022/154.

<sup>139</sup> Nicaragua. *supra* note 97, at ¶ 199.

<sup>140</sup> United Nations General Assembly (UNGA) General 76/740 (Mar. 7, 2022) A/76/740.

Moreover, India's dependence on Russia for its energy and military resources further validates its current stance.

In the 1950s, amidst the prevailing Cold War tensions, India initiated a close alliance with the Soviet Union. The connection was further solidified due to conflicts with Pakistan. The 1965 war over the disputed Kashmir region saw Soviet mediation, leading to a ceasefire. In December 1971, during the Indo-Pakistani conflict, the Soviet Union utilised its veto power to support India at the UN.<sup>141</sup> In August 1971, India and the Soviet Union signed a pact emphasizing peace, friendship, and cooperation. Following the Soviet Union's dissolution, this pact was replaced in January 1993 by the Treaty of Indo-Russian Friendship and Cooperation.<sup>142</sup> Despite criticism from the West and China, the Soviet Union supported India's actions, including the 1974 nuclear test and the absorption of Sikkim in 1975.<sup>143</sup> This backing persisted even after the Soviet Union's collapse, as Russia endorsed India's second nuclear test in 1998, despite widespread condemnation from Western nations.<sup>144</sup> The historical relationship between India and the Soviet Union, evolving into a strategic partnership, has endured beyond the Cold War era. Therefore, India has historical reasons to back its neutral stance.

Moreover, as per a group led by Sameer Lalwani, a senior specialist at the United States Institute of Peace, substantial military commerce has taken place between the two nations since the 1960s.<sup>145</sup> Presently, approximately 85% of India's military inventory is comprised of Russian equipment.<sup>146</sup> Russia has supplied fighter aircraft, nuclear submarines, cruise missiles, battle tanks, Kalashnikov rifles, and various other weapons. Certain assets, like fighter aircraft, are expected to remain integral to India's arsenal until the year 2065.<sup>147</sup> Over the coming

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<sup>141</sup> Rajan Menon & Eugene Rumer, *Russia and India: A New Chapter*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Sep. 20, 2022), <https://carnegieendowment.org/2022/09/20/russia-and-india-new-chapter-pub-87958>.

<sup>142</sup> Treaty of Peace, Friendship and Cooperation Between the Republic of India and the Union Of Soviet Socialist Republics, India-U.S.S.R., Aug. 9, 1971.

<sup>143</sup> Srija Cilarapu, *What's Behind India's Neutrality in the Russia-Ukraine War?*, STATECRAFT (Aug. 16, 2023), <https://www.statecraft.co.in/article/statecraft-explains-what-039-s-behind-india-039-s-neutrality-in-the-russia-ukraine-war>.

<sup>144</sup> *Id.*

<sup>145</sup> Karishma Mehrotra, *As Modi visits White House, India's reliance on Russian arms constrains him*, THE WASHINGTON POST (June 20, 2023, 2:00 AM), <https://www.washingtonpost.com/world/2023/06/20/modi-india-russia-military-equipment/>.

<sup>146</sup> *Id.*

<sup>147</sup> *supra* note 144.

decades, India is anticipated to depend on Moscow for the provision of replacement parts and maintenance services.

A recent study indicates that the surge in demand for fuel and other petroleum products, coupled with a decline in domestic crude oil production, has elevated India's reliance on imported crude. The record shows that in the fiscal year 2022-23, this dependency reached 87.3% of domestic consumption, up from 85.5% in the previous fiscal year, 2021-22.<sup>148</sup> As per shipping data reported by Nikkei, India's dependence on Russian oil surged to constitute 30% of its overall imports in March.<sup>149</sup> This marks a notable shift for India, which traditionally relied heavily on the Middle East, as it imported over 6 million tonnes of Russian oil during the mentioned month.<sup>150</sup> As per information provided by the energy cargo tracking service Vortexa, India's crude oil imports from Russia reached an unprecedented peak in May 2022.<sup>151</sup> The third-largest global oil consumer brought in almost 2 million barrels per day of crude oil from Russia during this period, establishing Russia as the primary source of oil for India.<sup>152</sup> These colossal Russian contributions to India's military and energy sector thus become another reason for India's neutral position in this conflict.

During the Cold War, the concept of non-alignment gained prominence, influenced by the ideas of former Indian Prime Minister Jawaharlal Nehru. Nehru advocated for a "third way," encouraging countries to abstain from aligning with either the capitalist United States or the communist Soviet Union.<sup>153</sup> The primary goal of this movement was to advocate for international peace by uniting non-aligned nations against alignment with any major power bloc. India's historical commitment to non-alignment and its pursuit of an independent foreign policy has shaped its response to global conflicts.

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<sup>148</sup> Sukalp Sharma, *India reliance on imported crude oil at record high of 87.3% in FY23*, INDIAN EXPRESS (Apr. 25, 2023, 08:30 AM), <https://indianexpress.com/article/business/commodities/india-reliance-on-imported-crude-oil-at-record-high-of-87-3-in-fy23-8573996/>.

<sup>149</sup> Toru Tsunashima, *India's dependence on Russian oil soars to 30%*, NIKKEI ASIA (Apr. 23, 2023, 02:20 AM), <https://asia.nikkei.com/Business/Markets/Commodities/India-s-dependence-on-Russian-oil-soars-to-30>.

<sup>150</sup> Id.

<sup>151</sup> Serena Huang, *Russia overcomes EU ban with record-high crude exports to India*, VORTEXA (Jan. 19, 2023), <https://www.vortexa.com/insights/freight/russia-overcomes-eu-ban-with-record-high-crude-exports-to-india/>.

<sup>152</sup> *supra* note 149.

<sup>153</sup> *supra* note 146.

We believe that due to these historical reasons, India's stance of strategic neutrality in the Russia-Ukraine conflict is deeply rooted in its longstanding relationship with Russia, its policy of non-alignment, and its pursuit of strategic autonomy.

*B. Stance of ASEAN Countries on Russia-Ukraine Conflict*

Among the member countries of the Association of Southeast Asian Countries (ASEAN), Singapore emerged as the most forthright, openly condemning Russia's actions, imposing financial sanctions, and implementing export controls against Moscow.<sup>154</sup> This robust response underscores Singapore's commitment to international law and the UN Charter, emphasizing the significance of principles over might, particularly for smaller nations like itself.<sup>155</sup>

In contrast, Brunei, Indonesia, and the Philippines decried the invasion but refrained from explicitly naming Russia as the instigator. Indonesia had previously called for a peaceful resolution to Russia's conflict with Ukraine, expressing concerns about potential economic repercussions.<sup>156</sup> Brunei and the Philippines, initially focused on evacuating their nationals from Ukraine, later issued condemnations related to violations of sovereignty and territorial integrity.<sup>157</sup>

Moving on to Malaysia, Thailand, Vietnam, Laos, and Cambodia,<sup>158</sup> we observe relatively restrained reactions. Malaysia expressed sorrow regarding the Ukraine events and called for de-escalation without explicitly singling out Russia. Thailand, aiming to maintain neutrality and good relations with Russia, expressed similar concerns and advocated for dialogue.<sup>159</sup> Vietnam, heavily reliant on Russian defence partnerships, expressed deep concern but avoided open criticism of President

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<sup>154</sup> Warren Fernandez, *Why Singapore had to take a strong stand against Russia's attack on Ukraine*, THE STRAITS TIMES (MAR. 26, 2022, 1:07 PM), <https://www.straitstimes.com/singapore/why-singapore-had-to-take-a-strong-stand-against-russias-attack-on-ukraine>.

<sup>155</sup> *Id.*

<sup>156</sup> Ann Marie Murphy, *Ukraine war highlights differences between Indonesian and US foreign policy frameworks*, EAST ASIA FORUM. (Aug. 5, 2022), <https://www.eastasiaforum.org/2022/08/05/ukraine-war-highlights-differences-between-indonesian-and-u-s-foreign-policy-frameworks/>.

<sup>157</sup> Apila Sangtam, *Ukraine Crisis: Implications for ASEAN's Maritime Security*, NATIONAL MARITIME FOUNDATION (Jan. 7, 2023) <https://maritimeindia.org/ukraine-crisis-implications-for-aseans-maritime-security/>.

<sup>158</sup> *What's behind SE Asia's muted Ukraine response?*, DW, (Sep. 27, 2023, 9:29 PM) <https://www.dw.com/en/ukraine-conflict-whats-behind-southeast-asias-muted-response/a-61039013>.

<sup>159</sup> *Id.*

Putin's actions.<sup>160</sup> Laos, prioritizing its friendship with Russia, called for restraint without overt condemnation. Similarly, Cambodia, much like Thailand, declared neutrality and expressed hope for a peaceful resolution.<sup>161</sup>

Myanmar was the sole Southeast Asian nation supporting Russia's actions, having recognised the military junta following the 2021 coup.<sup>162</sup> As a reciprocal gesture, Russia was the initial prominent power to validate the junta's governance, and Myanmar's military endorsed Russian initiatives under the pretext of preserving sovereignty. However, Myanmar's government in exile, the National Unity Government, openly condemned the invasion.<sup>163</sup>

While Cambodia held the ASEAN chair in 2022, Prime Minister Hun Sen stressed the need for a strong ASEAN voice in international affairs. Nevertheless, ASEAN's response, marked by divisions among its members, resulted in a relatively weak consensus statement issued on February 26.<sup>164</sup> The statement expressed deep concern and called for restraint but refrained from openly condemning Russia for violating the fundamental principles of the ASEAN Treaty of Amity and Cooperation. Criticised for its mild tone, the statement had limited impact outside the region, primarily highlighting existing divisions within ASEAN.<sup>165</sup>

Following the invasion, Southeast Asian countries participated in UNSC and UNGA resolutions. A UNSC resolution, co-sponsored by Singapore and others, was defeated due to Russia's veto.<sup>166</sup> Nevertheless, a UNGA resolution, co-sponsored by ASEAN members, garnered significant support. Eight ASEAN nations voted in favour of a non-binding resolution deploring Russia's

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Ingyin Naing, *Could Myanmar be implicated in Russia's war against Ukraine?*, VOA. (Sep. 27, 2023, 9:29 PM) <https://www.voanews.com/a/could-myanmar-be-implicated-in-russia-s-war-against-ukraine-/7000594.html#:~:text=Myanmar%20opposition%20concerns,office%2C%20told%20VOA%20via%20zoom>.

<sup>163</sup> *Id.*

<sup>164</sup> Sokvy Rim, *How has the Russia-ukraine war impacted Cambodia's foreign policy*, THE DIPLOMAT, (Sep. 27, 2023, 9:29 PM) <https://thediplomat.com/2022/12/how-has-the-russia-ukraine-war-impacted-cambodias-foreign-policy/#:~:text=General%20Assembly%20resolution%20condemning%20Russia,support%20to%20Ukraine's%20war%20effort>.

<sup>165</sup> *Id.*

<sup>166</sup> *Editor*, *UN General Assembly adopts resolution that strongly deplored Russia's aggression against Ukraine*, THE ECONOMIC TIMES, (Sep. 27, 2023, 9:29 PM) <https://economictimes.indiatimes.com/news/international/world-news/un-general-assembly-adopts-resolution-that-strongly-deplored-russias-aggression-against-ukraine/articleshow/89953932.cms?from=mdr>.

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aggression and calling for an immediate withdrawal of forces from Ukraine. Notably, Vietnam and Laos abstained from the vote, reflecting their distinct positions on the issue.<sup>167</sup>

From these reactions, it can be concluded that Southeast Asian countries have adopted a pragmatic and diverse approach to the Ukraine crisis, which may reflect their complex geopolitical and economic interests. This approach is different from the more forceful stance taken by some Western countries such as that of qualified neutrality. We believe that there are three reasons why the global south has taken such a stance.

First, Southeast Asia has little to lose if Russia's economy falters as a result of international sanctions, given the region's limited economic relations with Russia. Although the conflict has substantial global economic ramifications, its direct impact on Southeast Asian economies is comparatively less pronounced.<sup>168</sup>

Second, Russia has been engaged with ASEAN through dialogue partnerships since 1996. However, President Putin's limited personal attendance at ASEAN-led summits underscores that Southeast Asia is not a top priority for Moscow.<sup>169</sup>

Third, Russia's primary security involvement in Southeast Asia is related to arms sales. Western sanctions could disrupt its defence sales to the region. Southeast Asian countries may reconsider contracts with Russian defence companies, considering potential sanctions.<sup>170</sup>

Therefore, Southeast Asian countries have taken diverse positions in response to Russia's invasion of Ukraine. While they have not heavily aligned with Western powers in adopting a policy of qualified neutrality, the ongoing conflict and its global implications may continue to shape their responses and diplomatic actions. The situation highlights the complex web of international relations in the region, with states carefully weighing their actions and policies in the face of a rapidly evolving global landscape.

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<sup>167</sup> *Id.*

<sup>168</sup> Editor, *Russia's influence in Southeast Asia is fading*, COUNCIL ON FOREIGN RELATIONS. (Sep. 27, 2023, 9:29 PM) <https://www.cfr.org/article/russias-influence-southeast-asia-fading>.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

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## VII. CONCLUSION

This article has examined the intricate and diverse matter of neutrality as it pertains to the Russia-Ukraine conflict, concentrating specifically on the notion of "qualified neutrality." Although customary international law does not appear to contain a specific rule in support of qualified neutrality, this analysis has illuminated possible rationales for neutral states to supply arms to one belligerent over another in the name of quasi-neutrality.

The ongoing significance of neutrality principles in modern international law has been brought to light by the Russia-Ukraine conflict. Additionally, the difficulties of adjusting conventional notions to the changing dynamics of modern conflicts have been brought to light. By applying the TWAIL framework to examine the divergent reactions of Southeast Asian countries, the complexity and variety of viewpoints that exist within the international community are further illustrated.

The legal and practical aspects of neutrality in the Russia-Ukraine conflict continue to be intricate and dynamic topics, influenced by geopolitical factors, international law, and state conduct. The article's analysis of qualified neutrality and its ramifications offers significant perspectives on the ongoing dialogue concerning the obligations and rights of neutral states amidst a dynamic international environment.

## ARTICLE

**THE HIDDEN COSTS OF RESOURCE NATIONALISM: (MIS)  
UNDERSTANDING AND (MIS) MANAGING THE LEGAL AND  
ECONOMIC IMPLICATIONS OF RESOURCE NATIONALISM ON  
INDIGENOUS POPULATION**

*Divyanshi Shukla & Swastik Shukla\**

**ABSTRACT**

*Since time immemorial, Indigenous people have represented a rich diversity of cultures and traditions across the globe. At one end of the spectrum, they form a vital part of society, while at the other, the realities which confront them have been marked by discrimination, marginalisation, and inequalities. The concept of resource nationalism has rekindled this anxiety around the globe. Over the last few decades, there has been a steady rise in developmental activities which have been motivated by the concept of resource nationalism. While our analyses leave open the possibility that resource nationalism has some positive impacts on the economy of a nation, our study provides strong evidence that such economic development ought not to be at the cost of violating the Indigenous peoples' rights. Suppressing the voices of Indigenous people renders them mute spectators in their pursuit of justice. As the adage warns, the difficulty is often with the dog, not the tricks. Legislations aiming to protect Indigenous rights as a result of resource nationalism often overlook its causal relationship with the economic aspect.*

*By undertaking a methodological triangulation coupled with a reform-oriented approach towards research, this paper aims to offer a logical framework for resource nationalism, and its impact on Indigenous people. Additionally, this article brings the intersection of law and economics into a broader legal and scholarly conversation regarding their importance in striking a balance amidst conflicting narratives surrounding resource nationalism. The goal of this paper is to critically analyse the implications of resource nationalism vis-à-vis the rights of Indigenous people, and to*

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*suggest the way forward since this discussion needs to be brought to the central stage in modern legal and policymaking discourse.*

Keywords: Resource Nationalism, Indigenous/ Tribal People, Development, Economic Implications.

## I. INTRODUCTION

Resource nationalism is a curious term. It refers to the tendency of countries in adopting policies driven by the desire to maximise political and economic benefits in order to assert greater control over their natural resources.<sup>1</sup> The implications of this concept cannot be looked into in isolation. Its roots are spread over historical, political and economic factors. The origin of this tendency can be traced back to the mid-20<sup>th</sup> century. The birth of numerous nation states was accompanied by the apprehension that their former colonisers might attempt to continue exploiting their natural resources nations through diplomatic means and skewed trade policies.<sup>2</sup> In order to ensure that this apprehension would never become a reality, several states have adopted policies which focus on establishing maximum state control over the natural resources within its territory.<sup>3</sup> The expansion of resource nationalism in the light of the recent global boom poses several risks. While it is fair to argue that the pursuit by nation states to benefit from the ownership and control of natural resources within their own jurisdiction is part of the concept of sovereignty, it is also important to address the issue of violation of Indigenous rights as a result of resource nationalism.<sup>4</sup> The primary contradiction in this issue is reflected in the persistent nature of nations in advancing their economic and political interests on the global stage on the one hand and the obligation of states to protect the rights of the Indigenous people on the other. Balancing these two objectives is perhaps one of the most convoluted legal arenas in the contemporary capitalist world. Notably, India has not remained immune to this trend.

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<sup>1</sup> Jeffrey D. Wilson, *Understanding Resource Nationalism: Economic Dynamics and Political Institutions*, 21 CONTEMP. POLITICS 399 (2015).

<sup>2</sup> Halina Ward, *Resource Nationalism and Sustainable Development: A Primer and Key Issues*, INT. INST. ENVIRON. DEV. 1, 14-15 (2009).

<sup>3</sup> I. Gede Wahyu Wicaksana, *Economic Nationalism for Political Legitimacy in Indonesia*, 24 J. INT. REL. DEV. 27 (2021).

<sup>4</sup> This paper refers to “Indigenous peoples” rather than “Indigenous and tribal peoples”; Nevertheless, reference to “Indigenous peoples” is to be understood as including “tribal peoples”.

Thus, growth and diversification of developmental activities makes it extremely important to regulate the impact of resource nationalism. Nations across the globe are constantly competing in the race for resource extraction. However, it is perhaps unsurprising that there persist several knowledge gaps in understanding their social and economic conditions. This is the gap which this article aims to fill. Our attempt to resolve the dilemma of balancing resource nationalism with the rights of Indigenous people is a subset of the larger question that has been haunting nations for years: “How to compel the expanding forces of capitalism to bow to collective moral visions of human dignity?”<sup>5</sup>

This issue has become extremely relevant in the light of the COVID-19 pandemic and the resulting economic upheaval. The global mining and metals industry is expected to undergo a political and economic metamorphosis in the light of tensions in the global commodity supply chains and gradual shifts taking place in the energy sector. Analysts predict for a resurgence of resource nationalism since resource-rich countries are seeking to extract more resources while grappling with budget deficits directly caused by the COVID-19-induced economic tragedy and soaring commodity prices.<sup>6</sup> Governments worldwide have been proposing and implementing fiscal policy measures, thus signalling a shift towards a more nationalistic administration of extractive industries.<sup>7</sup>

Two primary factors underpinning this trend have been observed. Firstly, there has been a global rise in commodity prices, particularly copper, iron ore, silver and gold, resulting from government stimulus, deficit spending, and infrastructure projects. Furthermore, the increasing demand for battery minerals such as nickel, lithium and cobalt due to the ongoing transition to green energy is also a significant contributor to this surge in metal prices. Secondly, the fiscal crunch that many countries have faced has prompted governments to seek a larger share of mineral wealth to address budgetary shortfalls.<sup>8</sup>

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<sup>5</sup> Harvard Law Review, *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755 (2016).

<sup>6</sup> Damien Nyer & Silvia Marchili, *A new wave of resource nationalism in the mining & metals industry*, WHITE & CASE, (Sept. 15, 2021), <https://www.whitecase.com/insight-our-thinking/new-wave-resource-nationalism-mining-metals-industry> [hereinafter “Nyer”].

<sup>7</sup> *Id.*

<sup>8</sup> Nico Valckx, et al., *Metals Demand from Energy Transition May Top Current Global Supply*, IMF BLOG (Dec. 8, 2021), <https://www.imf.org/en/Blogs/Articles/2021/12/08/metals-demand-from-energy-transition-may-top-current-global-supply>.

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Governments have been confronted by the dual challenges of ensuring that fiscal policies do not lead to catastrophic budgetary prospects whilst providing legal and industrial certainty to extractive industry's stakeholders. Anticipating heightened resource nationalism, investors should assess their positions by prioritising stability agreements, and evaluating project-holding structures to optimise strategies which conserve their interests. Some investors may reconsider projects or locations in response to changes in the fiscal policy landscape. The evolving scenario suggests that increased fiscal pressure on mining projects is inevitable, with governments succumbing to nationalist politics which would jeopardise project economics. This can be considered as the logical conclusion to the rise in nationalistic tendencies across the globe. As governments navigate the delicate balance of increasing revenues without deterring investments, investors are being advised to secure stable agreements and optimise protections afforded by investment treaties. With emerging signs of a new wave of resource nationalism, it is high-time for investors to ensure that their strategic and contractual arrangements are robust and well-positioned to withstand potential economic challenges.<sup>9</sup>

Violation of the Indigenous people's rights resulting from increased developmental activities are caused by a variety of reasons, such as corporate favouring by the political class, grant of permits to private corporations for extractive economic activities, and state-led developmental activities which include implementation of resource nationalistic policies. The reason why this paper focuses on the latter is two-fold. First, the assessment of the impact of resource nationalism on the rights of Indigenous people has yet to be adequately recognised. Second, the interplay between international laws dealing with these concepts independently makes it imperative to find a middle-ground wherein States can exploit their sovereign rights over natural resources in a responsible manner without violating the rights of Indigenous people. This paper attempts to address these issues with special emphasis on the Indian context.

This paper follows a step-by-step analysis by expanding on the legal and economic implications, expected consequences, and possible alternatives. The exposition of this subject is carried out in five parts. Part I outlines the concept of resource nationalism and the rights of Indigenous people, and argues that the former leads to a violation of the latter. Part II provides a doctrinal foundation for international laws and Indian laws to locate the rights of the Indigenous people. In light of recent developments surrounding resource nationalism, Part III analyses the economic aspects

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<sup>9</sup> Nyer, *supra* note 6.

through the lens of Indigenous people and resource nationalism. The paper's analysis and conclusions have been summarised under Parts IV and V respectively, thus offering legal and economic options for finding a middle ground for States, especially India, to strike a balance amidst the conflicting narratives surrounding resource nationalism.

## II. PART I: CONCEPTUALISATION OF RESOURCE NATIONALISM AND INDIGENOUS DIASPORA

In a globalised world economy, the management of resources, and the race for claiming sovereignty over the same gave rise to resource nationalism. It has taken the centre stage of the contemporary discourse on resource policy, hence leading to monumental changes in the tendency of nations in asserting economic and political control over natural resources found within their sovereign territories.<sup>10</sup> This is done generally for strategic, nationalistic, and economic reasons.<sup>11</sup> Resource nationalism is founded on the premise that an increase in control over the wealth of natural resources would lead to the socio-economic well-being of the country.<sup>12</sup>

Though there does not exist a universally acceptable definition for Indigenous and tribal people,<sup>13</sup> the International Labour Organisation ('ILO') has defined Indigenous and tribal people as "a common denominator for more than 370 million people found in more than 70 countries worldwide. They have their own cultures, languages, customs, and institutions which distinguish them from other parts of the societies in which they find themselves."<sup>14</sup> There are nearly 476 million Indigenous peoples across the globe which comprise 6.2% of the world's total population.<sup>15</sup>

Attempts by states to preserve their sovereignty over natural resources has been frequently found to be at odds with the rights of Indigenous people. They are amongst the first persons to have

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<sup>10</sup> Hal Weitzman, *The Rise of 'Resource Nationalism'*, POLITICO (Apr. 25, 2012) <https://www.politico.com/story/2012/04/the-rise-of-resource-nationalism-075575>.

<sup>11</sup> Amit Bhaduri, *Nationalism and Economic Policy in the Era of Globalisation*, UNU WIDER 188 (2000) [hereinafter 'Bhaduri'].

<sup>12</sup> Ekim Arbatli, *Resource Nationalism Revisited: A New Conceptualization in light of Changing Actors and Strategies in the Oil Industry*, 40 ENERGY RES. SOC. SCI. 101 (2018).

<sup>13</sup> JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS* (Transnational Publishers 2006) [hereinafter "GILBERT"].

<sup>14</sup> *Who are the Indigenous and tribal peoples?*, INTERNATIONAL LABOUR ORGANIZATION (June 15, 2023, 10:05 PM), <https://www.ilo.org/resource/who-are-Indigenous-and-tribal-peoples>.

<sup>15</sup> RISHABH KUMAR DHIR ET AL., *IMPLEMENTING THE ILO INDIGENOUS AND TRIBAL PEOPLES CONVENTION NO. 169: TOWARDS AN INCLUSIVE, SUSTAINABLE AND JUST FUTURE* (INTERNATIONAL LABOUR ORGANIZATION 2019) [hereinafter "DHIR"].

faced the direct impact of resource nationalism. Distinct threats have been posed to their lives as a result of resource nationalism. The Indigenous persons are primarily affected for two reasons. Firstly, a majority of the world's natural resources are found in or close to Indigenous lands wherein Indigenous people are owners and inhabitants.<sup>16</sup> Secondly, the requirement for energy security along with support of domestic industries has raised the demand for extraction of natural resources in regions having a high density of Indigenous population, such as India.<sup>17</sup> The combination and inter-relationship of these factors resulting in resource development projects on their lands contribute to conflicts arising between the Indigenous people and respective governments.<sup>18</sup>

When the nations adopt policies in pursuance of resource nationalism, the implications of such policies are felt severely since land dispossession and forcible relocation lead to the destruction of Indigenous peoples' social, cultural and economic structures.<sup>19</sup> The foundation of recognising Indigenous rights lies in acknowledging that "deep connections with particular lands are a constitutive aspect of Indigenous cultures."<sup>20</sup> The changes are often aggravated by the power imbalances between Indigenous communities and states. Governments worldwide have acknowledged only 18% of the land over which Indigenous people have a legitimate claim to own or control.<sup>21</sup> It should be placed on record that Indigenous people live on lands which contain the last of the remaining unexploited natural resources.

With this backdrop, the following parts take stock and discuss the legal implications of resource nationalism through the lens of both international and Indian laws.

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<sup>16</sup> J. M. COBO, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, (United Nations Publications 1987) [hereinafter "COBO"].

<sup>17</sup> Patrik Oskarsson & Kuntala Lahiri-Dutt, *India's resource (inter)nationalism: Overseas mining investments shaped by domestic conditions*, 6 EXTR. IND. SOC. 747 (2019).

<sup>18</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of Indigenous peoples, James Anaya: Extractive industries operating within or near Indigenous territories*, UNHRC, 18<sup>th</sup> Sess, UN Doc A/HRC/18/35 (July 11, 2011). It summarises human rights violations caused by extractive operations globally.

<sup>19</sup> Aoife Duffy, *Indigenous Peoples' Land Rights: Developing a Sui Generis Approach to Ownership and Restitution*, 15 INT'L J. MINOR. GROUP RTS. 505 (2008).

<sup>20</sup> Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 211 (2014).

<sup>21</sup> *New report details Indigenous struggle for land rights*, UN NEWS (June 26, 2023), <https://news.un.org/en/story/2021/03/1087242>.

### III. PART II: CONTEMPORARY LEGAL REGIME REVOLVING AROUND INTERNATIONAL AND INDIAN LAWS

The issues faced by Indigenous people are not of recent origin. Historically, they have been victims of forced displacement, loss of land, marginalisation, discrimination, and violence.<sup>22</sup> What is new, however, is the justification for resource nationalism under the garb of sovereignty. State-influenced diaspora of Indigenous people is challenging the use of principles of international and municipal laws which contain provisions in aid of the practice of resource nationalism. The complete, equitable and effective participation of Indigenous peoples in political, economic, social, and cultural spheres has been hampered by several issues, especially due to legal and structural barriers. At the same time, there are laws which provide for the protection of the rights of the Indigenous population.

This part seeks to analyse how the interplay of these two spheres of law would impact the life and culture of the Indigenous people. This section will test whether policies of resource nationalism could be challenged under the current legal regime of international and/or Indian laws for violating the rights of the Indigenous people.

#### (A) INTERNATIONAL LAW: THE SENTINEL OF INDIGENOUS RIGHTS?

Built upon the bedrock principles of “equality and non-discrimination” and “leave no one behind”,<sup>23</sup> the international human rights framework consists of various legal instruments to combat discrimination and exclusivity.<sup>24</sup> The impact of resource nationalism on Indigenous peoples’ rights must be understood and addressed in the light of the framework of relevant international and regional human rights instruments.<sup>25</sup> To ameliorate the conditions of Indigenous people, it requires a focus on the alignment with the law so that a middle ground between rights of the Indigenous people, and resource extraction activities is reached. Through this discussion, it

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<sup>22</sup> GILBERT, *supra* note 14, at 69.

<sup>23</sup> *The Sustainable Development Agenda*, UNITED NATIONS (July 2, 2023), <https://www.un.org/sustainabledevelopment/development-agenda/>.

<sup>24</sup> *Equality and Non-Discrimination*, UNITED NATIONS AND THE RULE OF LAW (June 26, 2023), <https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination/>.

<sup>25</sup> LEE SWEPSTON, *THE FOUNDATIONS OF MODERN INTERNATIONAL LAW ON INDIGENOUS AND TRIBAL PEOPLES* 230–231 (Brill | Nijhoff, 2018) [hereinafter “SWEPSTON”].

becomes clear that resource nationalism and international humanitarian law cannot be rigidly separated.

There has been an increase in litigations<sup>26</sup> giving rise to various judgments which have broadened the jurisprudence pertaining to Indigenous people's rights.<sup>27</sup> These judgements play a pivotal role in empowering the Indigenous population, thus serving as the precedential cornerstone for the protection of Indigenous rights which are relied upon by various courts.

The modern tenets of international law on Indigenous rights is erected on two main instruments namely the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP')<sup>28</sup> and the International Labour Organization Convention No. 169 ('C169').<sup>29</sup> The rights of Indigenous people victimised as a result of resource nationalism can be better understood by focussing on these two international instruments.

### *1. United Nations Declaration on the Rights of Indigenous Peoples*

UNDRIP was adopted by the United Nations General Assembly ('UNGA') on 13<sup>th</sup> September 2007.<sup>30</sup> This Declaration is a comprehensive document detailing the rights of Indigenous people in international law and policy.<sup>31</sup> It establishes a universal framework for the recognition, preservation and development of the Indigenous peoples' rights.<sup>32</sup> Amongst its provisions, the UNDRIP seeks to ensure equal participation of Indigenous people in all matters which concern them.<sup>33</sup> It echoes and encourages a harmonious and cooperative relationship between the State and the Indigenous people.<sup>34</sup>

Nevertheless, in the race of resource nationalism, various developmental activities have

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<sup>26</sup> GILBERT, *supra* note 14.

<sup>27</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); Kaliña and Lokono Peoples v. Suriname, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015); Centre for Minority Rights Development (Kenya) and Minority Rights Groups International on behalf of Endorois Welfare Council v. Kenya, African Commission on Human and Peoples' Rights, 276/2003.*

<sup>28</sup> G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter "UNDRIP"].

<sup>29</sup> Convention (No. 169) concerning Indigenous and tribal peoples in independent countries, June 27, 1989, 1650 UNTS 383) [hereinafter "C169"].

<sup>30</sup> UNDRIP, *supra* note 28.

<sup>31</sup> UNDRIP, *supra* note 28, at art. 1.

<sup>32</sup> UNDRIP, *supra* note 28, at art. 37.

<sup>33</sup> UNDRIP, *supra* note 28, at art. 18.

<sup>34</sup> UNDRIP, *supra* note 28, at annex.

proliferated, thus leading to collisions between Indigenous rights and government-aided transnational activities.<sup>35</sup> These abuses include violations of right to life, right to land and resource development, right to free speech and expression, all of which contribute to the violation of provisions of the UNDRIP.<sup>36</sup> Particularly, the right of the Indigenous people for their inclusion in those matters which concern them has been violated. Indigenous people have not been asked for their free and informed consent prior to commencement of developmental activities in their land.<sup>37</sup> This makes the relationship between the Indigenous people and the Government complex and destructive, thus defeating the primary objectives of the UNDRIP.

Nations are reluctant in adopting UNDRIP through their domestic legislations. Bolivia is the only nation that has done so.<sup>38</sup> Most states argue that UNDRIP was problematic, and would undermine the sovereignty of their own states, particularly in the context of land disputes and natural resource extraction.<sup>39</sup> Nevertheless, alignment with the provisions of the UNDRIP, primarily those pertaining to their land and participatory rights, provides a promising way forward in accommodating the interests of Indigenous people, and promoting their inherent human rights.<sup>40</sup> By incorporating several amendments to the existing framework of UNDRIP, nations can adopt its provisions in order to uphold the rights of their Indigenous population.

## 2. *International Labour Organization Convention No. 169*

The ILO has always been at the forefront in safeguarding the rights of Indigenous people. Keeping this goal in mind, C169 had been adopted to empower Indigenous people by protecting their rights. It lays forth a clear vision, and offers detailed instructions for achieving their rights while promoting sustainable development in line with the aspirations of the Indigenous peoples.<sup>41</sup> The Convention provides a strategic framework to build institutions and mechanisms to tackle the

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<sup>35</sup> COBO, *supra* note 16.

<sup>36</sup> STEPHEN ALLEN & ALEXANDRA XANTHAKI (eds.), REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 121–143, (Hart Publishing 2011).

<sup>37</sup> JULIAN BURGER, DG EXPO, INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND HUMAN RIGHTS (2014).

<sup>38</sup> *Adoption of the United Nations Declaration on the Rights of Indigenous Peoples: 14 years later*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS (July 2, 2023), <https://www.un.org/development/desa/indigenouspeoples/news/2021/09/adoption-of-the-united-nations-declaration-on-the-rights-of-Indigenous-peoples-14-years-later/>.

<sup>39</sup> Erin Hanson, *UN Declaration on the Rights of Indigenous Peoples*, INDIGENOUS FOUNDATIONS (NOV. 29, 2023), [https://indigenousfoundations.arts.ubc.ca/un\\_declaration\\_on\\_the\\_rights\\_of\\_Indigenous\\_peoples/](https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_Indigenous_peoples/).

<sup>40</sup> Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. J. INT'L. HUM. RTS. 54, 61–62 (2011).

<sup>41</sup> C169, *supra* note 29, at art. 6.

issues faced by Indigenous people. The Convention's Preamble outlines its guiding principle by stating "the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."<sup>42</sup>

So far, 23 countries have ratified this convention, which represents only 15 % of the Indigenous population.<sup>43</sup> This underscores the fact that even after 30 years of this Convention's adoption, nations, in which a majority of Indigenous population reside, continue to fall outside C169's ambit. This is a grave obstacle in achieving the goals which the Convention envisages. It also identifies the often overlooked potential for the public and private sector in creating employment opportunities for Indigenous people. These reforms can catalyse the adoption of Indigenous rights into the local legislations of countries.

Furthermore, the justification for state control over natural resources, and the state's right to carry out activities towards their exploitation for development purposes can be traced back to UNGA Resolution 1803 (XVII) on Permanent sovereignty over natural resources which is also known as the United Nations Declaration on Permanent Sovereignty over Natural Resources ('Resolution 1803').<sup>44</sup> Resolution 1803 was adopted in the backdrop of the Second World War, and the subsequent wave of decolonisation since the newly independent states sought to protect their resources from any future exploitation by their colonial masters.<sup>45</sup>

### *3. Declaration on Permanent Sovereignty Over Natural Resources*

Adopted by the UNGA on 14 December 1962, Resolution 1803 consists of eight paragraphs outlining the sovereign right which are exercised by states over their natural resources. It imposes a duty on the states to exercise their rights for the benefit of their people.<sup>46</sup> Article 1 of the Resolution 1803<sup>47</sup> makes it clear that the instrument is to be utilised to strengthen national communities and was not to serve as a tool to inflict injustice upon them under the garb of sovereign exercise of power by using the phrasing, "must be exercised in the interest of their

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<sup>42</sup> NORMLEX INFORMATION SYSTEM ON INTERNATIONAL LABOUR, <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO::> (last visited June, 23, 2023).

<sup>43</sup> Bhaduri, *supra* note 11.

<sup>44</sup> Nicolaas Schrijver, *Self-determination of peoples and sovereignty over natural wealth and resources*, in REALIZING THE RIGHT TO DEVELOPMENT 95 (United Nations Publication 2013).

<sup>45</sup> James N. Hyde, *Permanent sovereignty over Natural Wealth and Resources*, 50 AM. J. INT'L. L. 854 (1956).

<sup>46</sup> UNDRIP, *supra* note 28.

<sup>47</sup> UNDRIP, *supra* note 28.

national development and of the well-being of the people of the State concerned.” This concept relies on the premise that people are still at the heart of policy making. States have the ultimate authority over the exploitation of natural resources but it must be exercised responsibly. The discussion in the following sections will elaborate on how the rights of the Indigenous people need to be given significant consideration by states while implementing nationalistic economic policies lest they risk violating certain fundamental principles governing international laws and state practices.

#### (B) INDIAN LAWS: SOMETHING OLD, SOMETHING NEW, SOMETHING BORROWED

After addressing the conjoint issues of resource nationalism and the protection of rights of the Indigenous people under international law, it becomes necessary to substantially appraise their legal aspects in the Indian context.

The Government of India does not consider any particular group of people to be Indigenous people.<sup>48</sup> Nevertheless, it has been agreed that Scheduled Tribes could be classified as Indigenous people in the Indian context.<sup>49</sup> In *Kailas v. State of Maharashtra*,<sup>50</sup> the Supreme Court has underscored that the Scheduled Tribes are the original inhabitants of the land and hence, are Indigenous people.<sup>51</sup> There are 705 ethnic groups in India which are recognised as having the status of Scheduled Tribes.<sup>52</sup>

India has voted in favour of the UNDRIP but has yet to sign C169.<sup>53</sup> Although the legal framework of international law aims to safeguard the interests and rights of Indigenous people, implementation of instruments of international law in India is not without flaws and limitations. It is very complex to use international human rights arguments in national legal regimes. Often voices of Indigenous people become muffled, thus making them mute spectators of their own quest for justice. This section analyses such practical problems as they exist in Indian jurisprudence

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<sup>48</sup> C.R. BIJOY ET AL., INDIA AND THE RIGHTS OF INDIGENOUS PEOPLES 13-14 (Asia Indigenous Peoples Pact 2010) [hereinafter “BIJOY”].

<sup>49</sup> ACHR, *Who are the Indigenous Peoples in India?* (2010).

<sup>50</sup> *Kailas & Ors. v. State of Maharashtra* T.R. Taluka P.S., (2011) 1 SCC 793.

<sup>51</sup> Since Scheduled Tribes or “tribals” are considered as constituting India’s Indigenous people, these terms are used interchangeably in this section.

<sup>52</sup> INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, *THE INDIGENOUS WORLD 2022* (2022).

<sup>53</sup> SWEPSTON, *supra* note 25, at 56.

by means of exposition of various constitutional provisions, and provides an analytical framework to help in understanding its probable consequences in the Indian legal regime.

### *1. Constitution of India and Rights of Indigenous People*

The Constitution of India<sup>54</sup> is a seminal statute that protects a growing number of social rights. This Constitutionalisation of social rights protects the rights of Indigenous people<sup>55</sup> since the makers of the Constitution had been both conscious and cognisant of the problems faced by the Indigenous populus.<sup>56</sup> The legal obligations mandated by the Indian Constitution are threefold:

1. Duty to respect: This obligation implies that India does not adopt any such laws which would interfere with the rights of Indigenous people. The Fifth and Sixth Schedules of the Constitution contain special provisions for the benefit of the Indigenous people.<sup>57</sup> As noted by Hidayatullah J, “The Fifth and Sixth Schedules to the Constitution have emerged as effective sanctuaries to the Indigenous people by being constitutions within the Constitution.”<sup>58</sup> Moreover, special land rights and right to self-governance are provided to regions having high tribal population.<sup>59</sup>
2. Duty to protect: This implies that the State has to take steps to avert violation of the rights of Indigenous people. Part III of the Indian Constitution safeguards the fundamental rights. Among other rights, it prohibits discrimination on any grounds.<sup>60</sup> In pursuance of the same, the Constitution promotes the educational and economic rights of the Indigenous people. It provides reservation in educational, institutional and occupational opportunities to the Indigenous people.<sup>61</sup>
3. Duty to fulfil: Under this obligation, the State has to take steps to promote and provide rights to the Indigenous people. Part IV of the Indian Constitution acknowledges the Directive Principles of the State Policy. These are “fundamental to the governance of the country,” and include the

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<sup>54</sup> INDIA CONST.

<sup>55</sup> *Constitutional Safeguards for STs*, National COMMISSION FOR SCHEDULED TRIBES (July 5, 2023), <https://ncst.nic.in/content/constitutional-safeguards-sts>.

<sup>56</sup> *Samatha v. State of Andhra Pradesh*, (1997) 8 SCC 191 [hereinafter “Samatha”].

<sup>57</sup> INDIA CONST. schs. V & VI.

<sup>58</sup> MOHAMMAD HIDAYATULLAH, *THE FIFTH AND SIXTH SCHEDULES TO THE CONSTITUTION OF INDIA 1* (Ashok Publishing House 1979) [hereinafter “HIDAYATULLAH”].

<sup>59</sup> Human Rights Council, *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1, India*, U.N. Doc. A/HRC/WG.6/1/IND/1 (2008).

<sup>60</sup> INDIA CONST. art. 15.

<sup>61</sup> HIDAYATULLAH, *supra* note 58.

duty for the “Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.”<sup>62</sup>

Issues faced by the Indigenous people as a result of resource nationalism are akin to the violations of Constitutional rights. Despite these Constitutional rights and other special provisions provided in the Constitution discrimination, harassment and marginalisation of the Indigenous people still persist in India.

## *2. Violation of Indigenous People's Rights in India*

In order for these Constitutional rights to become a reality, they must be implemented and properly enforced. In India, there is a lack of proper enforcement. Although Section 4(5) of the Scheduled Tribes and Other Traditional Forest Dwellers Act (2006)<sup>63</sup> provides that “no member of a Scheduled Tribe or other traditional forest dweller shall be evicted from land until the recognition and verification procedure for settlement of forest rights is complete”, the rights of Indigenous people continue to be violated by the Government. For instance, in 2015 the Government of Tripura served eviction notices to 1300 Indigenous families without obtaining the assent of the concerned communities.<sup>64</sup> To worsen the situation, the evicted Indigenous communities were not rehabilitated, resettled, or financially assisted. According to data from the Ministry of Tribal Affairs, there has been a total of 1,753,497 tribals and forest dwellers whose claims had been rejected.<sup>65</sup>

According to a report by the Ministry of Tribal Affairs, nearly 86.56% of the total claims received under the Forest Rights Act<sup>66</sup> has been rejected or are still pending before courts.<sup>67</sup> In many instances, Indigenous people were arrested and imprisoned for “illegal encroachment into government land” when they tried to reclaim those lands which were seized by the Government

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<sup>62</sup> INDIA CONST. art. 37.

<sup>63</sup> Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, § 4(5), No. 2, Acts of Parliament, 2007 (India).

<sup>64</sup> Cultural Survival, *Observations on the State of Indigenous Human Rights in India* (41<sup>st</sup> Session of Human Rights Council, Mar. 2022), <https://www.culturalsurvival.org/sites/default/files/UPR%20India%202022%20-FINAL.pdf>.

<sup>65</sup> Ministry of Tribal Affairs, 23011/3/2016-FRA (Issued on Dec. 20, 2019), <https://tribal.nic.in/FRA/data/MPRJuly2019.pdf>.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, *THE INDIGENOUS WORLD* 2016, at 335 (2016).

for developmental activities.<sup>68</sup> These violations can be attributed to non-implementation of the extant laws. Furthermore, no new legislation has “modernised” the laws related to Indigenous people. As a result, Indigenous people in India are forced to rely on the laws of the bygone era to protect their rights.

In the political and economic sphere, India is fast emerging as a major player on the global stage. It is important for India to maintain its influence globally, and it is equally important to acknowledge the fact that the pursuit of the same cannot justify the continuation of unjust and discriminatory domestic policies. The concerns of Indigenous people cannot be understated in order to assert power or sovereignty globally. Achieving social justice is closely interwoven with the well-being of the Indigenous people. The conflict between India’s developmental policies and the need for the protection of rights of the Indigenous people will shape the laws which would define and refine the steps that India has to take in the future.

#### **IV. PART III: HOW ECONOMICS IS (RE)SHAPING RESOURCE NATIONALISM AND ITS IMPACTS ON INDIGENOUS PEOPLE?**

Indigenous people share a unique relationship with their lands. As noted by the Inter-American Court of Human Rights, “close ties of Indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”<sup>69</sup> One dimension of this relationship is economic because land is vital for the subsistence and survival of the Indigenous people.<sup>70</sup> Understanding the economic dimension provides counter-narratives against the views promulgated by states across the globe.

For the exposition of the economic aspect, the theoretical discussion in this part is divided into two sections. Section A discusses the economic realities faced by Indigenous people, and Section B zooms into the economic aspects of resource nationalism which is a critical aspect to understand the realities of resource nationalism and its impact on the Indigenous people.

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<sup>68</sup> *Indian Government and Coal India Sacrifice Indigenous Rights in the Name of Development*, AMNESTY INTERNATIONAL, (June 15, 2023), <https://www.amnestyusa.org/press-releases/indian-government-and-coal-india-sacrifice-Indigenous-rights-in-the-name-of-development/>.

<sup>69</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

<sup>70</sup> Jose Mencion Molintas, *The Philippine Indigenous Peoples’ Struggle for Land and Life: Challenging Legal Texts*, 21 ARIZ. J. INT’L. & COMP. L. 269, 275 (2004).

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(A) ECONOMIC REALITIES OF INDIGENOUS PEOPLE

Understanding economic aspects plays a vital role in assessing wider dynamics of the changing socio-political dimensions of the Indigenous population. However, there exists several limitations and shortfalls. One of the main reasons for such knowledge gaps is the “persistent invisibility” of Indigenous people in official data and records.<sup>71</sup> For instance, out of 184 countries and territories, only 43% has attempted to collect statistical data, and maintain records on their Indigenous people.<sup>72</sup> This lack of data also leads to insufficient policy attention directed towards Indigenous people, thus making it difficult to effectively assess and analyse the on-going steps taken for the Indigenous people’s benefit. This section will make an economic assessment based on available statistics.

The participation of Indigenous people in employment is 62.2%.<sup>73</sup> Although the participation of Indigenous people in the workforce is higher, poor working conditions are widespread. Indigenous people are 20% more likely to be employed in the informal sector, where their wages and salaries are 18.5% less than their non-Indigenous counterparts.<sup>74</sup> Therefore, their socio-economic condition has not improved. The level of participation of Indigenous people in the formal and informal sector can be inferred from Figure 1.

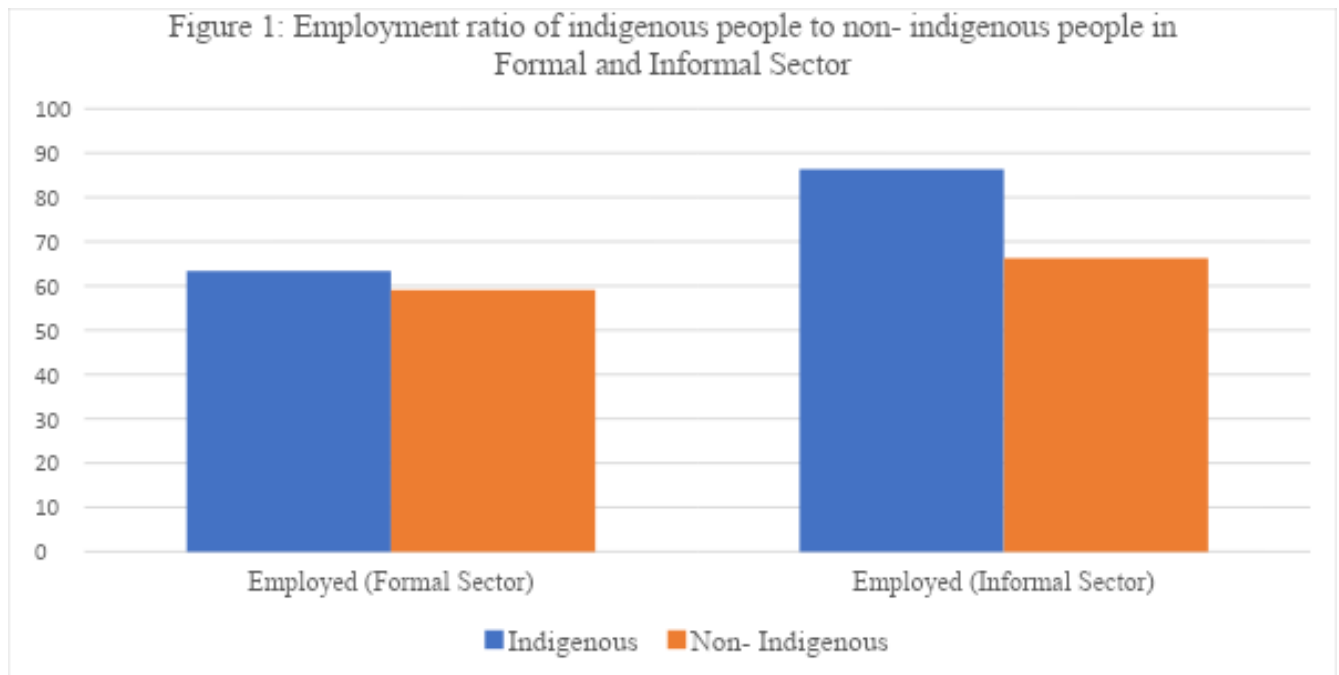
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<sup>71</sup> UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, STATE OF THE WORLD’S INDIGENOUS PEOPLES: RIGHTS TO LANDS, TERRITORIES AND RESOURCES (2021).

<sup>72</sup> *Id.* at 4.

<sup>73</sup> Bhaduri, *supra* note 11, at 14.

<sup>74</sup> ILO News, *Urgent action needed to tackle property and inequalities facing Indigenous peoples*, INTERNATIONAL LABOUR ORGANIZATION (2020) [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_735575/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_735575/lang-en/index.htm).



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Indigenous people are largely involved in agricultural activities, with 55% of them relying on agriculture, forestry, and fishing for their sustenance.<sup>76</sup> They often fall victim to extreme forms of discrimination and marginalisation,<sup>77</sup> which lead them to representing the poorest strata of the society by accounting for almost 14.4% of the global poor.<sup>78</sup> Financial hardships further amplify their vulnerability to exploitation by both state and non-state actors. Since this paper's primary focus is on the harm caused by state-led economic activities, we find that such harm can manifest in various ways.

Firstly, the implementation of international legal principles within a state's territory is carried out in accordance with the municipal laws of that state. Therefore, when international conventions offering protection to Indigenous people are implemented, the respective state has an upper hand, thus creating power imbalance. For instance, the Indonesian government recognises all of its citizens as Indigenous<sup>79</sup> which undermines the principles established in international human rights

<sup>75</sup> DHIR, *supra* note 13, at 87.

<sup>76</sup> *Indigenous Peoples*, FOOD AND AGRICULTURAL ORGANIZATION (JULY 1, 2023), <https://www.fao.org/Indigenous-peoples/en/>.

<sup>77</sup> Department of Public Information, *Press Conference on 'State of the World's Indigenous Peoples' Report*, UNITED NATIONS (Jan. 14, 2010), [https://press.un.org/en/2010/100114\\_Indigenous.doc.htm](https://press.un.org/en/2010/100114_Indigenous.doc.htm).

<sup>78</sup> *Id.* at 3.

<sup>79</sup> Gerard Persoon, *Isolated Groups or Indigenous Peoples; Indonesia and the International Discourse*, 154 J. HUMAN. SOC. SCI. SOUTHEAST ASIA & OCEANIA 281 (1998).

jurisprudence which provides special rights and protections to the Indigenous communities. Consequently, when a family residing in a resource-rich area becomes an obstacle to the compulsory acquisition of that land, the state can displace this Indigenous family.<sup>80</sup> Since the Government considers them to have the same rights as any other Indonesian citizen, no specific provision is available to afford special protection for these marginalised groups.<sup>81</sup> When the rights of Indigenous communities cross swords with the economic interests of the state apparatus, it is obvious that the conflict of interest will tilt the scale against social justice by favouring political and economic benefit. This socio-economic impact of resource nationalism on the Indigenous populations is to be mitigated.

Secondly, the laxity of the state in enforcing the rights of Indigenous people is equally glaring and alarming. For instance, though the Brazilian regime under President Lula da Silva marked a relative progress for Brazil on the environmental front, there was laxity on the part of the state in enforcing the rights of Indigenous people for their social and economic well-being.<sup>82</sup> In the periods characterised by Lula's government, the victimisation of the Indigenous population had predominantly manifested itself through institutional and structural violence which primarily took the form of governmental omissions.<sup>83</sup> This was observed when governmental entities which were tasked with delineating Indigenous territories, and safeguarding them against encroachments exhibited delays and inadequacies in fulfilling their responsibilities.

A state motivated to extract profits from its natural resource base can commit the said omissions, hence resulting in grave social and economic rights violation of the Indigenous population.

#### (B) RESOURCE NATIONALISM: THE DOUBLE-EDGED SWORD OF ECONOMIC SOVEREIGNTY?

In the context of resource nationalism, economic factors establish a causal relationship between its purpose and long run consequences.

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<sup>80</sup> Nicola Colbran, *Indigenous Peoples in Indonesia: At Risk of Disappearing as Distinct Peoples in the Rush for Biofuel?* 18 INT'L. J. MINOR. GROUP RTS. 63 (2011).

<sup>81</sup> Aliansi Masyarakat Adat Nusantara, *The Situation of Human Rights of Indigenous Peoples in Indonesia* (27<sup>th</sup> Session of Human Rights Council, Apr. 2017), <https://www.forestpeoples.org/sites/fpp/files/publication/2016/09/indonesiaamanaippupr3rdcyclefinal.pdf>.

<sup>82</sup> Salo de Carvalho et al., *Politics and Indigenous Victimization: The Case of Brazil*, 61 BR. J. CRIMINOL. 251 (2021).

<sup>83</sup> *Id.*

The economics of resource nationalism largely rely on the Market Cycle Theories which state that when a commodity's global prices show an upward trend,<sup>84</sup> the nation which produces a decent amount of that commodity would adopt policies which would maximise profits so that the government could earn as a result of the price boom. When the commodity price boom subsides, the state tends to liberalise its economic policies, stray away from resource nationalistic policies, and encourage foreign investment.<sup>85</sup> While there are a number of nations which have adopted such nationalistic policies for economic and political reasons, this paper focuses primarily on Indonesia, Brazil, and Mexico since they are all developing economies whose scores are very similar to India when it comes to their performance on human rights parameters.<sup>86</sup>

In 2006, economists John Hawksworth and Gordon Cookson grouped these nations under the title of "E7" which are a group of seven emerging economies expected to overtake the "G7" as the world's largest economic powerhouses.<sup>87</sup> This term comprise China, Russia, and Turkey. While these three countries have had their fair share of nationalistic economic policies, they are not quite as suitable for our discussion because of their relative ethnic and cultural homogeneity, and diverging systems of government which are completely different from that of the remaining members of the E7.

Due to these reasons, our focus is on the impact of such policies on the economies of the aforementioned three nations. In Indonesia, the time period between 2004 and 2014 saw resource nationalistic policies during the reign of Susilo Yudhoyono.<sup>88</sup> While his performance on the economic front was mixed at worst, most academics and critics do agree that he provided the nation with a period of economic stability, and a development-oriented legal framework.<sup>89</sup>

In Brazil, the left-leaning government of Lula Da Silva had adopted various nationalistic economic policies. His government was liberal on the cultural side, and interventionist on the economic

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<sup>84</sup> Anton Kolotilin et al., *High oil prices and the return of "resource nationalism"*, VOX EU (Apr. 12, 2008), <https://cepr.org/voxeu/columns/high-oil-prices-and-return-resource-nationalism>.

<sup>85</sup> Eve Warburton, *Resource Nationalism in post-boom Indonesia: The New Normal?*, LOWY INSTITUTE (Apr. 27, 2017), [https://www.lowyinstitute.org/publications/resource-nationalism-post-boom-indonesia-new-normal#\\_edn3](https://www.lowyinstitute.org/publications/resource-nationalism-post-boom-indonesia-new-normal#_edn3) [hereinafter "Warburton"].

<sup>86</sup> UNDP India, *India ranks 132 on the Human Development Index as Global Development Stalls* (2022), <https://www.undp.org/india/press-releases/india-ranks-132-human-development-index-global-development-stalls>.

<sup>87</sup> PwC, *The Long View: How will the Global Economic Order Change by 2050?* (2017).

<sup>88</sup> Warburton, *supra* note 85.

<sup>89</sup> James Guild, *Reappraising the Economic Legacy of Susilo Bambang Yudhoyono*, THE DIPLOMAT (Sept. 28, 2021), <https://thediplomat.com/2021/09/reappraising-the-economic-legacy-of-susilo-bambang-yudhoyono/>.

one.<sup>90</sup> His reign, between 2002-2012, saw a moderate but stable GDP growth at a rate of 4% per annum, with a reasonable fiscal deficit which was not disastrous for the overall fiscal health of the nation, and an impressive fall in the public debt to GDP ratio, all while millions of Brazilians were lifted out of poverty.<sup>91</sup>

The Mexican economy has witnessed waves of resource nationalism arising out of populism in a manner similar to that of Brazil. The global boom in oil prices served as the motivation for increased state-interference in the oil sector, which in turn had discouraged foreign investment. The result was not as positive for the oil sector as many nationalists at that time had expected because there occurred a downward trend in Mexico's oil production.<sup>92</sup>

Therefore, these three major developing economies did not witness extraordinary economic growth despite their respective governments' push for state-control over natural resources. The same can be inferred from the following data provided in Table 1 and Figure 2. On an average, the World Bank data shows that the average annual GDP growth rate for these economies has been as follows-

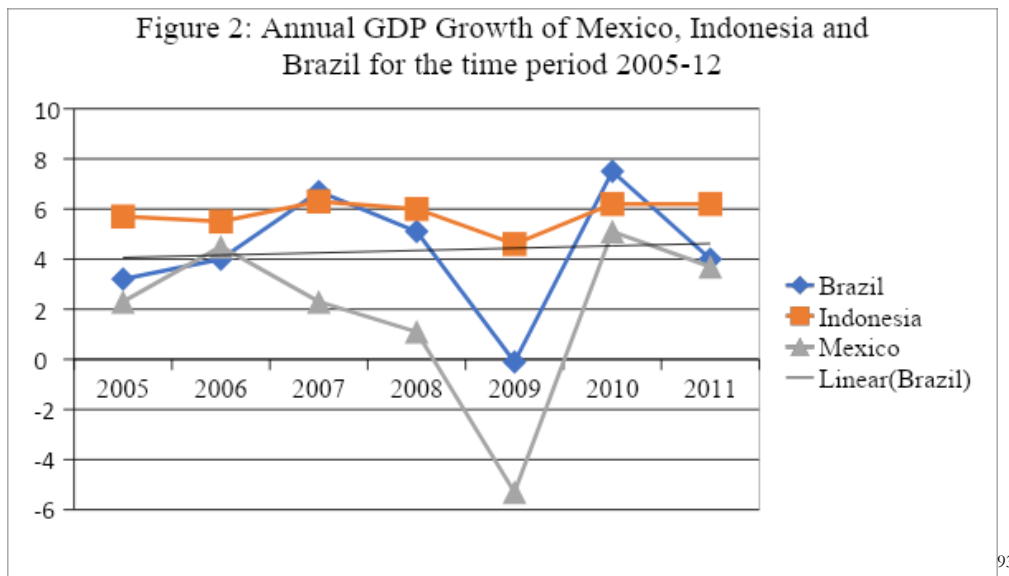
Table 1:

Sl. No.	Country	Annual Growth Rate
1.	Brazil	4.6%
2.	Indonesia	3.7%
3.	Mexico	4.7%

<sup>90</sup> WILLIAM S. MADDOX & STUART A. LILIE, *BEYOND LIBERAL AND CONSERVATIVE: REASSESSING THE POLITICAL SPECTRUM* (Cato Institute 1984).

<sup>91</sup> FocusEconomics, *How will Brazil's economy perform under Lula?* (July 12, 2023), <https://www.focus-economics.com/blog/how-will-brazils-economy-perform-under-lula/>.

<sup>92</sup> Franciso J. Monaldi, *The Cyclical Phenomenon of Resource Nationalism in Latin America*, OXFORD RESEARCH ENCYCLOPEDIAS: POLITICS (2020), <https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1523>.



These findings make several important contributions. Firstly, adopting resource nationalism policies to maximise profits for state exchequer is not an exceptionally advantageous practice for large, diverse and emerging economies. Secondly, keeping in mind the remaining legal and political factors, it is imperative that states shift their focus towards ensuring judicious treatment of the Indigenous population who will prove instrumental in ensuring sustainable development and economic growth in climate change-affected, future global economy.<sup>94</sup>

## V. PART IV: ANALYSING THE CONUNDRUM IN BALANCING LEGAL AND ECONOMIC SPHERES

Even a cursory review of the recent economic policies of countries around the globe reveals that capitalism has been viewed as a driver of a nation's development. India will have to find its way through a labyrinthine set of laws and policies which would complicate the notions of resource nationalism. If not regulated, resource nationalism has the potential to jeopardise the delicate balance that the Indigenous people have maintained between modernisation, and protecting their rights. The laws needed to regulate resource nationalism break no new ground. In fact, they have

<sup>93</sup> WORLD BANK, *GDP Growth (annual %)- Indonesia* (July 1, 2023), <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=ID>; WORLD BANK, *GDP Growth (annual %)- Mexico* (July 1, 2023), <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=MX>; WORLD BANK, *Growth (annual %)- Brazil* (July 1, 2023), <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=BR>.

<sup>94</sup> UNFCCC, *How Indigenous Peoples Enrich Climate Action* (Aug. 9, 2022), <https://unfccc.int/news/how-Indigenous-peoples-enrich-climate-action>.

already been widely adopted by several international instruments and developing countries. However, India, which is home to the largest number of Indigenous people, has no specific legislations dealing with the rights of the Indigenous people victimised as a result of policies of resource nationalism.

According to studies, “a total of about 60 million people were displaced between 1947 and 2000.” This makes India the country with one of the highest development-induced displacements in the world. As was observed by K. Ramaswamy J. in *Samatha v. State of Andhra Pradesh*,<sup>95</sup> “90 % of the Scheduled Tribes predominantly live in forest areas; 95 % of them are below poverty line and totally depend upon agriculture or agriculture-based activities; and some of them turn out as migrant construction labour due to their displacement from hearth and home for the so-called exploitation of minerals and construction of projects.” Among major states of India, Chhattisgarh (31.8%) is home to the highest percentage of Indigenous population followed by Jharkhand (26.3%) and Odisha (22.1%).<sup>96</sup> These three states have the highest reserves of resources as well.<sup>97</sup> Therefore, it is intriguing to note that resource nationalism in India takes place in areas having the highest Indigenous population. To illustrate, coal mines grab lands belonging to the Indigenous people of Chhattisgarh, Jharkhand, and Odisha without their consent and consultation. It has been speculated that the Government plans to double the investment for developmental projects that provide coal outputs.<sup>98</sup> Due to these reasons, the Indigenous population has been forced to relocate without any hope and with empty promises of rehabilitation, resettlement, and financial aid.<sup>99</sup>

For instance, Table 2 depicts the extent to which the Indigenous population gets affected by various developmental projects in Odisha.

Table 2: Indigenous Displacement in Development Project in Odisha<sup>100</sup>

<sup>95</sup> Samatha, *supra* note 56.

<sup>96</sup> BIJOY, *supra* note 48, at 20-21.

<sup>97</sup> Ministry of Mines, *National Mineral Scenario* (July 5, 2023), <https://mines.gov.in/webportal/nationalmineralsscenario>.

<sup>98</sup> Press Trust of India, *Human right violations at mines run by Coal India: Amnesty*, BUSINESS STANDARD (July 13, 2016), [https://www.business-standard.com/article/pti-stories/human-right-violations-at-mines-run-by-coal-india-amnesty-116071301103\\_1.html](https://www.business-standard.com/article/pti-stories/human-right-violations-at-mines-run-by-coal-india-amnesty-116071301103_1.html).

<sup>99</sup> L.K. Mohapatra, *Development for Whom? Depriving the Dispossessed Tribals*, 41 SOC. ACT. 271 (1991).

<sup>100</sup> Walter Fernandes & Mohammed Asif, *Development-Induced Displacement in Odisha 1951 to 1995: A Database on its Extent and Nature*, INDIAN SOCIAL INSTITUTE (1997).

Sl. No.	Nature of Project	Total displacement	Indigenous displacement	Total affected	Indigenous affected
1	Irrigation and Dam	4,10,000	1,53,540 (37.45%)	3,90,000	1,54,830 (38.70%)
2	Industries	71,794	25,937 (36.13%)	86,275	14,719 (17.04%)
3	Mining	1,00,000	50,000 (50.00%)	2,00,000	1,00,000 (50.00%)
4	Parks and Sanctuaries	840	840 (100.00%)	1,07,000	80,450 (75.00%)
5	Other Projects	50,000	25,000 (50.00%)	50,000	11,000 (22.00%)
	Total	6,32,634	2,55,317 (40.36%)	8,33,275	3,60,999 (43.14%)

The interface of laws and economics is worthy of deeper understanding as is evident from the abovementioned arguments. The legal framework of a country is greatly influenced by its economic factors. It is the fundamental economic belief that greater control over resources would lead to greater productivity which results in greater revenue for the respective state.<sup>101</sup> It originates from the twentieth-century mindset that eschews industrial interference by former colonial powers by regarding political-economic autonomy as supremely significant.

The available data shows us that states have generally followed the market cycle theories while practicing resource nationalism. The extent to which it has benefitted the states' exchequer is difficult to determine but tracing the overall macroeconomic indicators help us to reach a safe conclusion wherein the practice is not exceptionally beneficial for any major developing economy. This conclusion, however, does not repudiate the possibility that resource nationalism has positive impacts on the economy of a nation. Rather, our study essentially provides strong evidence that it is not justified at the cost of violating the rights of Indigenous people.

## VI. PART V: CONCLUSION AND WAY FORWARD

The impact of resource nationalism on the lives of Indigenous people is an important issue and its answer lies in the interaction between economic policy and social justice. In light of the aforementioned analysis of the topic, the authors make the following suggestions: First, India

<sup>101</sup> Addisu A. Lashitew et al., *What Drives Successful Economic Diversification in Resource-Rich Countries?*, 36 *WORLD BANK RESEARCH OBSERVER* 164 (2021).

should make provisions to adopt the principles of international instruments like the UNDRIP and C169 within its domestic legislations. The government should focus its policies to balance both developmental activities resulting from resource nationalism, and rights of Indigenous people. With a significant population of Indigenous people as well as resource-rich lands, India is uniquely positioned to adopt a specific resolution to balance both.<sup>102</sup> In the light of this evolutionary pattern, it becomes prudent to argue that contemporary states should consider the rights of Indigenous persons while exercising their sovereign powers as is suggested by international human rights jurisprudence. As discussed above, although the Indian Constitution contains several provisions for the protection of its Indigenous population, more specific provisions should be adopted owing to the advent of resource nationalism in India. The Indian legal fabric is interwoven with not just toleration but also the accommodation of a wide array of ethnic diversities. This requires that resource nationalism does not impinge on the rights and liberties of Indigenous people. Provisions of the country should be made consistent with substantive equality so as to maintain the dignity and culture of Indigenous population. This will increase the cohesiveness and collective action of the Indigenous community.

Second, India should take lessons from developing nations to build a balance between its economic and legal spheres. To say the least, the economic sphere of India has changed, and the legal sphere has not kept pace. As the Tughlaqian question “How to split branches in the stars before rooting firm in the earth?” cautions, it is of utmost importance to adopt a “down-to-earth” approach. The realisation of such rights is not possible without the adoption of these provisions in domestic legislations. A healthy blend of exposition of the interface of legal and economic aspects can provide a wider and comprehensive understanding of the issue. The provisions of the Sixth Schedule of the Indian Constitution exemplifies the need for effective tribal empowerment.<sup>103</sup>

Although states such as Odisha, Jharkhand, and Chhattisgarh cannot feasibly be granted similar status, valuable lessons can be drawn from the northeastern states and their autonomous administrative frameworks. Firstly, it is imperative for the Union Government to establish administrative bodies dedicated to safeguarding the interests of tribal communities who are particularly vulnerable to state-sponsored industrial activities and resource extraction. These

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<sup>102</sup> Leila Nasr, *Limiting Sovereignty and Legitimising Intervention*, LSE HUMAN RIGHTS BLOG (May 19, 2016), <https://blogs.lse.ac.uk/humanrights/2016/05/19/limiting-sovereignty-and-legitimising-intervention/#:~:text=Related%20to%20this%20idea%20is,its%20sovereignty%20can%20be%20limited.>

<sup>103</sup> INDIA CONST. pt. VI.

bodies should be constituted with a majority of positions reserved for individuals from tribal backgrounds, thus ensuring that the voices and concerns of the tribal populations are adequately represented. Additionally, Corporate Social Responsibility (‘CSR’) mandates for Public Sector Undertakings (‘PSUs’) operating in these regions should include a specific allocation for ensuring the resettlement and well-being of Indigenous population. It may be in the form of either reducing the negative externalities or to improve the condition of the Indigenous people.<sup>104</sup> Lessons can be learnt from Indonesia and Vietnam where CSR activities have had positive and significant impacts on the Indigenous population.<sup>105</sup>

Furthermore, before establishment of any project relating to resource nationalism, there should be adherence to due diligence processes to assess potential harms and human rights violations. Also, there should be effective grievance redressal mechanism for the affected communities.<sup>106</sup>

As the famous adage goes, “the future belongs to those who prepare for it today.” If India wants to see herself as an emerging global power, the Indian government must establish a transparent framework to make provisions for free, prior and informed consent. The decisions made by the Indigenous communities must be respected. New strategies born from open dialogue and responsible leadership can reinvigorate the legislative bases when dealing with the issues relating to the protection of the Indigenous persons from resource nationalism.

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<sup>104</sup> Ajay Kumar et al., *Community Resilience, Corporate Social Responsibility and Local Economic Development: The Case of Coal Mining in India*, 11 EXTR. IND. SOC. 101120 (2022).

<sup>105</sup> *Id.*

<sup>106</sup> Corinne Lewis, *Corporate Responsibility to Respect the Rights of Minorities and Indigenous Peoples*, MINORITY RIGHTS GROUP INTERNATIONAL (Oct. 2012), <https://minorityrights.org/app/uploads/2024/01/download-1157-corporate-responsibility-to-respect-the-rights-of-minorities-and-Indigenous-peoples.pdf>.

## ARTICLE

**ACHIEVING BETTER BRAND PROTECTION IN THE E-COMMERCE  
SECTOR THROUGH HARMONISATION OF TRADEMARK AND  
COMPETITION LAW***Jhanvi Sahni\****ABSTRACT**

*Trademark law integrates with Competition law at the crossroad of protecting business interests, maintaining the market structure while catering to the interests of the consumers. This relationship between Trademark law and Competition law becomes more visible in the context of Selective Distribution Systems that are often deployed by sellers with the justification of protecting the image of their product backed by the mark attached. The European Union, in the recent past, has observed greater acceptance of this reasoning through decisions of the Court on Trademark law, especially in cases of luxury products that claim to preserve the “aura of luxury” by virtue of such distribution channels. A commensurate expectation is also discerned under Competition law where exemptions are sought from violations of Article 101(1) of the TFEU. The scope of protection granted under realm of these laws must be viewed from the lens of current digital marketplace developments wherein e-commerce platforms have taken the lead which requires a distinctive approach from how the issue was traditionally being dealt with. This paper centres around the functions that a Trademark performs for a product’s brand image in the market, and discusses how it becomes the driving force for protection under Competition law. A case would thus be made for effects-based analysis of Selective Distribution Systems which would allow for a better integration of Trademark law into the assessment of antitrust violations that is missed out while conducting a by object assessment under Article 101. Lastly, taking forward the effects-based approach, this article would indulge in questioning the fact that whether the Court’s analysis of exempting Selective Distribution Systems from violation under Article 101(1) should be restricted to merely the binary of luxury and non-luxury goods or not. This paper argues that rather, it should focus on the case-by-case assessment for each instance, taking into consideration the restrictions imposed and the benefit to the consumers imparted. These themes would also be bound together and discussed in the Indian context.*

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## I. INTRODUCTION

Trademark law is a dynamic law, and so is Competition law. Both these realms of law are constantly developing with the pace of the market and seek to create a space for the furtherance and protection of the interests of the businesses in relation to the consumers they cater to.

Trademarks, traditionally, used to perform the function of identifying the source of the product,<sup>1</sup> with time, it expanded into providing consumers and sellers with other benefits, such as differentiation of products in the market from other manufacturers, giving assurance of the quality of the product, and preserving it further.<sup>2</sup> On the other hand, Competition law, while it seeks to primarily protect the interests of consumers in the European Union ('EU'), it also aims at maintaining the structure of the market and protecting the interests of the businesses.<sup>3</sup> One important component of the same is the protection of the image of the product, and this is where both these areas of law cross each other's paths.<sup>4</sup> At this intersection, the e-commerce market, especially third-party platforms, in the context of luxury products in the EU and the Indian Market, would be examined.

The intersection of Trademark law and Competition law is particularly significant in the context of protecting the image of products. As these areas of law converge, the e-commerce market, especially third-party platforms in the EU, presents a compelling subject for examination. The seminal case of *Coty Germany GmbH v. Parfümerie Akzente GmbH*<sup>5</sup> is essential to the discussion of the protection of luxury brands through the Selective Distribution System, as it was seen as a watershed moment to give the owners of luxury brands a chance to further the protection of the image and the "aura of luxury" attached with then. This case, which was originally a fashion sector antitrust case, has gained much recognition in the realm of Trademark law due to the protection mechanisms deployed for the concerned fashion brand, and further compelled the Court to lay down objective tests in order to avoid *by object* antitrust violations. Therefore, through the substantive appraisal of the position of courts with respect to antitrust violations, a case would be

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<sup>1</sup> Raveen Obhrai, *Traditional and Contemporary Functions of Trademarks*, 12 J. CONTEMP. LEGAL ISSUES 16 (2001).

<sup>2</sup> Mohammad A. Naser, *Re-examining the Functions of Trademark Law*, 8 CHI.-KENT J. INTEL. PROP. (2008).

<sup>3</sup> ALISON JONES AND OTHERS, *EU COMPETITION LAW* (OUP, 7<sup>th</sup> ed. 2019).

<sup>4</sup> Ioannis Lianos, *Brands, Product Differentiation and EU Competition Law*, CENTRE FOR LAW, ECONOMICS AND SOCIETY (CLES), UCL (2014).

<sup>5</sup> Case C-230/16 *Coty Germany GmbH v. Parfümerie Akzente GmbH* ECLI:EU:C:2017:941.

made for better integration of Trademark concerns into the same while emphasizing on the core of purpose of Trademark protection.

## II. BUILDING BLOCKS OF THE COURT'S APPROACH IN *COTY GERMANY*

### A. *E-Commerce: A Threat to Trademark Protection And an Antitrust Concern*

The emergence of e-commerce platforms such as Amazon, eBay, and Flipkart have brought in a flood of buyers and sellers by creating an easily accessible marketplace.<sup>6</sup> It cannot be denied that prices have lowered, search costs have reduced, and the market has become more transparent and competitive;<sup>7</sup> however, this has triggered Trademark and Antitrust concerns, wherein the former is fighting for the protection of products and maintenance of their brand images, and the latter, at one level, is also grappling with the same while seeking to maintain undistorted competition in the market.

To make the buyers aware of the products and their brand value, as is done by e-commerce platforms, thus bringing benefits under both these areas of law by facilitating technology and furthering the quality of goods and services. However, pushing and protecting the brand image of products also carries with itself certain challenges which are at times sought to be faced through controlled systems of distribution, and must be seen in greater consonance with Trademark law to holistically shelter the value of the concerned products.<sup>8</sup>

The increased use of these online platforms has made courts across various jurisdictions ponder regarding their differential treatment from offline transactions, more fundamentally, should there even be any. In the context of Trademark law and Competition law in the EU, which has the largest e-commerce market now, the European Court of Justice ("CJEU") has been vigilant of the fact that the economic consequences of the development of this sector cannot be undermined and has been a constant consideration in its string of decisions, as will be observed subsequently.<sup>9</sup>

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<sup>6</sup> Ariel Ezrachi, *The Ripple Effects of Online Marketplace Bans*, 40 *WORLD COMPETITION* 1 47-65 (2017).

<sup>7</sup> OECD, *Competition Issues in Electronic Commerce*, DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS, DAF/CLP (2000)32.

<sup>8</sup> EUROPEAN COMMISSION, FINAL REPORT ON THE E-COMMERCE SECTOR INQUIRY, (2017) [https://competition-policy.ec.europa.eu/system/files/2021-10/2017\\_ecommerce\\_SI\\_final\\_report\\_en.pdf](https://competition-policy.ec.europa.eu/system/files/2021-10/2017_ecommerce_SI_final_report_en.pdf), accessed September 17, 2023.

<sup>9</sup> Opinion of AG Wahl, Case C-230/16 *Coty Germany GmbH v. Parfümerie Akzente GmbH*, ECLI:EU:C:2017:603, para 2; EUROPEAN COMMISSION, FINAL REPORT ON THE E-COMMERCE SECTOR INQUIRY, (2017)

The advent of e-commerce has not necessarily been seen as positive in all cases. This apprehension has primarily been observed amongst sellers of luxury brands, who fear product generalization and tarnishing of their images on wide platforms like Amazon, who would focus more on quantity of sales than quality.<sup>10</sup> The dismay towards acceptance of such expansive e-commerce platforms is rigorously observed in German Court's decisions which has harsh decisions on online sales, not even emerging from antitrust or trademark infringement interests, but from a general aversion towards the emergence of e-commerce.<sup>11</sup>

This shall be studied from the lens of third-party platforms, dealt under systems of selective distribution which have flourished within this realm, bringing in strong intra-brand competition, and how the maintenance of luxury images has become a concern here under the pressure of lowering prices, both for Trademark law and Competition law.<sup>12</sup>

#### B. *Selective Distribution System*

A Selective Distribution System is a category of vertical agreement between two or more undertakings that are operating at different levels of the production chain. This arrangement tends to become a vertical restraint, violative of the antitrust law, if the conditions for distribution that prohibit selected authorized distributors from dealing with unauthorized distributors of the system. Such agreements often fall under Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") as a prohibited object restraint.<sup>13</sup>

Article 101(1) of the TFEU provides two distinct approaches for evaluating antitrust violations, which are squarely applicable in case of Selective Distribution Systems as well: *object* analysis and *effect* analysis. Under the object analysis, the Commission and the Court can determine antitrust conduct as violative through a *prima facie* opinion. On the other hand, the effect analysis necessitates a more detailed and reasoned analysis. These distinct approaches play a crucial role in

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[https://competition-policy.ec.europa.eu/system/files/2021-10/2017\\_ecommerce\\_SI\\_final\\_report\\_en.pdf](https://competition-policy.ec.europa.eu/system/files/2021-10/2017_ecommerce_SI_final_report_en.pdf), accessed September 17, 2023.

<sup>10</sup> Maria José Schmidt-Kessen, *Selective Distribution Systems in EU Competition and EU Trademark Law: Resolving the Tension*, 9 J. EUR. COMPET. LAW PRACT. 5 304-316 (2018).

<sup>11</sup> Higher Regional Court Berlin, Judgment of 19 September 2013 - 2 U 8-09 (Kart), *Wettbewerb in Recht und Praxis* 2013, 1517—School Backpacks and Bags.

<sup>12</sup> Stefan Wartinger and Lukas Solek, *Restrictions of Third-Party Platforms within Selective Distribution Systems*, 39 WORLD COMPETITION 2 291-305 (2016).

<sup>13</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1/1 (2003), Art 1(1)(a), Art 1(1)(b); Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art 101(1).

the assessment of Selective Distribution Systems and their compliance with antitrust regulations, shaping the regulatory landscape within the EU.<sup>14</sup>

A Selective Distribution System must not dissuade the authorized distributors to deal with an expansive base of customers, presented by the age of e-commerce, and must not impose a criterion that is not equivalent to the ones on brick-and-mortar shops for it to not constitute a hardcore restriction.<sup>15</sup> Therefore, the Selective Distribution Systems that are meant to restrict certain territories in which resellers are allowed to operate their sales are prohibited.<sup>16</sup> A *per-se* prohibition on online sales or over online marketplaces without any objective quality requirements would be impermissible since an alternative situation would not harm the product presentation or clash with other domains of law.<sup>17</sup>

Elsewhere, the qualitative criteria or thresholds imposed for distribution over online sites to become a part of the Selective Distribution System or selling on a third-party platform under solely the supplier's business name might be valid. This could be on the condition that the system must bring a balancing effect through increased efficiency in maintaining the quality of goods, and achieving their increased sales by this virtue, while compromising on reduction in intra-brand competition through such restrictions on the distributors, especially when the latter is necessary for furtherance or improvement of inter-brand competition and, parallelly, consumer satisfaction.<sup>18</sup>

A Selective Distribution System has thus become a mechanism to improve the quality of overall product usage or "experience", including pre-sales and post-sales connection with the customer.<sup>19</sup> This holds immense importance in the e-commerce context, where the sellers fear counterfeiting and the grey market and hence, producing a shell around their products has become all the more essential.

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<sup>14</sup>ALISON JONES AND OTHERS, EU COMPETITION LAW (OUP, 7<sup>th</sup> ed. 2019).

<sup>15</sup>COMMISSION (EC), NOTICE - GUIDELINES ON VERTICAL RESTRAINTS, C(2010) 2365 (2010), para 52; M. Thill-Tayara, *Online Selective Distribution: A Real Revolution?*, presented at "Online Retail: The Changing Landscape and Ramifications for Competition Policy" (2008).

<sup>16</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1/1 (2003), Art 1(1)(c).

<sup>17</sup> B2-98/11, ASICS Deutschland GmbH (2015).

<sup>18</sup> Commission (EC), 'Notice - Guidelines on Vertical Restraints', C(2010) 2365 (2010), para 54, para 176; Opinion of AG Wahl, Case C-230/16 Coty Germany GmbH v. Parfümerie Akzente GmbH, ECLI:EU:C:2017:603, para 38; Martijn van Wanroij, *Brand protection and European competition law*, LEXOLOGY, 2015 <https://www.lexology.com/library/detail.aspx?g=7bb3fcf6-f00d-4709-a0b8-41d22b094c73>.

<sup>19</sup> Anne C Witt, *Restrictions on the Use of Third-party Platforms in Selective Distribution Agreements for Luxury Goods* 12 EUR. COMPET. J (2-3) 435-61 (2016).

*C. Placing Luxury Products within Trademark and Antitrust Law*

The definition of luxury products is not certainly explicate; however, it is dependent on various factors such as social perception of consumers, counterfeits, the presence of internet and media in a particular region.<sup>20</sup> The crux, and the ultimate result post the consideration of all these factors is that luxury products bank on the idea of “image” for their success in the market. It is their image, derived from the experience that they give to the consumer, that fetches the highest value and exclusivity, something that is beyond the satisfaction of the basic necessities.<sup>21</sup>

Products are often equated with higher price, however, in the modern economy, luxury products go beyond that in terms of consumers investing into the product’s legacy and the promise of belonging to a certain group. The perceived value of the brand that the product belongs to overpowers its real costs drawing from its rarity, artisan skill, and attached emotions of the consumers over a long period of time.<sup>22</sup> It is also primarily the quality that allows a trademark owner, when met by consumer expectations, to charge a premium price for its product.<sup>23</sup>

Going a step forward from merely a product, is the perception of brands that have gained a central position in the modern economy, and have become a powerful tool for business proliferation.<sup>24</sup> They do not merely, at the most basic level provide information to the consumers about the product and indicate the consistent source or quality of the product, but when backed by Trademarks, they also appeal to the emotions and psych of the consumers they are catering to.<sup>25</sup> Therefore, Trademark law has widened its infringement protection net from protection for a mark into protection of a brand.

Connected to this thought is also when Antitrust law engages with brands in the market in terms of consumer loyalty, market power and maintenance of their market position as derived from these

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<sup>20</sup>R Akther, *Redefining the Meaning of Luxury Goods: A Conceptual Paper*, 2 *The Beagle*, University of Greenwich 2 (2014), <https://journals.gre.ac.uk/index.php/beagle/article/download/145/161>; M Husic and M Cacic, *Luxury Consumption Factors*, 13 *J. FASH. MARK. MANAG.* 2 231–45 (2009).

<sup>21</sup>Martijn van Wanroij, *Brand protection and European competition law*, *LEXOLOGY* (2015) <https://www.lexology.com/library/detail.aspx?g=7bb3fcf6-f00d-4709-a0b8-41d22b094c73>; A Brun and C. Castelli, *The Nature of Luxury: A Consumer Perspective*, 41 *INT. J. RETAIL. DISTRIB* 11 823–47 (2013).

<sup>22</sup>*Beyond the value: How luxury brands define their prices*, *Luxonomy* (2023) <https://luxonomy.net/en/beyond-the-value-how-luxury-brands-define-their-prices/>.

<sup>23</sup>Hanna Stakheyeva, *Competition law in attempt to understand (Luxury) Trademarks*, *EUR. COMPET. J.* (2021); David Higgins, ‘The Making of Modern Trademark Law: The UK, 1860-1914’ [2008] in *Trademarks And Brands: An Interdisciplinary Critique* (CUP, 2008).

<sup>24</sup>Deven R. Desai and Spencer Waller, *Brands, Competition, and the Law*, *BYU L. REV.* 1425 (2010).

<sup>25</sup>Burleigh B. Gardner & Sidney J. Levy, *The Product and the Brand*, 33 *HARV. BUS. REV.* (1955); Deven R. Desai and Spencer Waller, *Brands, Competition, and the Law*, *BYU L. REV.* 1425 (2010).

brands, and seeking to place a position of fair competition for the product under this law.<sup>26</sup> This cross-section at the helm of image of the brands is where both Trademark and Competition law integrate to regulate how brands and their luxury images affect the aspects of market or business governed by each of them respectively, which will now be explored in the context of Selective Distribution Systems.

### III. COTY GERMANY: A WATERSHED MOMENT?

Fashion sector has been under the scrutiny radar of the European Commission ('EC') as well as the national authorities because it is heavily dependent on the idea of luxury, which is its greatest selling proposition in the market and has become seemingly unstoppable post the advent of e-commerce.<sup>27</sup>

A seminal case, *Coty Germany GmbH v. Parfümerie Akzente GmbH*<sup>28</sup> has emerged from this idea in the EU, which has compelled the apex court to knit together the relationship between EU Trademark law and Antitrust law by examining the position of products belonging to luxury brands falling in the circle of Selective Distribution Systems, which has a separate base for assessment under Antitrust law. The case has thus set the ground for resolving the apparent tension in these two areas of law in light of the upswing of luxury products floating in the e-commerce market. While this case has been registered as an antitrust case, it would be apposite to parallelly consider the effect on Trademark law as their intersection.

The facts of this CJEU decision concerns the dispute initiated by a Trademark owner, a supplier of "luxury" cosmetics across the EU, namely Coty Germany GmbH and one of the authorized distributors of its goods, both through brick-and-mortar stores and online sites, Parfümerie Akzente GmbH. The former was in a selective distribution agreement with its distributors by which they were prohibited of associating or dealing with any of Coty's non-authorized retailers in the form of third-party undertakings for internet sales of its goods.

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<sup>26</sup>John A. Quelch & David Harding, *Brands Versus Private Labels: Fighting to Win*, 74 HARV. BUS. REV., 100–02 (1996); Deven R. Desai and Spencer Waller, *Brands, Competition, and the Law* BYU L. Rev. 1425 (2010).

<sup>27</sup>Martijn van Wanroij, *Brand protection and European Competition Law*, LEXOLOGY (2015) <https://www.lexology.com/library/detail.aspx?g=7bb3fcf6-f00d-4709-a0b8-41d22b094c73>.

<sup>28</sup>Case C-230/16 *Coty Germany GmbH v. Parfümerie Akzente GmbH* ECLI:EU:C:2017:941.

Coty justified its selective distribution in light of preservation of the image of luxury brands it holds, and the distribution channels must be positively displaying these high-quality goods. Parfümerie Akzente GmbH used to conduct the sales of its goods partly through its own platform, and partly via the platform of amazon.de, as it refused to sign to the conditions imposed on third-party, e-commerce sales by Coty.<sup>29</sup>

While the Court of First Instance had held the conditions imposed by Coty to be a hardcore restriction, the CJEU delved deeper into the questions of law to hold otherwise.<sup>30</sup> The Court primarily questioned whether ensuring the maintenance of “luxury” image while distributing luxury goods and services is compatible with Article 101(1) of the TFEU, and would it not be considered an object restriction. Further, the other major question of law involved was **whether such prohibitions from engaging with third-party distribution platforms hold water regardless of the quality standards imposed by the supplier in the agreement, in other words, *whether absolute sales ban are legitimate.***<sup>31</sup>

The court reiterated its position from the *Metro*<sup>32</sup> cases (*Metro I* and *Metro II*), wherein three-pronged criteria for validity of a Selective Distribution System under Article 101(1) of the TFEU were established in the context of high-quality and technically advanced durable consumer products. *Firstly*, the distributors must be chosen based on objective qualitative criteria, and should not be discriminatory towards them. *Secondly*, such a system must be necessary to maintain the quality and proper use of the product as derived from its characteristics, and *lastly*, the conditions must not go beyond what is necessary for this purpose, i.e., they must be proportionate.<sup>33</sup> This test has been transplanted for other luxury and fashion products and has been used thoroughly by national courts and the CJEU.

The CJEU, however, went beyond upholding the basic legitimacy of the Selective Distribution System in question to recall its position in the seminal Trademark case of *Copad*,<sup>34</sup> wherein the

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<sup>29</sup>Case C-230/16 Coty Germany GmbH v. Parfümerie Akzente GmbH ECLI:EU:C:2017:941, ¶¶8-16.

<sup>30</sup>Case C-230/16 Coty Germany GmbH v. Parfümerie Akzente GmbH ECLI:EU:C:2017:941, ¶17.

<sup>31</sup>Case C-230/16 Coty Germany GmbH v. Parfümerie Akzente GmbH ECLI:EU:C:2017:941, ¶20.

<sup>32</sup>Case 26-76 Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities [1977] ECR 1977 -01875; Case 75/84 Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities ECR 1986 -03021 (1986).

<sup>33</sup>Case 26-76 Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities ECR 1977 - 01875 (1977), ¶20.

<sup>34</sup>Case C-59/08, Copad SA v. Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL), ECLI:EU:C:2009:260, ¶24; Case C-439/09, Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi ECR 2011 I-09419 (2011), ¶41.

necessity of such a system, derived from its quality, extends *primarily* to preserve the allure, prestige and aura of luxury that the product emanates.

Therefore, the quality of the product, preserved and furthered through the Selective Distribution System conditions, becomes so essential to the protection of the product and contribution to sustenance of its brand that it aids the customers in distinguishing it from other products in the market, as envisaged and done through Trademark law as well.<sup>35</sup>

With respect to the second question of law in the present case, the court upheld the validity of restrictions on dealing with third-party platforms and using a different business name for Coty's products as these were essential to maintain exclusive association with the supplier's products.<sup>36</sup>

The Court took cognizance of the vast net cast by e-commerce, which might lead to dilution or distortion of the online image or presentation of the luxury products, the stability in its perception as sought by the consumers in the market, and the connected reputation of the supplier with it.<sup>37</sup> If these restrictions were not imposed on the authorized distributors, the online presentation of the supplier's goods would be in jeopardy because of lack of any contractual relationship with the third party platforms for it to have any demand or control over their display of the goods which might affect the quality and consumer perception of the luxury goods.<sup>38</sup>

Such quality-related prohibitions by the supplier would not be considered hard-core restrictions as long as the distributors are allowed to sell their products through their own websites while having a window for its products, and even to the extent that unauthorised third-party platforms or search engines can be used for retail level of trade online if the same is not discernible to the consumer and the luxury image of the product is preserved.<sup>39</sup> The Court, therefore, held these restrictions valid to the extent they are operated in a discernible manner towards the target consumers.<sup>40</sup>

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<sup>35</sup>Case C-59/08, Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL), ECLI:EU:C:2009:260, ¶25.

<sup>36</sup>Case C-230/16 Coty Germany GmbH v. Parfümerie Akzente GmbH ECLI:EU:C:2017:941, ¶44.

<sup>37</sup>Case C-230/16 Coty Germany GmbH v. Parfümerie Akzente GmbH ECLI:EU:C:2017:941, ¶49.

<sup>38</sup>Maria José Schmidt-Kessen, *Selective Distribution Systems in EU Competition and EU Trademark Law: Resolving the Tension* 9 J. Eur. Compet. Law Pract. 5 304-316 (2018).

<sup>39</sup>Case C-230/16 Coty Germany GmbH v. Parfümerie Akzente GmbH ECLI:EU:C:2017:941, ¶49, 67; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1/1 (2003), Art 4(b), Art 4(c), Opinion of AG Wahl, Case C-230/16 Coty Germany GmbH v. Parfümerie Akzente GmbH, ECLI:EU:C:2017:603, ¶24.

<sup>40</sup>Hanna Stakheyeva, *Competition law in Attempt to Understand (Luxury) Trademarks*, EUR. COMPET. J (2021).

This judgment of *Coty* must be differentiated from *Pierre Fabre*<sup>41</sup> in order to delineate the CJEU's stance clearly, since the latter brought about heavy uncertainty regarding protection of prestigious image of the product and Selective Distribution System. The products in question were cosmetics, hygiene, and personal care products and not luxury products<sup>42</sup>. The restrictions imposed on the distributors were not to preserve the image of the products but was to merely be present at all times at the pharmacy, in good condition for the supply of goods, and did not take online sales into its ambit.<sup>43</sup> The judgment had no mention regarding the "aura of luxury" and the court just did not find the condition on pharmacists justiciable enough for Selective Distribution System to be held valid, considering such absolute bans on online sales of goods are hardcore restrictions.

However, this cannot be understood in a way that Selective Distribution System which are directed towards preservation of luxury images would not be compatible with Article 101(1) lest they do not comply with the conditions. The air, however, has been cleared out by the court's stance in *Coty Germany* which would be analysed hereunder.

#### IV. THE INTEGRATION OF TRADEMARK AND COMPETITION LAW: SUBSTANTIVE APPRAISAL AND THE WAY FORWARD

##### A. Crossroads: Trademark Law and Competition Law

Trademark law and Competition law are commonly seen protecting brand owners that covet a luxury image for their product, and seek to protect it through these two realms of law, especially as observed in the approach of the courts observed above.<sup>44</sup> Antitrust law, in fact, has a lot to gain from Trademark law in order to assess what are legitimate or illegitimate restraints.<sup>45</sup>

Trademark law is certainly not standalone when viewed in the context of businesses in the market. It does have a considerable effect on Competition law related definitions, like Market Power and

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<sup>41</sup>*Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* ECR 2011 I-09419 (2011).

<sup>42</sup>*Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* ECR 2011 I-09419, ¶9, 46 (2011).

<sup>43</sup>*Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* ECR 2011 I-09419, ¶12 (2011).

<sup>44</sup>Deven R. Desai and Spencer Waller, 'Brands, Competition, and the Law' *BYU L. Rev.* 1425 (2011).

<sup>45</sup>Maria José Schmidt-Kessen, *Selective Distribution Systems in EU Competition and EU Trademark Law: Resolving the Tension*, 9 *J. EUR. COMPET. LAW PRACT.* 5 304-316 (2018).

Antitrust Liabilities, and becomes a mitigating or aggravating factor to balance protection of Trademark against the possible anti-competitive act that the undertaking might be engaging in.<sup>46</sup> Trademark law, although it plays the function of being a source of market power for the owner, mostly gained through consumer loyalty to the brand value, it also on the other hand inherently has a specific competitive function while it constantly interacts with prohibition of agreements and concerted practices in order to avoid a player gaining excessively dominant or monopolised position over a product in the relevant market.<sup>47</sup>

This side of Trademark law is not too far from Competition law on the spectrum where the value of luxury goods is intertwined with Trademark protection. It has been formally recognised by the CJEU in the case of *Copad*<sup>48</sup>, wherein it was held that a negative effect on the aura of luxury, in contravention of a license agreement which imparted this quality to the product, held by a product could lead to damage to its quality.<sup>49</sup> This would ultimately invoke the Trademark rights of the owner and would lead to an infringement of Article 25(1) of the EU Trademark directive, which gives him the control over the quality of the product.<sup>50</sup> The reasoning in the *Copad* case was vehemently used by the CJEU in *Coty* to justify the favourable treatment towards sales restrictions over third-party platforms.<sup>51</sup>

However, the protection of luxury brand image under Trademark law does not merely places limitations on the actions of the owners. The CJEU has also affirmed this in *Parfums Christian Dior v. Evora*,<sup>52</sup> holding that the reseller or distributor must not act in a way that is harmful or unfair to the interests of the Trademark owner and does not harm the reputation or image of his product that the owner had created for his product. In circumstances which do not harm the reputation of

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<sup>46</sup> J. Thomas McCarthy, Jennifer Lee Taylor, Michael B. Miller, and Sabrina Larson, *The Shifting Intersection Between Trademark and Antitrust Law* (Bloomberg Law, 2021) <https://www.bloomberglaw.com/external/document/X7HVDSE8000000/trademarks-professional-perspective-the-shifting-intersection-be>.

<sup>47</sup> ALISON JONES AND OTHERS, *EU COMPETITION LAW* (OUP, 7<sup>th</sup> ed. 2019).

<sup>48</sup> Case C-59/08, *Copad SA v. Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL)*, ECLI:EU:C:2009:260.

<sup>49</sup> Case C-59/08, *Copad SA v. Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL)*, ECLI:EU:C:2009:260, para 56.

<sup>50</sup> Maria José Schmidt-Kessen, *Selective Distribution Systems in EU Competition and EU Trademark Law: Resolving the Tension*, 9 J. EUR. COMPET. LAW PRACT. 5 304-316 (2018); Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks OJ L299/25 (2008), Art 25(1).

<sup>51</sup> Case C-230/16 *Coty Germany GmbH v. Parfümerie Akzente GmbH* ECLI:EU:C:2017:941, ¶¶25-27.

<sup>52</sup> Case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV* I-06013 (1997)¶¶45, 46.

the Trademark, the reseller cannot be outrightly opposed from using the Trademark, even if it does not match the exact quality.

Yet again, gathering from the obligations imposed on owners, resellers and distributors, the CJEU has dwelled on the fact that apart from indicating the origin of goods, it is pertinent for the Trademark to indicate that all the goods carrying the mark are produced by one manufacturer, assuring the consumers of its derived quality from the same. If this information regarding the producer of the good, and subsequently the link to its quality is missing, then it might lead to erosion of the guarantee that should ideally have been provided by the Trademark.<sup>53</sup>

Unlike what is commonly believed, the EU Competition law does not merely view price competition as the only model in the market structure. It equally, like Trademark law, intends to promote diversity of products up to their optimal quality, which would in turn stimulate further innovations.<sup>54</sup> Therefore, quality of products, and preservation of the brand image are legitimately justifiable criteria for price reduction or imposition of other restrictions in the market, based on which Selective Distribution System under Article 101(1) of TFEU are premised.<sup>55</sup>

It would, thus, be a legitimate aim to implement Selective Distribution System in order to protect its aura of exclusivity provided by a particular Trademark, based on consumer's psychological perception, and not just limited to its own material characteristics.<sup>56</sup>

Furthermore, a definitive prohibition under Selective Distribution System, which does not go beyond the statutory and precedential thresholds of validity, and does not foreclose or monopolise competition, would also help the consumers and other players in the market to trace the origin of goods, while also reducing the search costs for the former, as against the present reign of counterfeits and image dilution in the e-commerce world, thereby resonating with the primal function of Trademark law which dates back to "identification of source of origin" of the trademarked product.<sup>57</sup> It aims at avoiding confusion with respect to the products belonging to

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<sup>53</sup>Case C-324/09, *L'Oréal SA and Others v. eBay International AG and Others* I-06011 (2011).

<sup>54</sup>Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities* ECR 1977 - 01875 (1977), ¶21.

<sup>55</sup>Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission of the European Communities* ECR 1983 -03151 (1983), ¶33.

<sup>56</sup>Case T-88/92, *Groupement d'achat Edouard Leclerc v. Commission of the European Communities* ECR 1996 II-01961 (1996), ¶15, 106.

<sup>57</sup>Directive 2008/95/EC to approximate the laws of the Member States relating to trademarks, OJ L299/25 (2008), Recital 11.

third-party platforms like Amazon or eBay, and hence goes beyond merely distinguishing them in the eyes of the consumer.<sup>58</sup>

In its integration with Competition law, once it is assured that the single undertaking legitimately is responsible for protection of quality of a particular product, Trademark law seeps in to performing the function to gain and retain customers by identifying a product as satisfactory. This becomes possible only when the consumers are able to identify a product with its Trademark, a bearer for its quality, while maintaining reasonable competition in the market as envisaged under the TFEU.<sup>59</sup>

The fact that the route that a Trademark owner can successfully convey this to consumers is by relying on the retailer cannot be underestimated since that link would also have the responsibility of maintaining the image of the mark. For an effective scheme of Trademark protection to fructify, this channel, and preservation of reputation through it must be valued to let the Trademark reach other categories of products as well.<sup>60</sup>

The Selective Distribution System would, thus, create a shield such that the luxury image of the product does not get tarnished. This, along with other factors (*the metro criteria*), in the context of the present enquiry, justifies the exemption of Selective Distribution System from Article 101(1) of the TFEU as long as it geared towards maintaining the brand image of the concerned luxury products through such distribution. This goes in hand with the consumer perception, in terms of product differentiation and the experience they derive from the product, which is equally valued under Trademark law.

### B. *The Way Forward*

It has been observed that there is some apparent tension between Trademark law and Competition law as one squares down on the e-commerce reign. While the former seeks to focus on the quality of goods, and expanding into the product differentiation realm apart from indicating source of origin, the latter seeks to prohibit bans or restrictions on online sales by virtue of the Selective Distribution System that might be geared towards the same objective of protecting the image of

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<sup>58</sup>Anne C Witt, *Restrictions on the Use of Third-party Platforms in Selective Distribution Agreements for Luxury Goods*, 12 EUR. COMPET. J (2-3) 435–61 (2016).

<sup>59</sup>Case 85/76 Hoffmann-La Roche & Co. AG v. Commission ECR 0046, para 7 (1979); Case C-59/08, Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL), ECLI:EU:C:2009:260, para 22; Case C-10/89, SA CNL-Sucal NV v. HAG GF AG(1990), ¶13.

<sup>60</sup> Frank Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 813 (1926).

the seller's products through the distribution channel.<sup>61</sup> This was the position until there were judgments of *Copad* and *Pierre Fabre* in the legal regime. However, there was some relief and certainty brought about through the case of *Coty*, at least to the extent of luxury goods.

While the judgment of *Coty*, at one level, has definitively laid down the law in terms of objective qualitative criteria that must be met by the seller while choosing his distributor under the Selective Distribution System specially in cases where the system is directed towards protection of luxury images of the goods, it does miss out on aspects of Trademark law, and the way it crosses path in actual practice. The CJEU, even though it discussed the judgment of *Copad*, failed to how Trademark law interests can be roped into evaluating the criteria for selection in the selective distribution channel, despite the fact that the connection and concerns of these two areas of law are inevitably connected.

Additionally, prior to accepting *Coty* as the gospel law of the land, it must strike to one that the standard for comparison for necessity and proportionality of restrictions for maintenance of luxury images in online marketplace is with brick-and-mortar stores. It does not completely give an idea about how this necessity would be determined in a completely online or e-commerce dominated regime, which is what the market is now geared towards.<sup>62</sup>

The basis for this concern is that while with respect to brick-and-mortar shops, the quality standards can be decided upon based on the presentation, aesthetics, cleanliness, upholstery of the store, in addition to how products are packaged and displayed and made accessible to the consumers, how can the same be determined for online marketplaces.<sup>63</sup>

It is questionable whether the quality of retail services provided online are of such high value to the consumers as compared to the offline services.<sup>64</sup> Furthermore, if there is a difference in such a perception, when is it that a Trademark owner can invoke his rights against the apparent deterioration of image or quality of his goods online.

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<sup>61</sup>Maria José Schmidt-Kessen, *Selective Distribution Systems in EU Competition and EU Trademark Law: Resolving the Tension*, 9 J. EUR. COMPET. LAW PRACT. 5 304-316 (2018).

<sup>62</sup>P Marsden & P Whelan, *Selective Distribution in the Age of Online Retail*, 31 EUR. COMPET. LAW REV. 25-37 (2010); eBay, *Opportunities in Online Goods and Services: Public Consultation on the Issues Paper*, p.4 (2008), [http://ec.europa.eu/competition/sectors/media/ebay\\_contribution.pdf](http://ec.europa.eu/competition/sectors/media/ebay_contribution.pdf).

<sup>63</sup>Case C-230/16 *Coty Germany GmbH v. Parfümerie Akzente GmbH* ECLI:EU:C:2017:941, ¶12.

<sup>64</sup>P Marsden & P Whelan, *Selective Distribution in the Age of Online Retail*, 31 EUR. COMPET. LAW REV. 25-37 (2010).

It is not necessary that like the case of *L'Oréal and Others v. eBay International and Others*<sup>65</sup>, wherein the display of product after removal of packaging of perfumes and cosmetics affected the image of products of the Trademark owner would be a case for every other seller, especially given the plethora of dealings that take place in the online arena.<sup>66</sup>

Factoring in of this Trademark law concern in the online marketplace would affect the thresholds for allowing a Selective Distribution System, to be valid under Article 101(1) as it would change the dynamics of decision for the seller within that three-pronged criteria. While counterfeiting could be one of the valid concerns for invocation of one's trademark rights and raising Competition law concerns, the place where it would connect to the image and quality of the good, its differentiation from others, the consumer perception, which are the core of Trademark law is still missing from judicial practice.

Therefore, it is pertinent for the courts to strike a balance between preserving competition in the online marketplace with fair Selective Distribution System and giving the space to Trademark owners for adequate and efficient control over such systems in the pursuit of maintaining quality and reputation of their goods, and make a case for the instances where they can invoke their rights under this law.<sup>67</sup>

This brings us to materially notice that Competition law must take better cognizance of Trademark law. A two-pronged approach, rather entwined with each other, would be relevant here to begin with, *firstly*, in terms of analysis of the antitrust actions raised because of the Selective Distribution System, it should be an effects-analysis, and not a *prima facie* object analysis. This would require an in-depth understanding of Trademark law, and to understand its functions and components in terms of the experience or aura that it brings to the consumers, leading to product differentiation.

An effects analysis would allow the competition authority, and the courts as well to recognize this wider ambit of Trademark Law, which plays an important role in the trademark's owner idea of setting up Selective Distribution System in furtherance of fulfilling the functions of his mark. Therefore, a "rule of reason" approach over *per-se* approach would further the marketing and

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<sup>65</sup>Case C-324/09, *L'Oréal SA and Others v. eBay International AG and Others*, I-06011 (2011).

<sup>66</sup>Case C-324/09, *L'Oréal SA and Others v. eBay International AG and Others* [2011] I-06011, ¶78.

<sup>67</sup>Hanna Stakheyeva, *Competition law in attempt to understand (Luxury) Trademarks*, EUR. COMPET. J. (2021).

reputation of the marks through these vertical restraints, lest they cause appreciable effects on competition in the market.<sup>68</sup>

*Secondly*, taking forward the proposition of an effects-based analysis, Trademark law and Antitrust law can be better harmonized if they are geared towards protection of not just the strict binary of luxury and non-luxury products, retaining the primary function of Trademarks being centered around the “marks”.

While the ambit of Trademark law has expanded, bringing in more focus on the brand value, it equally has the onus for protection of any non-luxury product that carries the mark as well, given that it is sufficiently justified by the *metro* criterion. This would mean that the basic tenets of Trademark law would be intact, in the e-commerce regime, if it does not give rise to Competition law concerns.

There is ambiguity with what constitutes “luxury” and cannot be the basis for justifying the restrictions. Therefore, a case must be made for protection of non-luxury brands as well, which are not undermined by the position held by luxury goods. This view has also been advocated by the Court of Appeal in a case after *Coty Germany*, wherein it affirmed that even non-luxury brands can impose a ban on third-party online sales platforms<sup>69</sup>. It was rather emphasized that a case-by-case assessment would be more commercially sound basing it on characteristics of the product, distribution conditions and brand image instead of limiting certain straitjacket solutions to luxury and non-luxury products.

This should thus be complemented by the effects analysis, which would primarily be based on efficiency it brings to the sales and betterment of consumer protect, where the standard could indeed be enhanced through a clearer definition of what “luxury” as a perception is, thereby assessing the extent of exemption that the Selective Distribution System must be granted.<sup>70</sup> If the *metro* criteria require objective qualitative conditions to be applicable indiscriminately, differentiating the same based on luxury and non-luxury brands seems unjustifiable.

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<sup>68</sup>Warren S. Grimes, *Brand Marketing, Intra-brand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 88,121 [1995-1996].

<sup>69</sup> Case C/13/615474/HA ZA 16-959, *Action Sport v. Nike*, [2020] ECLI:NL:GHAMS:2020:2004 [2020].

<sup>70</sup>Julie Tamerler, *Everything isn't Gucci: Trademark law and the secondhand luxury goods market*, REUTER (2021) <https://www.reuters.com/legal/legalindustry/everything-isnt-gucci-trademark-law-secondhand-luxury-goods-market-2021-06-18/>.

Sticking to the core of Trademark law would not justify higher protection to luxury brands within this realm alone, and regardless of the brand, whether luxury or not, a Trademark owner must have the choice of exercising effective control over as well as protect it. Here, the selective distribution system would conditionally not be an issue, because the physical characteristics and image must equally be preserved. The system would give pro-competitive effects, if it is based on objective criteria and applied in a non-discriminatory fashion, while also resonating with the fundamentals of trademark protection.

This, further is, consistent with the position of the court in the seminal case of *Copad*, wherein it upheld that the distribution method is the most common and one of the most effective methods of protection that is directly linked to the image of the product, in terms of providing guarantee about its quality, which must be equalized and neutralized for non-luxury trademark protected brands too.<sup>71</sup>

This two-pronged approach would also take care of the direct application of *Coty* to purely online sales. It would give space for better integration of Trademark law and Competition law through this efficiency-based assessment, while establishing revised standards for examining such cases, as distinguished from purely offline dealings.

The court has reckoned the above approaches to some extent in the case of *Football Association Premier League v. Murphy*,<sup>72</sup> wherein the CJEU held that the justification for a restriction, a Selective Distribution System in the present case must be derived from the protection of intellectual property right itself, Trademark here, and its existence in the first place.

Therefore, the fact that Trademarks do not merely help the consumers distinguish but also carries with social prestige and their image in the market should be justification legible enough for justifying the online sales prohibitions or bans, if the case requires so. The EU Trademark directive and case laws have, in fact, itself endorsed the view that selective distribution channels which exclude systems or schemes that endanger or lessen the value, and reputation of their products are worthy of protection by the EU Trademark law.<sup>73</sup>

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<sup>71</sup>Case C-59/08, *Copad SA v. Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL)*, ECLI:EU:C:2009:260, ¶¶28-29.

<sup>72</sup>Joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others (C-403/08) and Karen Murphy v. Media Protection Services Ltd (C-429/08) I-09083 (2011)*, ¶94.

<sup>73</sup>Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks OJ L299/25 (2008), Art 25(1).

*C. India's Position on Selective Distribution Systems and Luxury Brands*

India, unlike the EU, does not have a well-developed judicial stance on the extent of protection that can be granted to Selective Distribution System if they are indulged in preservation of brands and the product image. India, however, is not detached from the negative value impact of e-commerce and has debilitated their intimacy with the brand value. From an Indian legal standpoint, it is likely to be examined under Sections 3(4)(c) of the Competition Act which mandates Exclusive Distribution Agreements as void if they lead to an Appreciable Adverse Effect on Competition.<sup>74</sup> This latter concept is where the line is drawn between the EU Competition law and Indian Competition law. While the threshold is lower in the former, the Indian Competition Act warrants a higher conception of the anti-competitive behavior to be caught under the statute. Appreciable Adverse Effect on Competition can be determined through various factors laid down under Section 19 such as barriers to entry and exit, foreclosure of competition, contribution to scientific or technological development, benefits to consumers etc.<sup>75</sup>

With respect to positioning the luxury brands within India, while the same trademarks exist for them as they are under other international jurisdictions, they cater to a very small proportion of population in India and are financially and geographically concentrated to a few parts of the country. India has a more diverse set of population groups, a major chunk of which is traditionally not as drawn towards luxury brands as is towards the Fast-Moving Consumer Goods even though the latter may be facing stagnation now, reducing the likeliness of any actual Appreciable Adverse Effect on Competition.<sup>76</sup> This does not, however, resolve the issue of setting a standard for luxury brands seeking protection through Selective Distribution Systems in the e-commerce market as the question has not been brought forward to the Competition Commission of India as of yet. It still remains doubtful whether this protection would be narrowly limited to luxury brands or would be defined primarily by their “mark”.

Therefore, it becomes imperative under the Indian Trademark and Competition law to first establish a standard of “luxury” and whether it can be used for granting such protections in

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<sup>74</sup> The Indian Competition Act, 2002, §3(4)(c), No. 12 of 2003, Acts of Parliament, 2002 (India).

<sup>75</sup> The Indian Competition Act, 2002, §19, No. 12 of 2003, Acts of Parliament, 2002 (India).

<sup>76</sup> *Inside the 2024 shopping bag: Where is the Indian consumer headed?* THE ECONOMIC TIMES (Jan 02, 2024) <https://economictimes.indiatimes.com/news/economy/indicators/inside-the-2024-shopping-bag-where-is-the-indian-consumer-headed/articleshow/106465628.cms>.

distinctive markets. This, again, cannot be established through a prima-facie or a by-object analysis, and hence requires more in-depth or effects-based assessment.

## V. CONCLUSION

Trademark and Competition regimes are quite closely knit together as observed through the decisions of the Courts and the prevailing law. At one level, the former's scope has expanded towards protection of their image which primarily gives the "experience" to the consumer. Aimed towards this, is also a system of distribution that is adopted by sellers, in order to preserve the image, and not let it get tarnished by distributors who do not adhere to the conditions stipulated under the channel.

While this has prompted for greater recognition of how mingled both the realms of law are, the courts have till date missed out on a proper assessment of antitrust violations where the basic functions of Trademark have been adhered to. Rather, the focus has been on luxury products whose identification has no threshold under Trademark law. When such a superficial factor is taken into consideration while deciding whether the Selective Distribution System is justifiable enough to be exempted from liability under Article 101(1) of TFEU. This entirely defeats the purpose of possessing a Trademark for one's product and even brand, whether luxury or non-luxury. It does not resonate with what a Selective Distribution System might seek to do, protect this image and further the product differentiation in the market, as belonging to one manufacturer. Hence, it becomes difficult to understand how the courts would establish the standard for such a protection while ignoring the core functions of Trademark law.

Therefore, it is imperative for the courts of the EU and India to take into account the basic functions of Trademark law in furtherance of product, and its connected brand image in the market. This would work well for development of both these regimes of law. On one hand, where Trademark law would become more inclusive in performing its functions with respect to both luxury and non-luxury brands, Competition law on the other hand would expand into developing objective criteria that would adhere to the former's roots. On the part of the Courts, this would require a step ahead of *Coty's* decision, wherein a revisiting of the *metro* criteria, especially in the context of digital marketplaces would be required, since the dynamics within the reign of Trademark protection and antitrust examination would change with such developments.

## ARTICLE

**UNFINISHED LIBERATION: THE HALFWAY JOURNEY OF  
TRANSGENDER MARRIAGE AND ADOPTION RIGHTS**

*Khushi Neb & Pranjal Diler\**

**ABSTRACT**

*This paper provides a comprehensive analysis of personal “rights” of the transgender persons under the Indian personal law framework, with a central focus on adoption and marriage rights. The paper shall aim at tracing the rights of transgenders in this regard and argues that despite the constitutional identification of the transgender community, in light of the historic verdict in the same-sex marriage case, judicial pronouncements alone have failed to make up for the lack of comprehensive legislation. The present framework of laws anachronistically undermines the fullest enjoyment of basic civil rights. The legislative lacunae in adoption with respect to the competence of prospective adoptive parents, as well as in marriage with respect to the implications for homosexual union post Supriyo verdict, shall be discussed through sectional analysis. In an attempt to remedy this, the paper shall thus, venture into a cross-jurisdictional analysis and conclude by advancing certain legal and policy recommendations which may remedy the pre-existing legislative lacunae and bolster the comprehensive realization of transgender persons’ rights.*

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## I. INTRODUCTION

*“By decriminalizing homosexuality, we have not just recognised treating relationships between consenting adults of the same gender, but we've also recognised that people who are of the same sex would even be in stable relationships”*

- Hon'ble Justice D.Y. Chandrachud in the 'same-sex marriage' case.<sup>1</sup>

India's Transgender community have had to embark on a long and tiring journey for the legal recognition of their basic rights under the constitution. The historic judgement of the Supreme Court in the aforementioned 'same sex marriage case' is a step backwards in recognizing the rights of the LGBTQA+ community, halting the progress in the jurisprudence. In 2018, the Navtej Singh Johar judgement<sup>2</sup> finally decriminalized section 377 which allowed consensual intercourse between two transgender persons. When the question of marriage was brought into light, Justice JAM Khanwilkar remarked “we are plunging into deep sea”, steering away the discourse from pertinent questions of marriage, adoption or maintenance. The Indian parliament in 2019, enacted the Transgender Person (Protection of Rights) Act<sup>3</sup>, which again, is emblematic of the first step of the state policy in the direction of legal recognition, yet it is only a step taken halfway as it finds no mention of any rights relating to marriage, adoption, etc.

This legislative lethargy, that borders on apathy, also continues to affect the adoption rights of the people belonging to transgender community. Laws characterized by a glaring lack of uniformity, overly-complicated procedure and unreasonable requirements, transgender people continue to be failed by the law in upholding their rights despite progressive constitutional safeguards, international covenants and declarations already being in place. The personal laws in India relating to marriage have only recognized the two gender binaries- The male/man and the female/woman. Therefore, only heterosexual marriages are valid and legally recognized. While the Hindu Adoption and Maintenance Act, 1956 only provides for Hindu male and female to adopt, the Juvenile Justice Act (The Juvenile

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<sup>1</sup> Supriyo v. Union of India, 2023 SCC OnLine SC 1348.

<sup>2</sup> Navtej Johar v. Union of India, (2018) 10 SCC 1.

<sup>3</sup> Transgender Person Act, 2019, No. 40, Acts of Parliament, 2019 (India).

Justice (Care and Protection of Children) Act<sup>4</sup>, 2015) uses the term ‘prospective adoptive parent’ incorporating gender-neutrality in adoption. However, even the latter needs to be further analyzed alongside other personal laws. The laws as they exist at the moment, have significant room for revision to include the rights of the transgender population. While we push for the legislature to introduce various amendments to rectify the faults in law, some considerations are also imperative to be kept in mind for the actualisation of legal inclusivity. A cross-jurisdictional analysis in this regard provides us with a foundation to compare the legislative and jurisprudential framework of various nations with the aim to incorporate the suitable policies within our own.

The paper is divided into three sections. The first part shall inquire into the sensitivity of the adoption laws in catering to the transgender parent(s). It focuses on the present adoption laws with respect to transgender people and shall demonstrate its anachronistic facets with respect to the eligibility of a transperson to ‘take in’ adoption as prospective adoption parents and socio-cultural factors operating in the Indian society. The part concludes by highlighting the interconnected concerns with the issue of marriage, which shall be analysed in the following chapter. The second part shall delve into the question, whether the present marriage frameworks are responsive to the interests of emerging forms of union with special focus on the implication of *Supriyo* and the veracity of its broader logic when extrapolated to trans-marriages. Lastly, the paper shall explore and analyze the legal and policy recommendations pertaining to the stages of marriage and adoption with the objective of mooted reforms that can be undertaken by the legislature to mitigate the vulnerability of the transgender people and expand the spectrum of their rights.

## II. ADOPTION RIGHTS OF TRANSGENDER PERSONS

One of the most crucial limbs of any personal law framework, besides marriage, is one that deals with adoption, encompassing all the corresponding laws, rules, and procedures. As per the Indian personal law, ‘adoption’ represents the legally recognised affiliation between the party or parties willing to adopt and the child. Earlier the personal law, only recognised Hindus to act as legal parents of the adopted child, as the other religious laws facilitated no such adoption. Nonetheless, after the enactment of the Juvenile Justice (Care & Protection of Child) Act, 2000, the adoption process was secularized by giving

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<sup>4</sup> The Juvenile Justice Act, 2015, No. 2, Acts of Parliament, 2016 (India).

access to other religious denominations. However, a civil right as personal, quintessential, and intimate as this, blatantly excludes- directly or indirectly- transgender persons from its entitlement in India. Moreover, the ‘same-sex marriage judgement’ has categorically refused the right of adoption to queer couples, adding a yet another obstacle for the community in their fight to equal rights. Meanwhile, the statutes that do confer adoption rights to transgender person, do so incompletely and inconsistently when evaluated against the touchstones of the fundamental rights in Part III of the Constitution as well as the legal positions elaborated in *NALSA*<sup>5</sup>. This part of the paper shall argue that current adoption laws are ambiguous, discriminatory and suffer from anachronism through discussion of the personal laws applicable to various religious domination as well as the secular law framework. It shall also evaluate the preliminary enquiry whether the central welfare legislation enacted recently, that is, The Transgender Persons (Protection of Rights) Act, 2019<sup>6</sup> aptly addresses the question of adoption among the transgender community.

*A. The Hindu Adoption and Maintenance Act, 1956*

The Hindu Adoption and Maintenance Act, 1956 (hereinafter ‘HAMA’), principally governs legal adoption among people belonging to the Hindu religious denomination. It is perhaps one of the singular pieces of legislation that imagines adoption through a ‘rights-based approach’ under section 6(i)<sup>7</sup>. Yet, even a cursory read of the provisions on the capacity of the parties to take in adoption, as laid down in Section 7 which reads “*capacity of a male Hindu to take in adoption*” as well as Section 8 which reads “*capacity of a female Hindu to take in adoption*” confers legitimacy to a valid adoption primarily on the basis of hetero-normative binary models of genders and sex. The *NALSA* Judgement while defining the term ‘transgender’ observed, “Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. Transgender may also take in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who, in this writ petition, describe themselves as “third gender” and they do not identify as either male or female. Transgender also includes persons who intend to undergo Sex

<sup>5</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

<sup>6</sup> *supra* note 3.

<sup>7</sup> The Hindu Adoption and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India).

Re-Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons.”

Effectively, this definition leads to the bifurcation of the term into a few general sub-categories<sup>8</sup>, provided that the boundaries of each may be fluid in nature. Firstly, those who psychologically identify as a gender that is not assigned to them at the time of birth but may not be desirous of their sex reassignment. Secondly, those who wish to get their sex reassigned to that end of the spectrum and align their biological anatomy with their gender identity. Lastly, those who have socio-cultural identities straying away from the binary and are publicly perceived are separate classes/categories, distinctly recognised such as Hijras, Jogtas, Aravanis, Shiv-shakti, Kothis etc. The appreciation of these general categories reveals the discriminatory and exclusionary nature of the statute. By logical implication, it can be found that the provisions confer the Right to Adopt only on the person who has undergone sex reassignment surgery, i.e., the transsexuals. As it appears, the Supreme Court’s recent determination of the long-standing question of same-sex marriage<sup>9</sup> culminated into a unanimous position that there exists no fundamental Right to Marry, with majority rejecting to recognise same-sex union. Effectively, even this adoption right - selectively available to transsexuals - evaporates if they are in a relationship with a person of the same sex.

Furthermore, Section 11 of the HAMA which outlines ‘other conditions for a valid adoption’, clauses (iii) and (iv), are silent on the possibility whereas, under Section 11 clause (iv) a female-born transsexual person, who merely intends and hasn’t yet undergone reassignment surgery, adopts a male child under the Act, and subsequently changes their sex to male and thus is no longer the ‘adoptive mother’ within the meaning of the provisions. Would such an adoption be valid? Or where a male adopts a son but without an age gap of 21 years between the two parties and subsequently transitions to a female.<sup>10</sup> Would such an adoption be void being in contravention to Section 11 (iv) requiring 21 year age gap between adoptive mother and son? The legal lacunae even within the limited scope of rights for transsexuals is glaring.

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<sup>8</sup> K Makkar, *Transgenders: Identity and Position in the Family Law in India*, *NLUJ Law Review* 5(1), SCCONLINE(last visited Jul 15, 2023) <http://www.sconline.com/DocumentLink/HE85W7cK>

<sup>9</sup> *Supriyo v. Union of India*, *supra* note 1.

<sup>10</sup> R Erande, *Sex change operation and its legal consequences*. PL (Dec. 9, 2007) <http://www.sconline.com/DocumentLink/tk2C18uM>.

The fact remains that the Hindu adoption law still excludes transgender people who wish not to reassign sex, are born with intersex genitalia or choose a gender identity apart from the binary male/female gender. Even if one imagines the possibility of a legislative reform that legalizes their inclusion to the entitlement of adoption rights, it is imperative that the statute appreciates the peculiar social realities of the transgender community, especially the socio-cultural communities of ‘third gender’ persons. The law should acknowledge the customs of adoptions that prevail among such communities before laying down the provisions. Take the case of ‘hijras’, one of the most prominent transgender communities in India. They observe a long tradition of customs that binds them with strong ties through formalization ceremonies observed by the community called ‘reet’, as pointed out in the NALSA judgement<sup>11</sup> as well, upon which the person is taken under the ‘guru’ being their mother and they become her customarily adopted children.<sup>12</sup> The question arises, if the NALSA judgement affirms the legal category of hijras and other socio-cultural gender groups, should their corresponding customs be given a place in such hypothetical legislation? Now, the effect of Section 4 of HAMA is to render all such necessarily followed customary practices, null and void so far as the adoption under Hindu Law is concerned. Admittedly, these customs may still be ‘conserved’ under Article 29 of the Indian Constitution. However, the larger question of legal enforceability and the allied institutional benefits looms unanswered. The law-makers, in either case, have to consider and evaluate the adoption provisions along with the sociological appreciation of the transgender community in India.

*B. The Juvenile Justice (Care and Protection of Children) Act, 2015*

In India, there are no separate adoption law frameworks for Muslims, Christians, and Parsis, thus, these religious denominations usually can adopt under the Guardians and Wards Act, 1890. However, following the Shabnam Hashmi Judgment<sup>13</sup> ruling, anyone, even Muslims, can adopt a child in accordance with the Juvenile Justice (Care and Protection of Children) Act's (hereinafter ‘JJ Act’) secular provisions. This legislation represents a path-breaking legal development in the secular law framework. Marking the legal acknowledgement of gender neutrality, Section 2(49) defines

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<sup>11</sup> Nalsa, *supra* note 5.

<sup>12</sup> K Makkar, *supra* note 8.

<sup>13</sup> Shabnam Hashmi v. Union of India, AIR 2014 SC 1281.

“prospective adoptive parents” to mean “a person or persons eligible to adopt a child as per the provisions of section 57”. The term ‘person’ denotes that any individual irrespective of religious identity or gender and sexual identity can become eligible for prospective adoption. A male, female, transexual, transgender, or a person falling under the larger label of ‘third gender’ can adopt under the statute. But, the lack of an express bar on the transgender person(s), does not translate into their equitable treatment in the legal provisions. The position in JJ Act, 2015 is quite clear. Both single and couple parents can become eligible provided they meet the criteria under Section 57, but Indian law doesn’t accord legitimacy to same-sex unions in terms of marriage nor is there any law on live-in relationships. What this means is that while a single transgender prospective parent may become eligible subject to CARA regulations<sup>14</sup>, a homo-sexual third-gender couple is and will not be eligible to adopt unless the legislature explicitly confers on them, this competency by legalising and legitimising same-sex union.<sup>15</sup> The majority in *Supriyo*, seems to hold the view that the “couple[s]” as laid down in Section 57(2) of JJ Act, 2015, is confined to married couples. The bench, further recognised that such restrictions are indirectly discriminatory,<sup>16</sup> and left them to be remedied through non-judicial intervention. Such evaluations for reform in the law are seen in the light of the 118th report of the Parliamentary standing committee<sup>17</sup> that observed that there is a need for bringing uniformity and harmony between the HAMA and the Juvenile Justice Act.

The need for relooking and completely overhauling the current legal framework for adoption that accords explicit recognition to transgender adoption and new forms of families has never been so evident. This has to firstly begin by accurately and precisely defining the term ‘transgender’ and opting out of a restrictive conception of gender straying away from the binary. Post-2014, the legislative efforts should have been devoted to bringing out the over-arching cascading effect of the judgement

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<sup>14</sup> Ministry of Women and Child Development, [https://wcd.nic.in/sites/default/files/NTESCL\\_636194033071198891\\_english%20regulation\\_0.pdf](https://wcd.nic.in/sites/default/files/NTESCL_636194033071198891_english%20regulation_0.pdf).

<sup>15</sup> *Parliament panel recommendation on adoption raises bigger question of recognising same-sex union: Experts*, THE ECONOMIC TIMES, (Aug. 9, 2022, 5:02 PM), [https://economictimes.indiatimes.com/news/india/parliament-panel-recommendation-on-adoption-raises-bigger-question-of-recognising-same-sex-union-experts/articleshow/93455670.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/india/parliament-panel-recommendation-on-adoption-raises-bigger-question-of-recognising-same-sex-union-experts/articleshow/93455670.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

<sup>16</sup> *Supriyo v. Union of India*, *supra* note 1

<sup>17</sup> Parliamentary Standing Committee on Personnel, Public Grievance, Law and Justice, [https://rajyasabha.nic.in/rsnew/Committee\\_site/Committee\\_File/ReportFile/18/164/118\\_2022\\_8\\_16.pdf](https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/18/164/118_2022_8_16.pdf) (last visited Jul. 15, 2023).

in personal laws as well, in order to give the fullest effect of Article 21 reaffirmed in the NALSA Judgement. That would translate into safeguarding the civil and personal freedom that each individual is conferred. This becomes even pertinent in the face of the same-sex marriage judgement, since through interpreting the NALSA Judgement liberally, the transgender community could have been incorporated into the framework of adoption, but consequent to the categorical denial of adoption rights to queer couples, only legislative instruments can remedy the lacunae. Evidently, the question of adoption is intimately tied to the question of same-sex marriage which shall be discussed in the following parts.

### III. MARRIAGE RIGHTS OF TRANSGENDER PERSONS

The historic judgement of the Supreme Court in the same-sex marriage case<sup>18</sup> seems to clarify the position on marriage rights transgender community but limits the rights to ‘heterosexual’ transgender couples. Marriage is universally acknowledged as a legally binding union between two individuals, bestowing upon them certain legal entitlements. The exercise of marital commitment is a voluntary choice, wherein individuals are empowered to solemnize their union. In India, marriage is regarded as a revered institution, safeguarded by constitutional provisions that prevent the State from encroaching upon this fundamental liberty. The diverse religious communities in India adhere to distinct personal laws that regulate the solemnization of marriages, each possessing its own unique prerequisites for a valid union. Regrettably, none of these personal laws currently extend recognition to marriages involving transgender individuals despite the recognition of same-sex consensual relationships. It may be pertinent to ask, whether the aforesaid recognition is sufficient to bring about legal equality for the LGBTQ+ community or is this merely a judicial step not taken to its natural and logical conclusion, that is the recognition of the Right to Marry? This part shall endeavour to critique the present legal framework and judicial developments in an attempt to answer the question so raised.

#### *A. Right to Marriage: A Fundamental Right*

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<sup>18</sup> Supriyo v. Union of India, *supra* note 1

The supreme court in a suo moto case of 2014 has categorically held that “*an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage.*”<sup>19</sup> In *Shafin Jahan v. Asokan K.M. and Ors.*<sup>20</sup>, it was found that Article 21 of the Indian Constitution is intimately linked to the freedom to marry whoever one chooses, as well as Article 16 of the Universal Declaration of Human Rights, which acknowledges the freedom to marriage as a basic human right. Additionally, in Justice K. Puttaswamy Judgment<sup>21</sup>, wherein the Supreme Court made reference to the *Obergefell v. Hodges*<sup>22</sup>, the US Supreme Court held that it would be contradictory to acknowledge a Right to Privacy for some parts of the domestic life but not for the decision to form the union that is the foundation of the family in society, a marriage. Transgender individuals cannot be denied the benefits of the societal institutions that are already recognized since the Indian Constitution is an empowering statute that promotes their integration into society.

It could have been argued that if the Right to Marriage is a fundamental right then what was the rationale behind exclusion of the LGBTQ community. In the *Navtej Singh Johar* decision<sup>23</sup>, the Court observed that depriving two consenting individuals of their homosexual acts is depriving them of their Right to Equality granted by the Indian Constitution by criminalizing their behavior violates that right. People from LGBTQ community in India are entitled to all of the same rights as other citizens, and they will not be subject to any form of discrimination. They acknowledged the LGBT community's right to union under Article 21 of the Constitution. Although later in the judgment, the Chief Justice and Justice A.M. Khanwilkar stressed, “*when we say union, we do not mean the union of marriage, though marriage is a union.*” Furthermore, the CJI made it clear that topics like marriage, adoption, maintenance, etc. are outside the purview of this hearing. Regrettably, no discernible shift in stance was noted in the recent same-sex marriage case as well. Despite acknowledging the existence of a right to a relationship

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<sup>19</sup> Sujoy Dhar, *Indian woman says gang-raped on orders of village court*, REUTERS (Jan. 23, 2014, 9:23 PM), [https://www.reuters.com/article/idUSBREA0M0VH/#:~:text=KOLKATA%2C%20Jan%2023%20\(Thomson%20Reuters,police%20officer%20said%20on%20Thursday\)](https://www.reuters.com/article/idUSBREA0M0VH/#:~:text=KOLKATA%2C%20Jan%2023%20(Thomson%20Reuters,police%20officer%20said%20on%20Thursday)).

<sup>20</sup> *Shafin Jahan v. Asokan K.M and Ors*, 2018 SCC OnLine SC 201.

<sup>21</sup> *Justice K. Puttaswamy v. Union of India*, (2018) 10 SCC 1.

<sup>22</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>23</sup> *Navtej*, *supra* note 2.

under Article 21 of the Indian Constitution, the majority refused to recognize the Right to Marriage under the same head.<sup>24</sup>

The same-sex marriage case, primarily addressing the marriage rights of same-sex couples, carried significant ramifications for homosexual transgender individuals' marital rights. It employed a narrow interpretation of both the Navtej Singh Johar and the Puttuswamy judgments, asserting that the Right to Marry takes precedence over the state as an institution.<sup>25</sup> There are broadly two issues with this line of argumentation. Firstly, despite the recognition of marriage rights for hetero-normative transgender couples, the court paradoxically withheld such recognition from homosexual transgender couples, thereby introducing a dichotomy within the transgender community solely based on their sexual orientation. This stems from the fact that 'transgender' includes both the persons who have and haven't undergone the Sex Reassignment Surgery (SRS), and as per the present state of law, the people who have had undergone SRS would have the right. This distinction further carries broader implications for their Right to Equality under Article 14 and 15 of the constitution as there no intelligible differentia<sup>26</sup> with this classification based solely on the sexual orientation of the transgender individual. Secondly, by validating hetero-trans relationship<sup>27</sup>, they have tacitly agreed that even such forms of marriage predate state because otherwise they could not have been validated, making the entire argument contradictory. Consequently, the highly awaited judgment has slowed down the progress of the LGBTQ+ rights movement significantly.

### B. Purposive Interpretation of "Bride"

It is pertinent to note that out of The Special Marriage Act, 1954 (hereinafter 'SMA'), The Hindu Marriage Act, 1955 (hereinafter 'HMA'), The Indian Christian Marriage Act, 1872 (hereinafter 'ICMA'), The Parsi Marriage and Divorce Act, 1936 (hereinafter 'PDMA'), none of them explicitly mention the requirement of a male and a female for a marriage. The acts only mention the terms "bride" and "groom" while discussing the requirement of a valid marriage. The reality of gender identities extending beyond binary and the complexities posed by the same was aptly highlighted by

<sup>24</sup> Supriyo v. Union of India, *supra* note 1, at 52.

<sup>25</sup> Supriyo v. Union of India, *supra* note 1, at 14.

<sup>26</sup> R.K Garg v. Union of India (1981) 4 SCC 675.

<sup>27</sup> Supriyo vs Union of India, *supra* note 1, at 119.

the Chief Justice of India in the ‘same-sex marriage’ case, where he categorically stated “*So, even when the Special Marriage Act says man and woman, the very notion of a man and a woman is not an absolute based on genitals*”. The requirements for legally binding marriages as stated in Section 4 of the SMA<sup>28</sup>, Section 60 of the ICMA<sup>29</sup>, Section 5 of the HMA<sup>30</sup>, and Section 3 of the PMDA<sup>31</sup> specifies the legal minimum consent age for marriage, which is 18 for females and 21 for males, other than that, the requirement of two separate genders is not specifically mentioned.

In a decision by Madras High Court,<sup>32</sup> Arunkumar, the petitioner, married Sreeja, a transwoman, in compliance with Section 7 of the Hindu Marriage Act, and suitable Hindu ceremonies and customs. The Tuticorin registrar, however, declined to record the marriage as per the Section 8 of the Hindu Marriage Act. The Madras High Court's Justice Swaminathan ruled that as long as both parties embrace Hinduism and the marriage has been solemnized in line with that religion, the union of a male and a transwoman is legal. Based on previous judgments of NALSA v. Union of India<sup>33</sup>, Justice K. Puttaswamy v. Union of India<sup>34</sup>, and Navtej Singh Johar v. Union of India<sup>35</sup>, the Court reiterated that transgender people were allowed to select their own gender.

In addition, the Court ruled that the term “bride” as it is used in the Hindu Marriage Act must be understood in the context of the relevant legal framework and cannot have a predetermined meaning. The Court came to the conclusion that Ms. Sreeja's fundamental rights under Articles 14, 19(1)(a), 21, and 25 of the Indian Constitution would be violated if their marriage were not registered. This is the first court decision in India to uphold the constitutional right to marriage for transgender individuals and to rule that transgender people who identify as women fall under the definition of “bride” under the Hindu Marriage Act. By upholding Sreeja's ability to self-identify as a woman, the Court upheld the rights of other intersexes and transgender people who identify their gender as a woman to be included in the term “bride”. This was reinforced in a recent same-sex marriage case where the court

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<sup>28</sup> The Special Marriage Act, 1954, § 4, No. 43, *Acts of Parliament, 1954 (India)*.

<sup>29</sup> The Indian Christian Marriage Act, 1872, § 60, No. 15, *Acts of Parliament, 1872 (India)*.

<sup>30</sup> The Hindu Marriage Act, 1955, § 5, No. 25, *Acts of Parliament, 1955 (India)*.

<sup>31</sup> The Parsi Marriage and Divorce Act, 1936, § 3, No. 3, *Acts of Parliament, 1936 (India)*.

<sup>32</sup> Arunkumar v. The Inspector General of Registration and Ors, AIR 2019 MADRAS 265.

<sup>33</sup> Nalsa, *supra* note 5.

<sup>34</sup> Justice K. Puttaswamy, *supra* note 18.

<sup>35</sup> Nalsa, *supra* note 5.

highlighted the significance of a coherent interpretation of prevailing marriage legislation and the Transgender Persons Act. It was underscored that the current marriage laws in India predominantly authorize unions originating from heterosexual relationships, delineated as involving a “man” and a “woman”, a “husband” and a “wife” or a “bride” and “bridegroom”. In a welcome step, the court upheld limiting these construals would run counter to the Transgender Persons Act, which explicitly prohibits discrimination against transgender persons.

As far as Islamic laws on Marriage rights are concerned, we can look at our neighboring country, Pakistan, which has the second-largest Muslim population in the world and has taken a progressive step in this direction. The Pakistani Sharia Board has issued a fatwa<sup>36</sup> or ruling, granting transgender persons the legal right to marry, inherit property, and have funerals under Islamic law. According to the ruling, “A transgender person with male characteristics in his body may marry a transgender person with female characteristics on her body.” Transgender communities in Pakistan have praised this decision despite the fact that it is unclear to what “indications” the fatwa is referencing. They have also vowed to seek courts to make the fatwa legal. Islamic authorities frequently issue fatwas in accordance with Islamic law, but until the government formally adopts them, these fatwas have no legal force.

The LGBTQ+ community now enjoys the ability to engage in sexual relations with whatever partner they choose thanks to the repeal of Section 377 of the IPC, but marriage is still a dilemma for them. This is true, even after the enactment of the special Transgender Persons Act, in 2019– which itself is the third bill to have been finally approved– that painfully lacks any mention of the marriage, adoption and maintenance rights for transgender persons. The liberal and purposive interpretation of the word “bride” is a progressive step. The fundamental issue still remains that this interpretation pertains to only hetero-normative couples including transgender individuals and court refused to recognise homosexual transgender relationships.<sup>37</sup>

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<sup>36</sup> M Bukhari, *Pakistani clerics declare transgender marriages legal under Islamic law*, REUTERS, (Jun. 27, 2016, 8:56 PM) <https://www.reuters.com/article/us-pakistan-transgender-idUSKCN0ZD11Z>.

<sup>37</sup> *How marriage may protect transgender couples*, Michigan State University (Jul. 25, 2017), <https://msutoday.msu.edu/news/2017/how-marriage-may-protect-transgender-couples#:~:text=%E2%80%9CPast%20research%20suggests%20marriage%20is,professor%20of%20sociology%20and%20principal>.

#### IV. CROSS JURISDICTIONAL ANALYSIS AND LEGAL RECOMMENDATIONS

Having dealt with the rights of the transgender community with regards to marriage and adoption in lieu of a number of court rulings, it is evident that the ongoing struggle to protect transgender rights necessitates more comprehensive efforts beyond the purview of a singular governmental branch, namely the judiciary. The current state of affairs calls for amendments to existing laws and the introduction of new legislation in order to address existing ambiguities, with some legal and policy considerations as a foundation of these changes. As it was recommended by the Parliamentary standing committee on Law and Personnel, “*there was a need to harmonize the Hindu Adoptions and Maintenance Act and the Juvenile Justice Act to bring out a uniform and comprehensive legislation on adoption that should cover all religions and the LGBTQ (lesbian, gay, bisexual, transgender and queer) community.*” It is well known that the transgender community has been caring for orphans since ancient times, and data has repeatedly shown that there is no causal relationship between the gender of the parent and the quality of parenthood, care and nurturing atmosphere they can provide to the child.

The parliamentary panel's study proposed that the new law provides for distinct adoption processes for children living in institutions and those who are adopted by families. The Committee believes that the LGBTQ community should be covered by the new legislation. Although this is a progressive step towards the desired direction, the committee failed to acknowledge the need for legalizing LGBTQ+ union<sup>38</sup>. The committee even went on to encourage more people from the LGBTQ community to adopt children. Agreeably, any person may adopt under either the Juvenile Justice Act or the Hindu Adoptions and Maintenance Act because the law neither permits nor forbids adoption based on sexual orientation<sup>39</sup>. However, the problem lies in the fact that for the purpose of adoption, neither LGBTQ+ marriage nor live-in relationships are permitted by law which translates to the fact that only as a single parent, can an LGBTQ person submit an adoption application to the Central Adoption Review

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<sup>38</sup> Pew Research Centre, <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/>.

<sup>39</sup> D Munjal & P Prakash, *Explained | Toward legalising same-sex marriage*, THE HINDU (Nov. 27, 2022, 6:35 PM) <https://www.thehindu.com/news/national/explained-toward-legalising-same-sex-marriage/article66193038.ece>.

Authority (CARA) for the purpose of adopting a child<sup>40</sup>. Keeping this in mind, the first policy consideration to be kept in mind while formulating legislations regarding the same is to place the LGBTQ couples on the same pedestal as heterosexual couples. In practice, this will entail maintaining the same procedures for heterosexual and homosexual couples without discriminating or inculcating unreasonable expectations as requirements for the LGBTQ community which will indirectly make the process of adoption tedious for them. This is in line with the Committee's recommendation of adopting a universal civil code on child adoption in India, and the adoption process be made more flexible, and straightforward and require fewer documents.

#### *A. India and the world*

India, among other countries, is far behind in this marathon of upholding LGBTQ rights and especially transgender rights, with regard to marriage and adoption. Countries like Australia, Belgium, Netherlands and the United States are among the thirty nations that have legalized LGBTQ+ unions with many other Western democracies that don't have legislation for recognizing marital equality accept civil unions while on the other hand, a whopping majority of almost 170 countries including India has not permitted and upheld LGBTQ marriage and adoption rights<sup>41</sup>. International institutions, like the United Nations, have passed resolutions in favor of LGBTQ+ rights with the objective of plummeting violence and discrimination against them but this dream is still far from reality. In addition to calling for the same benefits and protections for all, many UN human rights mechanisms have urged all the states to recognize LGBTQ+ relationships legally, whether through other arrangements like civil partnerships or by allowing same-sex marriage. As a result, an increasing number of states are passing legislation in this direction. Several subsequent UN documents that have expanded and cascaded down these rights include the Conventions that safeguard women, individuals with disabilities, and migratory workers as well as the International Covenant on Civil and Political Rights

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<sup>40</sup> Ambika P et al., *Allow LGBTQ community members to adopt child: Parl panel* | *India News - Times of India*, THE TIMES OF INDIA (Aug. 9, 2022), <https://timesofindia.indiatimes.com/india/allow-lgbtq-community-members-to-adopt-child-parl-panel/articleshow/93441324.cms>.

<sup>41</sup> CFR.org Editors, *Marriage Equality: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (Dec. 22, 2022), <https://www.cfr.org/backgrounder/marriage-equality-global-comparisons>.

and the International Covenant on Economic, Social, and Cultural Rights<sup>42</sup>. However, from another perspective, India can use this to its advantage by inculcating the spirit of the laws from different countries and bringing about a bulletproof legislation for the same.

*B. Countries that legitimized same-sex unions and adoptions by LGBTQ+ adoptions*

There are currently 32 countries where LGBTQ+ marriage has been legalized either through legislations or through court decisions<sup>43</sup> and all of these countries have set precedent for India to be inspired from. The Netherlands became the first nation in the world to extend civil marriage rules to LGBTQ+ couples when the law went into effect on April 1, 2001<sup>44</sup>. In the Netherlands, the same sex couples cannot be legally refused by the marriage officiants to solemnize their marriage<sup>45</sup>. A co-mother can legally become a child's mother as of April 2014, without going through the court procedures.<sup>46</sup> She can either recognize the child through the prescribed procedure which depends on the sperm donor being anonymous or known to the parents or be considered the child's parent automatically from birth depending on the circumstance while registering the birth.<sup>47</sup> In the case of a child being raised by two men who are in a relationship, and one of them is the child's father, only that man is recognised as the child's legal father. The father's partner can, however, establish paternity through either adoption or affidavit.<sup>48</sup>

In Australia, a legislation recognizing the LGBTQ+ marriage was passed in 2017 through which the words "man and a woman" were removed from the Act's definition of "marriage," and their place

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<sup>42</sup> United Nations, <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights>.

<sup>43</sup> Human Rights Campaign, *Marriage Equality Around the World*, HUMAN RIGHTS CAMPAIGN (2022), <https://www.hrc.org/resources/marriage-equality-around-the-world>.

<sup>44</sup> BRITANNICA, *same-sex marriage*, <https://www.britannica.com/topic/same-sex-marriage>.

<sup>45</sup> Government of Netherlands, <https://www.government.nl/topics/adoption/adopting-a-dutch-child>, (last visited Jul. 15, 2023).

<sup>46</sup> Center for Adoption Policy, *Overview of Dutch Adoption Policy*. (2020) <http://www.adoptionpolicy.org/pdf/eu-netherlands.pdf>.

<sup>47</sup> K Williams, *Journal of Marriage and Family*, (Jul. 15, 2023) [https://en.wikipedia.org/wiki/Journal\\_of\\_Marriage\\_and\\_Family](https://en.wikipedia.org/wiki/Journal_of_Marriage_and_Family).

<sup>48</sup> OECD, *June 2020 How does the Netherlands compare?* (2020) <https://www.oecd.org/netherlands/OECD-LGBTI-2020-Over-The-Rainbow-NETHERLANDS.pdf>.

was taken by the gender-neutral phrase “2 individuals”<sup>49</sup>. The provision that barred LGBTQ+ marriages from occurring abroad from being recognised in Australia was repealed. The law has led to the following definition of marriage in Australia: Marriage is the exclusive, voluntarily entered-in relationship of two persons for all time. Every marriage ceremony must include these words, or words to that effect, according to Section 46 of the Marriage Act of 1961. In all Australian jurisdictions, LGBTQ+ adoption has been permitted since April 2018. Even adoption by step-parents is permitted too in jurisdictions where LGBTQ+ couples may adopt their children jointly which makes the law all the more desirable. Lesbian co-mothers and gay co-fathers may use stepparent adoption provisions in all Australian jurisdictions, despite the fact that in some states, female couples may not actually need to adopt their children because the law there presupposes the mother’s female partner to be a legal parent as long as she voluntarily agreed to the conception.<sup>50</sup>

In the United States, the landmark civil rights case *Obergefell v. Hodges*, the Supreme Court ruled that the fundamental right of LGBTQ+ couples to be married under the same conditions as opposite-sex couples, with all the rights and obligations that come with it, is protected by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution<sup>51</sup> in June 2015. This ushered in a shift from the preceding situation where LGBTQ+ couples, for example, in states without marital equality, couples were not allowed to jointly file taxes, inherit a partner’s assets without being obligated to pay an estate or gift tax, or make critical medical decisions for their partners<sup>52</sup>. Seven years after the Supreme Court ruled that such unions must be given legal recognition throughout the nation due to the legalization of LGBTQ individuals, the United States Congress is eventually expected to pass legislation that would formalize validation of LGBTQ+ marriages under federal law, strengthening the right of LGBTQ couples to get married<sup>53</sup>. On June 26, 2017, the US Supreme Court overturned an Arkansas Supreme Court decision<sup>54</sup> that had

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<sup>49</sup> Revised Explanatory Memorandum: Marriage Amendment (Definition and Religious Freedoms) Bill (2017), No. 45, Acts of Parliament, 2017 (Australia).

<sup>50</sup> THE AGE, <https://www.theage.com.au/national/gay-adoption-law-to-stay-20040427-gdxqrm.html>.

<sup>51</sup> *Id.*

<sup>52</sup> German Lopez, *Same-sex marriage in the US, explained*, VOX (Jan. 30, 2015, 1:26 AM), <https://www.vox.com/2015/6/26/18093652/same-sex-marriage>.

<sup>53</sup> Rob Garver, *Same-Sex Marriage Bill Advances in US Congress*, VOA (Jul. 24, 2022, 3:00 AM), <https://www.voanews.com/a/same-sex-marriage-bill-advances-in-us-congress-/6670650.html>.

<sup>54</sup> Andrew Demillo, *Supreme Court sides with same-sex couples in Arkansas suit*, AP NEWS (Jun. 27, 2017), <https://apnews.com/article/41d066b9d8c349b3ab94af116c35f341>.

upheld a rule requiring the disclosure of parents' genders on birth certificates. Both LGBTQ+ spouses may now be mentioned on birth certificates pursuant to a landmark SCOTUS decision<sup>55</sup>. These court decisions made LGBTQ+ adoption legal throughout all 50 states<sup>56</sup>. The disparity in the US's adoption and marriage rules for homosexual couples continues to be a problem. As of January 2021, each state will be entitled to enact its own rules regarding parental presumption in LGBTQ+ couples, second-parent adoption, and LGBTQ discrimination in foster care. Many states either have no legislation against discrimination or continue to openly permit it in the foster care and adoption systems. Most jurisdictions do not mandate that foster parents receive training on raising LGBTQ children.<sup>57</sup> Additionally, few jurisdictions mandate foster parents to receive training on how to raise LGBTQ children. Regardless of whether a couple is legally married, many states do not allow second-parent adoptions for LGBTQ+ partners. In contrast to opposite-sex marriages, where both parents are married, LGBTQ+ marriages do not automatically assume that a parental relationship exists with any children born of that union.<sup>58</sup>

### C. *Legal and Policy Recommendations and the way forward*

After analyzing all these different types of laws existing in the foreign jurisdictions, it is evident that India as a country has a host of precedents at its perusal to devise just the laws that are fit for its socio-legal circumstances. Since the entire debate around the LGBTQ+ rights are still tabooed and stereotyped especially in the marginalized sections, the uniform legislations need to be devised with utmost sensitivity and fairness while also giving due care to the diversity of India. This is especially after the judiciary categorically declining to intervene to give inclusive interpretations to statutes and

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<sup>55</sup> *Roe v. Wade*, 410 U.S. 113, 1973.

<sup>56</sup> Sarah Warbelow, Courtney Avant & Colin Kutney, 2020 *State Equality Index*, HUMAN RIGHTS CAMPAIGN FOUNDATION (2020) <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/resources/HRC-SEI2020.pdf?mtime=20210124164058&focal=none>.

<sup>57</sup> A. E. Goldberg, L. A. Kinkler, H. B. Richardson, & J. B. Downing, *Lesbian, Gay, and Heterosexual Couples in Open Adoption Arrangements: A Qualitative Study*. WORD PRESS (2011, April). <https://wordpress.clarku.edu/agoldberg/files/2012/03/GoldbergKinklerRichardsonDowningJMF2011.pdf>

<sup>58</sup> 'Overview of Lesbian and Gay Parenting, Adoption and Foster Care, (1999), <https://www.bsu.edu/-/media/WWW/DepartmentalContent/CounselingCenter/PDFs/SAFEZONE%20Resources/Overvien%20lesbian%20and%20Gay%20parenting%20and%20adoption.pdf>.

the now the ball completely lies in the Legislature's courts. Since the subject of transgender rights has always been a point of contention, legal solutions alone won't suffice in creating a conducive environment for the holistic development of the LGBTQ+ community.

The following are certain legal recommendations that can be incorporated in the current legal and legislative framework:

1. The most pressing suggestion remains legalising homosexual unions in the light of the implications it has to ensure rights and securities to the LGBTQ unions.
2. The second most important suggestion pertains to validating adoption by unmarried transgender hetero-normative and homosexual couples.
3. Maintaining the same procedures for heterosexual and homosexual couples by adopting a Uniform Civil Code without discriminating or inculcating unreasonable expectations as requirements for the LGBTQ community which will indirectly make the process of adoption tedious for them.
4. Section 11 of HAMA requiring 21 year age gap between the parent and adopted child should be rephrased as to cater to the legal lacunae created by the non-inclusive language of the provision, making it suitable for the complicated scenarios that may arise including trans couples.
5. The law must also allow for co-parent adoption, also known as second-parent adoption, which enables one parent to adopt the biological child of their LGBTQ+ partner without removing their partner's parental guardianship of the child. This is in addition to safeguarding the rights of the LGBTQ+ community to marry and adopt somebody else's children.<sup>59</sup>
6. As was conspicuous from the example of United States, judicial determination of LGBTQ+ rights alone would not be sufficient and separate legislations that clearly lay down rules and procedures for the couples have to be formulated with adequate provisions to avoid cumbersome or tedious documentations and also inconsistent provisions across religions.

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<sup>59</sup> NATIONAL CENTRE FOR LESBIAN RIGHTS, [http://www.nclrights.org/wp-content/uploads/2013/07/2PA\\_state\\_list.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf).

7. Lastly, efforts will have to be extended beyond introducing legislations as change needs to be affected on the ground level and for that to be possible, extensive nation-wide awareness programs and workshops coupled with suitable legislations will have to be implemented.

There has been considerable public discourse surrounding the perceived notion that transgender or gay couples are unsuitable as parents, fueled by unfounded concerns about the potential influence of their gender and sexual predisposition on their children's sexual orientation. However, these assertions are entirely misleading and lack rational basis, as extensive scientific research consistently demonstrates that gay and lesbian parents are just as competent and capable as heterosexual parents<sup>60</sup>. Furthermore, the psychological well-being and adjustment of children raised by gay and lesbian parents are comparable to those raised by heterosexual parents, which was also observed by the Chief Justice of India in the *same-sex marriage case*.<sup>61</sup> It is worth noting that the current legal framework does not impose any restrictions on single gay or lesbian or transgender individuals for adopting children. Therefore, it is preposterous to maintain that the mere recognition of non-heteronormative couple, as opposed to single LGBTQ+ parent, would unusually and unnaturally affect the sexual orientation of the child, or gender for that matter.

The judiciary has conveniently shifted the burden to the legislature to formulate laws that are inclusive under the *same-sex marriage case*, which has pushed the trans rights movement backwards. The reforms in marriage must also be accompanied by corresponding legal reforms that are inclusive of the wider definition given in the NALSA Judgement. The efforts will also be expanded to the academic for, primarily to change the narrative surrounding trans rights as the current perspective is pre-dominantly informed by heterosexual individuals. Although they may point out the inconsistency and lacuna in the law but the discourse necessarily has to be addressed by the people who have the actual self-reflective experience. While this paper essentially focusses on a specific facet of the broader discourse on transgender community rights, the field in its entirety remains rather under-explored in India. Efforts have to be made to tap into a plethora of other rights of the community, most essentially their

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<sup>60</sup> Obergefell v. Hodges, *supra* note 22.

<sup>61</sup> Supriyo v. Union of India, *supra* note 1.

right to education<sup>62</sup> right to health<sup>63</sup> and right to safe workplace environment<sup>64</sup> especially in the current Indian context. Reverting back to the theme at hand, legal remedies alone won't be sufficient to create a supportive atmosphere for the holistic growth of the LGBTQ+ community because transgender rights have long been a contentious issue. Concluding by quoting Justice Kaul, “*The capacity of non-heterosexual couples for love, commitment and responsibility is no less worthy of regard than heterosexual couples. Let us preserve this autonomy, so long as it does not infringe on the rights of others. After all, 'it's my life'.*”<sup>65</sup>

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<sup>62</sup> Midhun Mohan, ‘No Space for Some: Transgender and Non-Binary Persons’ Access to Higher Education in Science in India – TE | SF INDIA (Apr. 27, 2022), [https://tesfindia.ihs.co.in/10\\_no-space-for-some-transgender/](https://tesfindia.ihs.co.in/10_no-space-for-some-transgender/).

<sup>63</sup> Joshua D Saferet et al., ‘Barriers to Healthcare for Transgender Individuals’ (2016) 23 Current Opinion in Endocrinology & Diabetes and Obesity 168, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4802845/>.

<sup>64</sup> *Accelerating Trans Inclusion in the Workplace in India*, COMMUNITY BUSINESS (May. 17, 2023), <https://www.communitybusiness.org/latest-news-publications/accelerating-trans-inclusion-workplace-india>.

<sup>65</sup> Supriyo v. Union of India, *supra* note 1.

## ARTICLE

**THE SUPREME COURT'S RESPONSE TO INTERNET SHUTDOWNS: A  
HOLE IN THE DOUGHNUT OF RIGHTS***Anshul Dalmia\**

## ABSTRACT

*The State of Jammu and Kashmir has seen the largest internet shutdown faced by the citizens in a democratic country. Anuradha Bhasin and Ghulam Nabi Azad approached the Supreme Court, challenging this shutdown on the grounds that their fundamental right of speech and expression as well as their freedom to trade were curtailed. Questions were also raised on the Union government's arbitrary imposition of restrictions through Section 144 of the Criminal Procedure Code coupled with their reluctance in producing these orders to facilitate an effective judicial review. The Court in return gave a judgment that upheld this case as a violation of fundamental rights and provided constitutional protection to these intrinsic rights through the medium of the internet. However, even after recognising the wrong, there was no remedy provided. The Court ordered the Review Committee, an executive body to take the final decision with respect to the violations of fundamental rights. While attempting to provide safeguards to prevent the dictatorial imposition of restrictions, the Court did not adjudicate on the constitutionality of the shutdown, leaving the petitioners with no effective relief. This paper attempts to highlight these errors that have led to a gross miscarriage of justice for the residents of the State. A closer look reveals a rise of an Executive court that provides great deference to the government while relinquishing its constitutional duty. This paper aims to analyse the legality of the shutdown while propagating a need to include the right to internet access as a fundamental right. In a technologically driven world, it becomes imperative that this judgment is scrutinised closely and effectively critiqued.*

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**Keywords:** *Internet Shutdowns, Jammu and Kashmir, Executive Court, Review Commission, Right to Access the Internet*

## I. INTRODUCTION

Recently, a three-judge bench of the Supreme Court refused to enforce guidelines on internet shutdowns which sought the compliance of an earlier judgment *Anuradha Bhasin v. Union of India* ('Anuradha Bhasin').<sup>1</sup> While rejecting this petition, the Court stated that it had committed a mistake while issuing notice for this challenge.<sup>2</sup> This paper argues that this is not the only mistake it has committed while evaluating internet shutdowns on the touchstone of the Constitution.

The historical narrative surrounding the State of Jammu and Kashmir ('J&K') has been unpleasant.<sup>3</sup> Since the partition of the country in 1947, there emerged several disputes with respect to the ownership of the State with Pakistan, the neighbouring country. Article 370 of the Indian Constitution was a product of the Instrument of Accession accepted by Lord Mountbatten.<sup>4</sup> It provided legal recognition to the sui generis nature between the State of J&K and the Union.<sup>5</sup> The grant of this 'special status' to the State included the power to have a separate Constitution and be governed by their own laws.<sup>6</sup>

However, on August 5, 2019, the country witnessed changes that redefined the fundamental relationship between the State of J&K and the Central Government.<sup>7</sup> These landmark events included the revocation of Article 370 of the Constitution and the bifurcation of the State of J&K into two union territories.<sup>8</sup> There was a sudden shift from a partly autonomous State to a territory governed wholly by the Central Government.

<sup>1</sup> *Anuradha Bhasin v. Union of India*, AIR 2020 SC 1308.

<sup>2</sup> Abhimanyu Hazarika, *Supreme Court rejects plea to enforce guidelines on internet shutdowns; says it earlier issued notice by "mistake"*. BAR AND BENCH, (Dec. 7, 2023), <https://www.barandbench.com/news/supreme-court-rejects-plea-guidelines-internet-shutdowns-issued-notice-mistake>.

<sup>3</sup> Sumantra Bose, *Kashmir at the Crossroads: Problems and Possibilities*, 32(1) SECURITY DIALOGUE, 41, 42 (2001).

<sup>4</sup> Venkatesh Nayak, *The Backstory of Article 370: A True Copy of J&K's Instrument of Accession*, THE WIRE, (Aug. 5, 2019), <https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india>.

<sup>5</sup> Shrimoyee Ghosh, *One Nation, One Flag, One Constitution? Internal, Bilateral or International*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY (Sept 26, 2019), <https://indconlawphil.wordpress.com/2019/09/26/one-nation-one-flag-one-constitution-ii-internal-bilateral-or-international/>.

<sup>6</sup> INDIA CONST. art. 370.

<sup>7</sup> The Constitution (Application to Jammu and Kashmir) Order, 2019.

<sup>8</sup> *Ibid.*

J&K has experienced many instances of suppression and suspension of the prominent civil and human rights of the citizens, as it has been the site to multiple reported killings, massacres, bomb attacks, and to being in a constant threat of cross – border terrorism.<sup>9</sup> However, after the abrogation of Article 370, the State saw a widespread imposition of restrictions on transportation and communication.<sup>10</sup> This indefinite suspension of internet services led to an environment marked with multiple violations of the sacrosanct fundamental rights of the right to freedom of speech and expression and the right to trade.<sup>11</sup> The curtailment of these rights led to a challenge in the Supreme Court, with the Union justifying their actions on grounds of national security and prevention of internal militancy.<sup>12</sup>

The Supreme Court, through the judgment of Anuradha Bhasin, held that the internet shutdown had a devastating effect on a number of fundamental rights.<sup>13</sup> These rights are often exercised over the medium of the internet and thus it should be constitutionally protected.<sup>14</sup> Additionally, the court ruled that the State's administrative action in blocking communication services was illegal and had to be founded on the tenets of proportionality, reasonableness and necessity.<sup>15</sup> The judgment briefly traced the jurisprudence surrounding Section 144 of the Criminal Procedure Code and rejected the Union's argument that it was exempt from having to publicly produce the orders on grounds of national security.<sup>16</sup> Unfortunately, after having spoken so extensively on the law, the Court refrained from applying the same to the facts of the case.

This paper critiques the Court's position in interpreting the ramifications of the illegal State action taken in J&K. The Court reinforced its complete faith in the Review Committee, an executive body of the Central Government to evaluate and scrutinise the orders passed by the District Magistrates. Hence, part two of the paper examines this transcendental shift of the Supreme Court into an executive court by reposing complete faith in the Union Government. This judgment, while attempting to be a panacea to the longest internet shutdown, leaves several questions

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<sup>9</sup> Bose, *supra* note 3..

<sup>10</sup> GLOBAL FREEDOM OF EXPRESSION: COLUM. UNIV., *Bhasin v. Union of India*, <https://globalfreedomofexpression.columbia.edu/cases/bhasin-v-union-of-india/>.

<sup>11</sup> Suhrith Parthasarathy, *The Kashmir Internet Ban – What is at Stake?*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY (Dec 25, 2019), <https://indconlawphil.wordpress.com/2019/12/25/guest-post-the-kashmir-internet-ban-whats-at-stake/>.

<sup>12</sup> Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, ¶¶ 1 -3.

<sup>13</sup> Ibid at ¶¶ 19 – 27.

<sup>14</sup> Ibid at ¶ 28.

<sup>15</sup> Ibid at ¶ 34 onwards.

<sup>16</sup> Ibid at ¶¶ 11 – 18.

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unanswered. Therefore, part three of the paper aims to bridge these gaps while analysing the constitutionality of the shutdown of these communication services. However, on the other hand this judgment adds several facets to the present constitutional jurisprudence. While it extends constitutional protections to fundamental rights over the internet, part four evaluates whether the right to access the internet could be extended the same protection.

## II. THE DANGEROUS GRADUAL SHIFT TO AN EXECUTIVE COURT

The growth of the executive court began in the early 1980's where the Apex Court started usurping power beyond its domain citing 'public interest'.<sup>17</sup> This was motivated by the fact that the Court needed to move away from a conservative institution to the last resort for the the oppressed and the marginalised.<sup>18</sup> The Courts traversed this path by diluting evidentiary standards and engaging in several administrative activities.<sup>19</sup> The Court had the inefficient State to blame for this judicial activism that expanded the judges' discretion and duty in providing remedies.<sup>20</sup> However, what started as bridging a gap and filling a vacuum created by an inactive government has now turned into what is recognisable as the executive itself. This leads to an environment of hesitation and the subsequent nonchalance by constitutional courts in preserving intrinsic civil liberties showcases the continuation of arbitrary state action.

Thus, the executive court can be defined to be briefly –

A court whose moral and political compass finds itself in alignment with the government of the day, and one that has no compunctions in navigating only according to that compass. Instead of checking and limiting government power, an executive court finds itself marching in lockstep with the government, and being used

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<sup>17</sup> Pratap Bhanu Mehta, *India's Unlikely Democracy: The Rise of Judicial Sovereignty*, 18(2) JOURNAL OF DEMOCRACY 72 (2007).

<sup>18</sup> Ibid at Page 70 – 71.)

<sup>19</sup> Ibid at Page 73 – 77.)

<sup>20</sup> Ibid at Page 79 onwards.)

to set the seal of its prestige upon more controversial parts of the government's agenda.<sup>21</sup>

It is contended that the Anuradha Bhasin judgment highlights the Supreme Court exhibiting the attributes of an Executive Court as described above. The Court delegates its sacrosanct responsibility of adjudicating the violations of the fundamental rights to the Review Committee,<sup>22</sup> an executive body created by the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules ('Suspension Rules'), which were passed under the Telegraph Act.<sup>23</sup> Thus, it is clear that the Court abdicated its duty as it provided the Review Committee the final word in matters of internet shutdown.

The Court did not concern itself to look at the constitutionality of the Committee that was set up under these legislations.<sup>24</sup> A mere glance at the composition of both the Central and State Review Committees would highlight the inclusion of several Government Secretaries and representatives as members of this body, making it extremely difficult for an unbiased decision regarding internet suspension to be made.<sup>25</sup> Thus, while the Court orders the Committee to review all the internet suspension orders and emphasises on swift decisions and several other procedural safeguards, it fails to realise that in all practicality, the State itself is being a judge of its own cause. Moreover, the Court abdicated its responsibility in awarding a remedy to the multiple violations of the fundamental freedoms, that they themselves recognised and had upheld. The Court reposed faith in a government that violated these civil rights and delegated the executive to adjudicate executive action itself.

It is imperative to note that the Court allowed for a prospective adjudication of the internet suspension orders and not retrospective.<sup>26</sup> This allowed the Court to lay down abstract guiding principles while not adjudicating on the constitutionality of the various orders that were challenged. These orders were never even produced before the Court as a result of the State not being ordered to do so. The Court didn't realise that, if the orders restricting fundamental rights

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<sup>21</sup> Gautam Bhatia, *The fear of Executive Courts*, THE HINDU, (Dec. 14, 2018, 11: 53 PM), <https://www.thehindu.com/opinion/lead/the-fear-of-executive-courts/article25735185.ece>.

<sup>22</sup> Anuradha Bhasin v. Union Of India, AIR 2020 SC 1308, ¶¶ 85 – 87.

<sup>23</sup> The Indian Telegraph Act, 1885, § 7.

<sup>24</sup> Anuradha Bhasin v. Union Of India, AIR 2020 SC 1308, ¶ 84.

<sup>25</sup> The Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017, Rule 2(5)(i).

<sup>26</sup> Internet Freedom Foundation, *SC's Kashmir communication shutdown judgment is just the beginning of a long bill campaign*, (Jan. 10, 2020), <https://internetfreedom.in/scs-judgement-on-kashmir-communication-is-just-the-beginning/>.

did not need to be produced, there was no effective way to challenge them; and if the Court could not intervene because of threat of “terrorism”, then there was no effective forum where the orders could be challenged.<sup>27</sup> In essence, the State of J&K was reduced to a state of complete emergency, where orders that were initially challenged weren’t required to be produced, where fundamental rights stood suspended at the grace of the Union Government and where the State was the final adjudicator in deciding illegal State action.

The subsequent judgment of the *Foundation for Media Professionals v. Union of India*,<sup>28</sup> proves that the extreme reliance on the executive is not a one-time incident but spans the Court’s attitude. In this case, the Court was tasked with analysing the restriction on the speed of internet provided to the citizens of the Kashmir valley. However, several scholars have examined the challenge to be that of access rather than speed,<sup>29</sup> since slow internet acted as an obstruction in gaining information even during the coronavirus pandemic. Here, the restrictions that were challenged were the product of the new review mechanisms that were laid down in the Anuradha Bhasin case. Hence, the Court was implicitly required to analyse the effectiveness of its earlier judgment and the success of the Review Committee, that it had blindly trusted. However, the Supreme Court, instead of rectifying its mistake, went further and created another committee that constituted three executive secretaries at the state and the national level.<sup>30</sup> The Court has once again abnegated its constitutional duty,<sup>31</sup> and has acted as an executive court.

The Apex Court instead delved into identifying glaring inconsistencies and gaps in the subsidiary legislations.<sup>32</sup> The Suspension Rules comprised of the word ‘temporary’ in their title, however the entire legislation failed to indicate the maximum duration as to when the suspension order would

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<sup>27</sup> Gautam Bhatia, *The Devil’s in the (future) Detail: The Supreme Court’s Internet Shut-down judgment*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY, (Jan. 10, 2020), <https://indconlawphil.wordpress.com/2020/01/10/the-devils-in-the-future-detail-the-supreme-courts-internet-shut-down-judgment/>.

<sup>28</sup> *Foundation for Media Professionals v. Union Territory of Jammu & Kashmir & Anr.*, Writ Petition (Civil) Diary No. 10817 of 2020.

<sup>29</sup> Chintan Chandrachud, *An Executive Court and a Judicial Committee: The Supreme Court’s decision on the Internet Restrictions in Kashmir*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY, (May 23, 2020), <https://indconlawphil.wordpress.com/2020/05/23/an-executive-court-and-a-judicial-committee-the-supreme-courts-decisions-on-the-internet-restrictions-in-kashmir/>.

<sup>30</sup> *Foundation for Media Professionals v. Union Territory of Jammu & Kashmir & Anr.*, Writ Petition (Civil) Diary No. 10817 of 2020, ¶ 23.

<sup>31</sup> Chintan Chandrachud, *SC’s decision on not to decide on the validity of restrictions in Kashmir is not just deferral but it is abdication*, THE INDIAN EXPRESS (Jan. 16, 2020, 10:10 AM), <https://indianexpress.com/article/opinion/columns/abdication-not-deferral-jammu-kashmir-communication-lockdown-6218567/>.

<sup>32</sup> *Anuradha Bhasin v. Union of India*, AIR 2020 SC 1308, ¶ 100

be in operation.<sup>33</sup> In order to fill this lacuna, the Court ordered the Legislature to take adequate steps and mandated the Committee to follow the principles of proportionality and necessity while taking any decision.<sup>34</sup> Despite all these protections, it is the Union Government that plays the key role, both in terms of applying and rectifying the law.

This framework highlights the arbitrary rule of executive orders without the backing by any legal safeguards. The absence of any effective intervention of the Court has even led to the creation of a legal culture that favours State action over judicial review, purportedly for the public good<sup>35</sup> and national security.<sup>36</sup> It is very aptly put that –

If the Supreme Court is once again called upon to determine the constitutionality of the restrictions on communication, it should not only take back the adjudicative mantle, but also hand over the executive one.<sup>37</sup>

### III. IS THE INTERNET SHUTDOWN UNCONSTITUTIONAL IN NATURE?

As is clearly evidenced from the above parts, that the Supreme Court did not adjudicate on the issues at hand. Rather, it returned a judgment, that provided no effective relief to the petitioners. The Court did not order for the restoration of internet services in the Kashmir Valley, only providing for the Review Committee to have the final say in the matter. However, the Court read in several safeguards in the Suspension Rules that ought to be followed. Firstly, the Court ordered that every decision taken by the Committee had to be published and accordingly notified, despite such a provision being absent in the statute.<sup>38</sup> The Court justified this safeguard on the premise that any order that affects the life and liberty of the people, must demand a compliance of

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Apar Gupta, *Favoring public order over Justice*, THE HINDU, (Jan. 12, 2020, 12:38 PM), <https://www.thehindu.com/opinion/op-ed/favouring-public-order-over-justice/article30551737.ece>.

<sup>36</sup> The Hindu Editorial Board, *Indelicate Imbalance: On Supreme Court and Kashmir*, THE HINDU, (May 13, 2020, 1:08 PM), <https://www.thehindu.com/opinion/editorial/indelicate-imbalance-the-hindu-editorial-on-supreme-court-abdicating-judicial-responsibility-on-kashmir/article31568631.ece>.

<sup>37</sup> Chandrachud, *supra* note 29.

<sup>38</sup> Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, ¶ 96.

notification.<sup>39</sup> Hence, the Court ordered that the decisions of the Committee be freely notified using a suitable mechanism.

Secondly, the Court highlighted that the right of challenging these orders was not absent merely because the statute did not provide for any appellate mechanism.<sup>40</sup> The power of judicial review was hence present with the High Court under Article 226.<sup>41</sup> Coupled with all these, the Court ordered the Union to mandatorily follow these procedural guidelines as it largely impacts the fundamental freedoms of the citizens.<sup>42</sup> These safeguards imposed by the Court largely is indicative of the few half-hearted attempts taken by the Court in protecting the intrinsic fundamental rights of the people.

The Court however, while laying down or reiterating the tenets surrounding the jurisprudence related to Section 144, did not rule on the unconstitutionality of the internet shutdown in Kashmir. This highlights the blinded partisan view taken by the Court and hence, it is contended through this part, that the present case of internet shutdown at hand is antithetical and opposite to the guidelines and principles laid down by the Court and as a result, is unconstitutional.

The judgment had briefly traced the law relating to Section 144, examining prior judgments that upheld the constitutional validity of the same and those which had laid down the safeguards against its misuse.<sup>43</sup> In rejecting the State's argument that it was exempt from having to publicly produce the orders passed pursuant to Section 144 on grounds of national security, the Court held that the same must be made public so that they can be challenged.<sup>44</sup> However, after having spoken so extensively on the law relating to Section 144, the Court refrained from applying the same to the facts of the case. The Court, neither ruled on the legality of the Section 144 orders in Kashmir nor did it ask the Union to even produce the orders. However, on applying the legal principles laid down by this judgment, and other precedents, it is apparent that the orders were illegal and unconstitutional.

To act as a mere pacifier to the outburst regarding the internet shutdown, the Court laid down several principles. These include – first, orders pursuant to Section 144 must be limited to

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<sup>39</sup> B.K Srinivasan v. State of Karnataka, 1987 AIR 1059.

<sup>40</sup> Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, ¶ 97.

<sup>41</sup> Ibid.

<sup>42</sup> Hukum Chand Shyam Lal, ¶ 18; Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, ¶ 98.

<sup>43</sup> Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, Part G.

<sup>44</sup> Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, Part D.

particular areas or issues.<sup>45</sup> Second, there must be a clear temporal and territorial basis for the order, which should be set out in the order itself.<sup>46</sup> Third, the constitutional principle of proportionality is one of the grounds on which orders passed under Section 144 can be challenged.<sup>47</sup> Finally, it was reiterated that the provision is meant only for exceptional circumstances and does not contemplate repeated orders.<sup>48</sup> However, the Court did not apply these principles to the issue at hand, leaving it to the ultimate decision of the Review Committee.

As a necessary implication of these assertions by the Court, it is argued that a blanket ban on the internet in the entire territory of the erstwhile J&K is illegal. First, the ban was on accessing the whole of the internet, and not only on those websites which may lead to the perpetration of nuisance. Moreover, the orders were not restricted to only those parts which were most likely to witness such nuisance. Therefore, there was no clear temporal and territorial basis to the orders. Further, the orders fail the test of proportionality, which requires the adoption of the 'least restrictive' method. The least restrictive method of passing Section 144 orders in the present case, as discussed earlier, could have been to only restrict social media websites that have led to the promotion of terrorism. Finally, assuming that the first order was necessary, the extension of the same must be on the basis of a continuation of exceptional circumstances, which has not been yet adequately established.

On account of these reasons, the Section 144 orders restricting the use of Internet were prima facie illegal and unconstitutional. However, to the contrary, the Court has implicitly upheld the internet ban highlighting its failure in protecting the violation of fundamental rights.

The current situation warrants an effective redressal mechanism along with a strict judicial review over government action. Thus, in such times of anarchy, while the Court has made it extremely difficult to crystallise and enforce fundamental rights against the State, returning back to the core values of a democracy appears to be the only option left.

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<sup>45</sup> Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, ¶ 140

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

#### IV. SUGGESTION AND RECOMMENDATION: RIGHT TO ACCESS THE INTERNET AS A FUNDAMENTAL RIGHT

The Supreme Court categorically refused to declare the right to access the internet as a fundamental right since it was not argued specifically by the counsels, preventing itself from adjudicating on the same.<sup>49</sup> This may have been a golden opportunity lost by the Supreme Court that could have extended constitutional protection to this right that becomes not only a medium of facilitating fundamental freedoms but also is a fundamental right in itself. In this part, it is contended that the right to access the internet can be read as a fundamental right due to the existing constitutional jurisprudence present.

Recently, in a case involving the restrictions imposed on the petitioner's right to education through the usage of smartphones, the Kerala High Court held that the right to internet access itself is a fundamental right and is encapsulated under the right to education and the right to privacy that form an essential part of Article 21 of the Constitution.<sup>50</sup> The Court recognised the fact that while technology provides us a set of challenges, it acts as a catalyst by enhancing individual liberty and granting complete freedom to an individual.<sup>51</sup> Moreover, it reduces the ability of the State to limit the enjoyment of the rights available to all the people.<sup>52</sup> The High Court additionally derived this right to access the internet from the free speech jurisprudence present in our country.<sup>53</sup> Thus this judgment highlights the increasing need to adapt towards contemporary challenges of technological growth and subsequently adopt them in our legal landscape.

Borrowing from the example set by the High Court, it is contended that this right has been embedded in the legal landscape of our country and has not yet been clearly expounded by the Supreme Court, despite having concrete reasons backed with precedents. In order, to bring the above statement into clarity, it is imperative that we trace the history of the development and evolution of the freedom of press as a fundamental right. This right evolved considering the great technological changes that took place after the Industrial Revolution. The press was not only seen

<sup>49</sup> Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, ¶ 22.

<sup>50</sup> Faheema Shirin R.K. v. State of Kerala, Writ Petition (Civil) No. 19716 of 2019.

<sup>51</sup> Faheema Shirin R.K. v. State of Kerala, Writ Petition (Civil) No. 19716 of 2019, ¶ 6.

<sup>52</sup> SFLC, *Defender of Your Digital Freedom, Kerala High Court declares the 'Right to Access Internet' as a Fundamental Right*, (Sept 20, 2019, 5.24 pm), <https://sflc.in/kerala-high-court-declares-right-access-internet-fundamental-right>.

<sup>53</sup> *Ibid*.

as a ‘mere medium’ but also portrayed to be a ‘revolutionary change’ behind the multifaceted understanding of the fundamental rights.<sup>54</sup>

Thus, the freedom of press has become crucial in the effective functioning of any democratic country. In *Anuradha Bhasin*, the judges highlighted its importance in the current times, considering the immense transfer of information and importance of communication.<sup>55</sup> Thus, it is contended, that the Internet is similarly and gradually climbing up the pedestal seeking the constitutional protection.

#### *A. Accentuating Existing Constitutional Jurisprudence*

This part aims to analyse the existing framework surrounding the right to free speech and its composition of rights, in order to make a case for the Internet to be provided the same recognition. The Supreme Court through the years, has developed a penchant in expanding the freedom of speech to consist several derivative rights that have evolved through a contemporaneous exposition and interpretation of the Constitution. Justice Mathew in the celebrated case of *Kesavananda Bharati*, stated that “each generation must pour its content in the light of its experience”<sup>56</sup> which was expounded further by Justice Shah in the case of *PUCL*, where he held that, there was no inherent composition of any right but it was the utmost responsibility of the Court to fill the “skeleton (of fundamental rights) with soul and blood and [make] it vibrant”.<sup>57</sup>

These precedents have not allowed the Court to shy away from including, demarcating and recognising several rights as fundamental rights. With respect to the free speech jurisprudence, the case of *Indian Express* began the expansion of the constituents of Article 19(1)(a).<sup>58</sup> The Court held that,

Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self-fulfilment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in

<sup>54</sup> Kartik Chawla, *Right to Internet Access – A Constitutional Argument*, 7 INDIAN JOURNAL OF CONSTITUTIONAL LAW, 57 (2017).

<sup>55</sup> *Anuradha Bhasin v. Union of India*, AIR 2020 SC 1308, ¶ 146.

<sup>56</sup> *Kesavananda Bharati v. State of Kerala*, AIR1973 SC 1461, ¶ 1619

<sup>57</sup> *PUCL v. Union of India*, AIR 2003 SC 2363, ¶ 42.

<sup>58</sup> *Indian Express Newspapers v. Union of India*, 1986 AIR SC 515.

decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.<sup>59</sup>

Using these objectives, the Court upheld the constitutional guarantee that every person of the country must be deemed capable of forming their own beliefs and thoughts and in the end, be allowed the freedom to communicate the same. Through the judgment, the Court expanded Article 19(1)(a) to include the ‘right to know’<sup>60</sup> and further to the ‘freedom to propagate’.<sup>61</sup> The imperative thing to note is that the Internet successfully demonstrates the completion of all the above objectives and the aims sought to be achieved by the fundamental right of speech.

The Internet started off as a research tool primarily to be used by academicians in knowledge – sharing and other similar purposes.<sup>62</sup> Now, the Internet hosts a multitude of information, allowing the user to make a conscious decision after considering a variety of literature. The various search engines provide an array of information as well as the ability to communicate with other people in order to satisfy their quest for the truth. Finally, the Internet, being such a vast platform, allows the exchange of ideas and dissents, promoting the healthy discourse that leads to social change and stability as people are made more aware of their surroundings.<sup>63</sup> Thus, *prima facie*, the Internet successfully fulfils the objectives laid down by the Court and must be actively considered as a *pari materia* medium.

### *B. Drawing an Analogy with the Freedom of Press*

This part aims to trace the trajectory of cases that The Supreme Court, as early as in the year 1989, upheld that the freedom of speech under Article 19(1)(a) would duly include and involve the ‘right to propagate and publish opinions’ through “any medium, newspaper, magazine or movie”<sup>64</sup> or by “printing and/or electronic media”<sup>65</sup> or “any other media”.<sup>66</sup> Through these cases, the Court made it clear that the fundamental right of speech and expression was medium-neutral and was protected

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<sup>59</sup> *Indian Express Newspapers v. Union of India*, 1986 AIR SC 515, ¶ 68.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Indian Express Newspapers v. Union of India*, 1986 AIR SC 515, ¶¶ 91 & 100.

<sup>62</sup> Julien Mailland, *The Semantic Web and Information Flow: A Legal Framework*, 11 NORTH CAROLINA JOURNAL OF LAW AND TECH., 269, 272.

<sup>63</sup> Chawla, *supra* note 54, at 80.

<sup>64</sup> *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574, ¶ 8.

<sup>65</sup> *Life Insurance Corporation v. Manubhai*, 1993 AIR SC 171, ¶ 8.

<sup>66</sup> *Odyssey Communications v. Lokvidayan Sanghatana*, AIR 1988 SC 1642, ¶ 5.

over any channel. This position was exactly enunciated in the *Anuradha Bhasin* case, where the Court extended the freedom of speech and expression ‘through the medium of the internet’.<sup>67</sup> However, this idea could be extended to the ‘Freedom of Internet Access’ if an analogy to the development and recognition of the ‘Freedom of Press’ is made and a comparative analysis is drawn out.

The arguments in favour of having the ‘Freedom of Press’ was first canvassed in the case of *Sakal Papers*, where the Court re-iterated that the freedom of speech rightly included the freedom of publication, circulation and subsequent dissemination.<sup>68</sup> The rationale behind including this right was that the press had become the most basic and essential attribute to the right of speech.<sup>69</sup> It was held to be a *sine qua non*, since the right to expression could not be exercised if complete freedom was not provided to the medium, which are the newspapers and the press.<sup>70</sup> Here, it is imperative to note that the protection that was granted to the press was entirely dependent on the press being a ‘medium’ to the freedom of speech and expression. However, through the years this position and rationale for recognition has changed tremendously with the ‘Freedom of Press’ being an individual fundamental right encapsulating a bundle of rights.

The Supreme Court held the importance of the ‘Freedom of Press’ to be essential to a modern democracy.<sup>71</sup> The Court even stated that its role in enabling a healthy discourse was extremely important in achieving scholarly and artistic endeavours.<sup>72</sup> Moreover, the Court emphasised that the freedom of press was a right that helped in facilitating other imperative rights such as that of entertainment, education and information.<sup>73</sup> Furthermore, the Court clarified that the reason the press was imparted the special recognition was due to the immense support and encouragement it provided in order to crystallise and enforce the fundamental right of speech and expression. Through these judgments and clarifications, the Court has, to a great extent, upheld the ‘Freedom of Press’ to be a stand-alone right and not limited to its functions of being a mere medium.

The same reasons that were used to justify the recognition of the ‘Freedom of Press’ can be applicable to the ‘Freedom of Internet Access’. It is imperative to note that, the ‘Freedom of Press’

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<sup>67</sup> *Anuradha Bhasin v. Union of India*, AIR 2020 SC 1308, ¶ 26.

<sup>68</sup> *Sakal Papers Pvt. Ltd. v. Union of India*, AIR 1962 SC 305.

<sup>69</sup> Chawla, *supra* note 54, at 82.

<sup>70</sup> *Ibid.*

<sup>71</sup> *The Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*, 1995 AIR SC 1236, ¶ 2.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Zee Telefilms v. Union of India*, AIR 2005 SC 2677, ¶ 63.

was always considered to be a fundamental right rather than the ‘Freedom of Speech and Expression through the medium of the press’. In the Anuradha Bhasin case, the Court has recognised the ‘Freedom of Speech and Expression through the medium of the internet’ which can thus be translated and contemporaneously interpreted to the ‘Freedom of the Internet’ as it has substituted the press in this technological age.

### C. Other Ancillary Justifications

The Anuradha Bhasin case, cites the proposition of Vinton Cerf,<sup>74</sup> who highlights the proposition that the internet is not a human right but is a mere enabler of rights.<sup>75</sup> However, he believed that the existence of the internet could not be undermined.<sup>76</sup> The current trends, as portrayed by several scholars showcase the elevation of the right to internet access as a human right. Cerf, believed that the placement of internet access among other important human rights such as the right to equality and conscience seems a misfit.<sup>77</sup>

This highlights the naturalistic theory, which places the normativity of the rights based on the core values of human nature through which it classifies human rights.<sup>78</sup> However, Charles Beitz opposes such a proposition as he believed that this naturalistic framework was excessively universalised and such a method allowed the recognition of rights that were very basic to humanity.<sup>79</sup> He believes that the classification and normativity of a human right must be based on not only the basic rights but also must be based on the political role it is expected to span in the contemporary human rights practice.<sup>80</sup> In his book titled ‘The Idea of Human Rights’, he mentions three standards that must be followed in order to classify human rights –

These are (i) that the interest protected has a kind of importance that it would be reasonable to recognize across a wide range of possible lives; (ii) that in the absence of the protections embodied in the right, there is a significant probability that domestic

<sup>74</sup> Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, ¶ 23.

<sup>75</sup> Vinton G. Cerf, *Internet Access is not a Human Right*, THE NEW YORK TIMES (January 04, 2012), <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html>.

<sup>76</sup> Anuradha Bhasin v. Union of India, AIR 2020 SC 1308, ¶ 26.

<sup>77</sup> Cerf, *supra* note 75.

<sup>78</sup> Xiaowei Wang, *Time to Think About Human Right to the Internet Access: A Beitz Approach*, 6(3) JOURNAL OF LAW AND POLITICS, 67 (2013).

<sup>79</sup> CHARLES BEITZ, THE IDEA OF HUMAN RIGHTS 49 – 68 (Oxford University Press 2009).

<sup>80</sup> Wang, *supra* note 78, at 70.

level institutions will behave, by omission or commission, in ways that endanger this interest; and (iii) that there are permissible means of international action such that, if they were carried out, the interest would be less likely to be endangered and that these means would not be unreasonably burdensome for those who have reason to use them.<sup>81</sup>

The importance of the Internet cannot be discounted and thus, warrants protection across spectrums.<sup>82</sup> Internet access has always been vulnerable to authority, as demonstrated in the case of China<sup>83</sup> and more importantly, Kashmir. Though, the Right to Internet Access has been deemed to be expensive, however the involvement and support by international agencies such as the United Nation<sup>84</sup> aids in making internet accessible across countries. Accordingly, the right to accessing the internet can be considered as a human right considering the fulfilment of all the above three tests. The Right to Internet Access has also been classified as an imperative social right itself<sup>85</sup> and has been widely recognised as a fundamental right by several countries.<sup>86</sup> Thus, it is imperative that India follows suit.

## V. CONCLUSION

The internet shutdown in Kashmir persists till date, despite the numerous safeguards that were reiterated and sought to be implemented. Here, the judiciary abdicated its role as the people's 'sentinel on the qui vive' and failed to hold the State accountable for the violations of the fundamental rights. Thus, while this decision is a watershed moment in the interpretation of the Fundamental right to speech, this judgment can be seen as a mere reiteration of several Constitutional principles. The enormous powers of the Review Committee coupled with the failure of the Supreme Court to provide an effective relief paves a dangerous way for the fundamental

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<sup>81</sup> Beitz, *supra* note 79, at 111.

<sup>82</sup> Tommaso Edoardo Frosini, *Access to the Internet As a Fundamental Rights*, 5(2) ITALIAN JOURNAL OF PUBLIC LAW, 227 (2013).

<sup>83</sup> Wang, *supra* note 78, 72.

<sup>84</sup> Frank La Rue, *Special Rapporteur on the Promotion & Protection of the Right to Freedom of Opinion & Expression*, HUMAN RIGHTS COUNCIL, U.N.Doc. A/HRC/17/27, 3 (May 16, 2011).

<sup>85</sup> Ivar A Hartmann, *A Right to Free Internet? On Internet Access and Social Rights*, 13(2) JOURNAL OF HIGH TECHNOLOGY AND LAW 300 (2013).

<sup>86</sup> Chawla, *supra* note 54, from 69 – 74.

rights of the people of Kashmir. The paper even posited the adoption of the right to internet access as a fundamental right considering its importance in contemporary times. It is imperative that we recognise the importance of the Internet as a facilitator of several rights and grant it the - due constitutional protection it requires. Through this paper, it is envisioned that the above steps would be taken in consideration in order to correct this miscarriage of justice happening every day in Kashmir.

## CASE NOTE

**STATE OF PUNJAB V. PRINCIPAL SECRETARY TO THE GOVERNOR OF  
PUNJAB: THE JUDICIARY'S FINALE IN GOVERNOR'S  
CONSTITUTIONAL CONCERTO**

*Anubhuti Raje & Masoom Sanyal\**

**ABSTRACT**

*The Supreme Court's recent landmark judgment in the case of State of Punjab v. Principal Secretary to the Governor of Punjab addresses the recurrent issue of gubernatorial misuse of the 'pocket veto' power, a loophole allowing Governors to withhold assent to Bills without formal rejection. The case, emblematic of similar controversies in states like Kerala and Tamil Nadu, involved the Governor's refusal to act on Bills passed by the Vidhan Sabha, citing doubts about the legality of the legislative Session. The Court, in its meticulous analysis, clarified that the Governor's authority is not independent, but bound by the 'aid and advice' of the Council of Ministers, emphasizing the supremacy of elected representatives in a parliamentary democracy. The judgment effectively curtails the misuse of 'pocket vetoes,' underscoring the Constitutional imperative of prompt action and preventing indefinite delays in legislative processes. Furthermore, the ruling distinguishes between 'prorogation' and 'adjournment,' affirming the Speaker's exclusive jurisdiction in regulating procedural intricacies. The Court underscores the collaborative spirit needed in parliamentary democracy, discouraging Governors from becoming inadvertent stumbling blocks to legislative efficacy. The decision's broader implications extend beyond the immediate case, serving as a guiding precedent to Governors across states. It reinforces the delicate balance between federalism and democracy, upholding constitutional fidelity. The verdict, echoing principles of constitutional statesmanship, safeguards the orchestrated choreography of democracy, ensuring its intended grace and efficacy.*

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**Keywords:** pocket veto, gubernatorial powers, parliamentary democracy, legislative processes, federalism, collaborative governance.

## I. INTRODUCTION

The story is now all too familiar: the State Government passes a law or takes an action that the Governor does not approve of (usually for more ideological reasons than legal ones); and to register his protest, the Governor acts in ways that arguably fall outside his powers, leading to either a stalemate or even a full-blown conflict between the elected State Government, i.e. the Council of Ministers, and the Governor's office.<sup>1</sup> We have seen this story play out in several states now: Kerala<sup>2</sup>, Punjab<sup>3</sup>, West Bengal<sup>4</sup>, and Tamil Nadu<sup>5</sup> are prominent examples. One common technique that the Governors in these states have deployed is the exercise of the 'pocket veto' power – a loophole in the Constitution that allows the Governors and the President to withhold assent to a Bill passed by the legislature. Instead of assenting to the Bill or remanding it back to the legislature for reconsideration, the Governors in the abovementioned states have come up with an ingenious third solution which has now become almost a pattern in each state where the Governor and the State Government are at loggerheads: this clever method is of simple inaction – neither assenting to the Bills, nor remanding them back to the legislature, but letting the Bills remain stuck at the desk of the Governor. This is

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<sup>1</sup> Kesava Menon, *How conflicts between Governors and State Governments are playing out*, FRONTLINE (Dec. 1, 2022, 10:50 AM), <https://frontline.thehindu.com/politics/how-conflicts-between-Governors-and-state-Governments-are-playing-out/article66188258.ece>.

<sup>2</sup> *Governor Arif Mohammed Khan's battle with Kerala Government, media*, THE INDIAN EXPRESS (Nov. 9, 2022, 8:47 AM), <https://indianexpress.com/article/opinion/editorials/Governor-arif-mohammed-khans-battle-with-kerala-Government-media-8257123/#:~:text=Kerala%20Governor%20Arif%20Mohammed%20Khan,on%20grounds%20of%20procedural%20violations>.

<sup>3</sup> Kanchan Vasdev and Khadija Khan, *Punjab govt moves SC over Governor's refusal for State budget Session: What does the law say?*, THE INDIAN EXPRESS (Feb. 28, 2023, 4:56 PM), <https://indianexpress.com/article/explained/explained-law/punjab-govt-supreme-Court-Governor-purohit-budget-Session-explained-8470995/>.

<sup>4</sup> Suhrid Sankar Chattopadhyay, *Higher education is limbo as Governor and Government battle over universities in West Bengal*, FRONTLINE (Oct. 4, 2023, 5:12 PM), <https://frontline.thehindu.com/the-nation/education/west-bengal-higher-education-in-limbo-Governor-cv-ananda-bose-vs-mamata-banerjee-Government-battle-rages-for-control-over-state-universities/article67357376.ece>.

<sup>5</sup> V. Venkatesan, *Can a Governor withhold assent without reasons?*, FRONTLINE (Nov. 18, 2023, 4:59 PM), <https://frontline.thehindu.com/columns/tamil-nadu-Governor-rn-ravi-withhold-assent-to-bills-by-assembly-Constitutional-controversy/article67547402.ece>.

what is dubbed as ‘pocket veto.’ The Governments of Tamil Nadu, Kerala, and Punjab have challenged the inactions of their respective Governors over the unnecessary delay in clearing the Bills, or the exercise of the ‘pocket veto power.’<sup>6</sup>

The Supreme Court considered these petitions moved by the State Governments against their respective Governors. On November 10, 2023, it delivered the verdict in the petition moved by the government of Punjab against the Governor of Punjab in the case of *State of Punjab v. Principal Secretary to the Governor of Punjab*<sup>7</sup> (‘Punjab Governor Case’). This case note analyses the verdict of the Supreme Court in this case and the ramifications it has on the Governors’ powers. An issue unique to this case was the Governor’s decision to cast doubt on a sitting of the state assembly of Punjab as ‘unconstitutional’ and ‘illegal.’ The Supreme Court also determined whether the Governor has the power to decide the constitutionality, legality, and validity of the Session of the legislature. The judgement of the Court effectively restricts the possibility of the Governors exploiting the loophole of ‘pocket veto.’

## II. THE CONTROVERSY IN THE CASE

The controversy in the Punjab Governor Case was about the technique described earlier: the deliberate delay in passing of Bills by the Governor by exercising the loophole of the pocket veto power. As mentioned above, a unique issue in this case was the Governor’s determination that a Session of the Vidhan Sabha was illegal and unconstitutional. This alleged illegality and unconstitutionality of the Session was, according to the Governor, the reason why he was not passing the Bills that the legislature had passed in that Session and sent to him for his consideration – according to him, the Bills passed

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<sup>6</sup> Krishnadas Rajagopal, *States in Court against their Governors*, THE HINDU (Nov. 6, 2023, 10:14 PM), <https://www.thehindu.com/news/national/states-in-Court-against-their-Governors/article67505721.ece>;

Krishnadas Rajagopal, T.N. *Government moves Supreme Court against Governor Ravi over delay in clearing Bills*, THE HINDU (Oct. 31, 2023, 10:57 AM), <https://www.thehindu.com/news/national/Governor-ravi-is-acting-as-a-political-rival-says-tamil-nadus-writ-petition-in-supreme-Court/article67479409.ece>;

Sherlyn Sebastian, *'Governor Defeating Rights Of People': Kerala Government Moves Supreme Court Against Governor's Inaction In Assenting Bills*, LIVELAW (Nov. 2, 2023, 10:29 AM), <https://www.livelaw.in/top-stories/Governor-defeating-rights-of-people-kerala-Government-moves-supreme-Court-against-Governors-inaction-in-assenting-bills-241406>;

Abraham Thomas, *Punjab Government moves Sc against Governor over delay in nod to bills*, HINDUSTAN TIMES (Nov. 1, 2023, 5:30 AM), <https://www.hindustantimes.com/cities/others/punjab-Government-moves-sc-against-Governor-over-delay-in-nod-to-bills-101698778886187.html>.

<sup>7</sup> *State of Punjab v. Principal Secretary to the Governor of Punjab*, W.P.(C) No. 1224 of 2023.

during a sitting that itself is bound to be illegal and *void-ab-initio*. The entire controversy is discussed in the following paragraphs in chronological order.

The earliest controversy in Punjab arose when the Governor refused to summon the Budget Session of the Punjab Legislative Assembly. This led to the Punjab Government instituting a petition before the Supreme Court. The Court ordered that the Governor did not enjoy the discretion to seek legal advice, as he had argued, when it came to summoning of the legislature, once a recommendation to do so has been forwarded to him by the Council of Ministers. The advice of the Council of Ministers simply binds him.<sup>8</sup>

It was only after this decision of the Court that the Budget Session of the Punjab Legislative Assembly was summoned on 3 March 2023. It continued till 22 March when it was adjourned *sine die* by the Speaker. A *sine die* adjournment simply means adjournment till further notice. Thus, naturally, once a Session has been adjourned *sine die*, the Speaker reserves the power to reconvene it. Exercising this power, which is formally nested Rules of Procedure<sup>9</sup>, the Speaker summoned the House once again on 19 and 20 June 2023 – three months after it had been adjourned *sine die*. It was during this Session that four Bills were passed. These Bills were sent to the Governor who refused to take any action on the Bills. This inaction of the Governor was at the heart of the controversy in the case.

When the Chief Minister wrote to the Governor asking him to give his assent to the Sikh Gurudwaras (Amendment) Bill, 2023 – one of the four Bills passed by the legislature during 19 and 20 June, 2023 – the Governor replied that he believed that the Bills were passed during a Session that was “in breach of law and procedure.” This was the Governor’s reason behind not giving his assent to the Bills. He said that he would only take action after the legality of the Vidhan Sabha Session on 19 and 20 June was established.

On 24 July 2023, he wrote to the Chief Minister that he had obtained advice from a constitutional expert and had arrived at a conclusion that the Vidhan Sabha Session on 19 and 20 June was illegal.

In October, the earlier budget Session of the Vidhan Sabha was sought to be reconvened. The government wished to introduce 3 money Bills which could not be introduced without the prior was

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<sup>8</sup> State of Punjab v. Principal Secretary to the Governor of Punjab, W.P. (C) No. 302 of 2023, 2023 LiveLaw (SC) 188.

<sup>9</sup> Rules of Procedure and Conduct of Business in the Punjab Vidhan Sabha (Punjab Legislative Assembly), 1952, Rule 16, Punjab Government Gazette, Notification No. 2 (2 May 1952).

reiterating his opinion that the 'extended' budget Session was illegal, "*against the accepted procedures and practice of the legislature, and against the provisions of the Constitution.*" He asked the Chief Minister to call for a fresh Monsoon or Winter Session and set out an agenda for those Sessions.

For a moment, the Governor's argument requires consideration. His argument was simply that there is a legislative practice in India that the Budget Session of any legislature is concluded in the month of March and in the mid-year months of July, August, and September, the Monsoon Session of the Legislature is convened. Further, the Winter Session is convened in the months of November and December. It was quite unusual for the Budget Session to go on till October without being prorogued. However, the real question is whether continuing the budget Session till October constituted a violation of any constitutional provision?

The Governor refused to give permission to summon the House for the budget Session in October, and he refused to sign the Bills that were passed in the Session conducted on 19 and 20 June because, in his opinion, that Session itself was illegal and therefore, the Bills passed during it could not claim legitimacy and were *void ab initio*.<sup>10</sup> Against this inaction, the Government of Punjab moved the Supreme Court.

### III. THE ISSUES BEFORE THE COURT

The following issues arose for the Supreme Court's consideration in this case that the Punjab Government had instituted against the Governor of their State.

- (i) Can the Governor withhold action on Bills that were put before him for his consideration?
- (ii) Whether the Governor can determine the validity of legality of a Session of the House?
- (iii) Whose domain does the regulation of the procedure and functioning of the House fall within?

While answering these questions, some other incidental questions were also settled. The Supreme Court explained the difference between prorogation of the House and the adjournment of the House, and the possibility of a House being adjourned without being prorogued and being summoned at any time at the instance of the Speaker. Therefore, in addition to the limits on the power of the Governor,

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<sup>10</sup> State, *supra* note 7, at Governor¶6, 7.

the specific contours of the power of the Speaker with respect to the regulation of the functioning and the procedure of the House were also discussed in the judgement.

We will consider each of these issues and arguments tendered by both sides.

#### IV. CEREMONIAL BEACON: IMPERATIVE GOVERNANCE AND THE INABILITY TO WITHHOLD STATE LEGISLATURE'S BILL ACTION

In the intricate dance of governance within a parliamentary democracy, the role of the Governor is often characterized as symbolic. The recent judgment of the hon'ble Supreme Court in the case of *State of Punjab v. Principal Secretary*<sup>11</sup> sheds light on the essence of this symbolism, emphasizing that the Governor is not a wielder of independent power, but a constitutional statesman guiding the government on matters of constitutional significance.

The foundational principle underscored by the Court is that in a parliamentary democracy, the real power resides in the elected representatives of the people. The elected government, be it at the state or central level, is composed of members accountable to and scrutinized by the legislature. The Governor, on the other hand, is appointed by the President, who assumes the position of a titular Head of the State, expected to act on the 'aid and advice' of the Council of Ministers, except in areas where the Constitution vests discretionary powers in the Governor.

This principle, rooted in the Constitution since its adoption, was reaffirmed in the decision in *Samsber Singh v. State of Punjab*<sup>12</sup>, where the Court held that the Governor, as the constitutional head, exercises powers on the advice of the Council of Ministers, ensuring a parliamentary and responsible form of government. The manner in which the Governor, as a symbolic Head of State, executes their role is crucial to safeguarding this basic feature<sup>13</sup>. The Court warns against the exercise of unbridled discretion by Governors in areas not entrusted to their discretion, as it poses a threat to the functioning of democratically elected governments at the state level.

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<sup>11</sup> *Id.* at Governor ¶15, 28.

<sup>12</sup> *Samsber Singh v. State of Punjab*, AIR 1974 SCC 2192, ¶28.

<sup>13</sup> *Id.* at ¶32.

Quoting the observation in *SR Bommai v. Union of India*<sup>14</sup>, the judgment underscores the inseparable nature of federalism and democracy, both integral components of the Constitution's basic structure. The Court emphasizes that the tuning fork of democracy and federalism is essential for realizing the fundamental freedoms and aspirations of citizens.

The dispute at the heart of the case revolves around the Governor's withholding of four Bills passed by the Vidhan Sabha on June 20, 2023. Article 200<sup>15</sup> of the Constitution delineates the Governor's powers concerning Bills presented for assent. As per the provisions of Article 200, the Governor only has three options: to assent, withhold assent, or reserve the Bill for the consideration of the President. The first proviso to Article 200 allows the Governor to return a non-Money Bill to the legislature, requesting reconsideration. However, the Court clarified that this power is recommendatory in nature and does not bind the state legislature.

The crucial aspect of the judgment lies in the interpretation of the first proviso. It is emphasized that the Governor, when withholding assent, must follow the course of action indicated in the first proviso, which includes promptly returning the Bill for reconsideration<sup>16</sup>. The Court underscores the constitutional imperative of expedition, stating that keeping a Bill pending indefinitely is inconsistent with this imperative.

The Court observed that the Governor, being an unelected Head of State, cannot wield his powers to thwart the normal course of lawmaking by democratically elected state legislatures. The Court held,<sup>17</sup> the Governor must act in accordance with the course of action outlined in first proviso of Article 200, if he disagrees with certain aspects of the Bill before him. What is not open to the Governor is simple inaction over a Bill that is before him, or 'pocket veto.' The Court has, therefore, outlined the course of action that the Governor has to necessarily follow upon receiving a Bill for his consideration, preventing him from virtually vetoing the Bills passed by the legislature.

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<sup>14</sup> S. R. Bommai v. Union of India, (1994) 3 SCC 1.

<sup>15</sup> INDIA CONST. art. 200.

<sup>16</sup> State, *supra* note 7, at Governor¶20.

<sup>17</sup> State, *supra* note 7, at ¶24.

## V. “CASTING DOUBTS”:

### GOVERNOR CANNOT QUESTION THE VALIDITY OF A SESSION OF THE HOUSE

Highlighting the distinction between ‘prorogation’ and ‘adjournment’ of the Session of the House, the Supreme Court clarified that the Session of the Punjab Vidhan Sabha held on 19 and 20 June, which the Governor had doubted as ‘illegal’, was valid and legal. Acknowledging that generally prorogation of the Session follows the *sine die* adjournment of the Session, it is not necessary that once a Session is adjourned *sine die* it must be deemed prorogued. The judgement mentions several instances where Sessions of the Lok Sabha have been adjourned *sine die*, but not prorogued, and they were later reconvened by the Speaker.

The definition of ‘prorogue’ is found in Rule 2 of the Rules of Procedure of Punjab Vidhan Sabha.<sup>18</sup> The rule defines prorogue as “*ending of a Session by an order of the Governor under Article 174(2)(a).*” Article 174(2)(a)<sup>19</sup> gives the Governor the power to prorogue a House. Simply defined, prorogation happens when an entire Session of the House is considered over, and when the next time the House reconvenes, it is for the next Session. Adjournment happens when the particular sitting of the House is over and when the House reconvenes it is not for a new Session, but in continuance of the same Session that was adjourned.<sup>20</sup> A Session of the State Legislative Assembly is only considered prorogued if an order to that effect is passed by the Governor under Article 174(1)(a).<sup>21</sup> In this case, the Governor had not passed any such order before the 19 and 20 June, when the Session whose legality the Governor questioned took place.

Another important distinction between ‘prorogation’ and ‘adjournment’ is with respect to summoning the sitting of the House again. If the House has been prorogued, it can be summoned only by the Governor. However, if it has merely been adjourned without prorogation, it can be summoned by the Speaker of the House for a sitting. The Court held that since the Punjab Vidhan Sabha on 22 March 2023 had only been adjourned *sine die*, without prorogation by the Governor under Article 174(1)(a),

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<sup>18</sup> Rules, *supra* note 9, at Rule 2.

<sup>19</sup> INDIA CONST. art. 174, cl. 2.

<sup>20</sup> Ramdas Athawale v. Union of India, (2010) 4 SCC 1, ¶22.

<sup>21</sup> Rules, *supra* note 9, at Rule 2; State, *supra* note 7, at Governor¶33; INDIA CONST. art. 174, cl. 1.

the Speaker was acting well within his powers while reconvening a sitting of the House on 19 and 20 June.

In the Conclusion, Court held that:

- (i) the Sessions of the House held on 19 June, 20 June, and 20 October were valid in law,
- (ii) the re-convening of the House was within the powers of the Speaker under the Rules of Procedure, and
- (iii) casting doubt on the validity of the Session of the House is not a constitutional option open to the Governor.

The Court reiterated the principle inherent Article 122<sup>22</sup> and Article 212<sup>23</sup> of the Constitution. Article 122 and Article 212 prohibit the Courts from enquiring into the proceedings of the House. A principle naturally follows these provisions that “*it is the right of each House of the legislature to be the sole Judge of the lawfulness of its own proceedings so as to be immune from challenge before a Court of law.*”<sup>24</sup> Thus, it is also not open to the Governor, who is not a part of the House himself, to question the legality or validity of the proceedings of the House.

The Court directed the Governor to consider the Bills pending before him and act on them in accordance with the judgement, i.e. either give assent, or return the Bills for reconsideration, or refer the Bills to the President if he deems it necessary. What would not be open to the Governor is inaction or withholding of his assent to the Bills pending before him.

## VI. SPEAKER’S POWERS: THE ‘SOLE CUSTODIAN’ OF THE HOUSE

The Supreme Court has held that the regulation of the procedure of the House is within the ‘exclusive domain’ of the Speaker.<sup>25</sup> The Court reiterated its observations in *Ramdas Athavale v. Union of India*<sup>26</sup> that the Speaker is the ‘guardian’ of the House and its ‘spokesman and representative,’ that it is the

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<sup>22</sup> INDIA CONST. art. 122.

<sup>23</sup> INDIA CONST. art. 212.

<sup>24</sup> State, *supra* note 7, at Governor¶39.

<sup>25</sup> State, *supra* note 7, at ¶38Governor.

<sup>26</sup> *Ramdas Athavale v. Union of India*, (2010) 4 SCC 1.

Speaker who is the “*interpreter of [the House’s] rules and procedure, and is invested with the power to control and regulate the course of debate and to maintain order.*”<sup>27</sup>

The Court observed that in the present case it was well within the Speaker’s domain to reconvene the House after it had been adjourned *sine die* in March.

An important question arises at this point: whether the House can be run by merely adjourning it *sine die* and doing away with the need for prorogation entirely? The petitioners in the present case, i.e. the Government of Punjab, argued that such a course was adopted precisely because of the differences between the Government and the Governor and the difficulty in getting the Governor to summon the House for a new sitting. Simply put, the House was being adjourned and not prorogued because the Governor did not easily res summon the House upon the recommendation of the government. In order to avoid an imbroglio which had arisen before the Governor reluctantly summoned the House for the budget Session arising again, the House was not prorogued, but adjourned *sine die* in order to facilitate its res summoning without the need for the Governor’s order. The Court observed that there was a need for ‘statesmanship’ and ‘collaboration’ between the government and the Governor.

## VII. IMPLICATIONS OF THIS CASE

The implications of the Supreme Court’s decision in the *Punjab Governor* case directly impact the imbroglio that has been created by the Governors of other states like Tamil Nadu and Kerala by their inaction on the Bills or exercise of ‘pocket veto.’ In fact, in Kerala’s plea before the Supreme Court, whereby it has challenged the inaction of the Governor of Kerala on the Bills that the legislature has sent to him, the Court asked the Governor to go through the decision in *Punjab Governor* case.<sup>28</sup> Therefore, it is expected that the Supreme Court’s outlining of the Governor’s powers and role in legislative process in this case will impact the controversies that have arisen in other states as well. It is expected to undo the ‘constitutional deadlock’ that has been created in several states apart from Punjab, like Kerala, Tamil Nadu, and Telangana, between the State Governments and the Governors due to the latter’s inaction on Bills.

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<sup>27</sup> *Id.* at ¶31.

<sup>28</sup> Padmakshi Sharma, ‘*Read Judgment In Punjab Governor’s Case’: Supreme Court To Kerala Governor On State’s Plea Against Delay In Assenting Bills*’, LIVELAW, (Nov. 24, 2023, 5:17 PM), <https://www.livewlaw.in/top-stories/read-judgment-in-punjab-governors-case-supreme-court-to-kerala-governor-on-states-plea-against-delay-in-assenting-bills-242940>.

The Supreme Court clarified that the Governor does not have the power to withhold his assent to the Bills – such exercise of the power of ‘pocket veto’ finds no basis in the constitutional understandings. The Governor cannot be permitted to defeat the legislature by exercise of a power that is essentially the result of a loophole and was never intended to be vested in the Governor. There may be some merit in the argument that the informal ‘pocket veto’ power of the Governor is a helpful check on the legislature’s ability to pass laws that may appear constitutional at the first blush, but may not necessarily be in the spirit of the constitution. The recent flurry of laws against religious conversions by many states, popularly dubbed as ‘love jihad laws’, are an example of such laws. They may pass the test of constitutional validity when examined by a constitutional Court, but it is not difficult to see that their real object is far from what the constitution envisages. The existence and exercise of ‘pocket veto’ would provide a safeguard in the form of the Governor’s wisdom. A constitutional functionary like the Governor is expected to always act in furtherance of the constitution itself. However, the recent trend of the Governors acting as political rivals of the State Governments and creating constitutional deadlock when it comes to giving their assent to Bills pending before them, has not been in true constitutional spirit. Therefore, the possibility of unelected Governors defeating elected legislatures by exercise of this power of ‘pocket veto’ – a possibility created by the actions, or inactions, of Governors across states – has led the Supreme Court to put a stop on the Governor’s exercise of ‘pocket veto’ power. This decision is expected to have implications for the existing imbroglios between other State Governments and their Governors, and it will shape the outcomes in the petitions that have been filed by those states against their Governors.<sup>29</sup>

### VIII. CONCLUSION

The Supreme Court's landmark judgment in *State of Punjab v. Principal Secretary to the Governor of Punjab* serves as a definitive guide to gubernatorial powers within the constitutional framework. The ruling accentuates that in a parliamentary democracy, the crux of authority rests with its elected representatives while underscoring the Governor's role as a constitutional functionary which is bound by the 'aid and advice'<sup>30</sup> of the Council of Ministers. The Court's meticulous examination of 'pocket vetoes' clarifies that gubernatorial authority, even in withholding legislative assent, is circumscribed by

<sup>29</sup> Yogesh Byadwal, *Withholding Assent – Where's the Delay?*, INDIA CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (Dec. 8, 2023), <https://indconlawphil.wordpress.com/2023/12/08/guest-post-withholding-assent-wheres-the-delay/>.

<sup>30</sup> INDIA CONST. art. 163, cl. 1.

constitutional mandates, preventing undue delays in legislative processes. This emphasis on expedition safeguards against encroachments on the essence of parliamentary proceedings.

Beyond its immediate implications, the verdict resonates as a guiding precedent, thereby directing Governors away from unfettered discretion and subsequently, upholding the delicate balance between federalism and democracy. The Court's distinction between 'prorogation' and 'adjournment' reinforces the Speaker's exclusive role in regulating procedural intricacies, averting potential constitutional deadlocks. In essence, the Court's resolute pronouncement not only dispels the spectre of 'pocket vetoes', but also issues a clarion call for unwavering constitutional fealty, guiding Governors to navigate their roles with sagacity. This adjudication not only resonates as a jurisprudential echo, but also sculpts the constitutional landscape thereby safeguarding the orchestrated choreography of democracy with its intended grace and efficacy.

## ARTICLE

**SETTLEMENT AGREEMENTS UNDER THE INSOLVENCY AND  
BANKRUPTCY CODE, 2016: AN EGRESS FOR FINANCIAL DEBTORS?**

*Heli Dubey, Shoibolini Mukhopadhyay & Siddhi Nigam\**

**ABSTRACT**

*The Insolvency and Bankruptcy Code, 2016 (IBC)<sup>1</sup> has faced hurdles in its implementation, divulging inconsistencies in addressing legal issues not explicitly covered by its provisions. One significant grey area pertains to the consequences of breaching settlement agreements between corporate debtors and operational creditors. This article probes the ramifications of such breaches, critically assessing the applicability of the IBC in these situations. Through examination of various legal precedents related to settlement agreement breaches, the article navigates the complexities of these violations and their potential impact on the insolvency landscape. The analysis extends to a chronological perspective, encompassing the pre-COVID era's extrajudicial settlement framework and anticipating the post-COVID scenario. By focusing on the dynamics of settlement agreements and dissecting legal intricacies, the article seeks to contribute to the ongoing discourse regarding the effectiveness of the IBC in addressing unforeseen legal complexities. In an evolving legal landscape, a comprehensive understanding of settlement agreements and their interaction with insolvency frameworks becomes increasingly indispensable. This exploration serves as a crucial step in unravelling the multifaceted nature of insolvency issues, anticipating challenges, and fostering informed discussions within the legal community. As complexities persist, an informed dialogue is essential for refining and adapting the IBC to meet the dynamic needs of the ever-changing economic and legal environment.*

**Keywords:** *Insolvency, Revival, Settlement Agreement, COVID-19, Corporate Insolvency Resolution Process (CIRP)*

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<sup>1</sup> The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

## I. INTRODUCTION

The Insolvency and Bankruptcy Code of 2016 has brought forth a myriad of unresolved legal challenges due to its recent enactment. The advent of the COVID-19 pandemic spurred corporate debtors and creditors to opt for out-of-court settlements, raising concerns about breaches within ongoing IBC proceedings. Earlier, the IBC lacked clear provisions regarding the withdrawal of a Corporate Insolvency Resolution Process (CIRP) application submitted to the National Company Law Tribunal (NCLT). Notably, *Rule 8* of the Insolvency and Bankruptcy (Application to the NCLT) Rules of 2016,<sup>2</sup> *Rule 11* of the National Company Law Tribunal Rules 2016,<sup>3</sup> and subsequent amendments to *Section 12A* of the IBC<sup>4</sup> through case law have partially tackled this issue.

This article aims to explore whether a breach of the settlement agreement will automatically reinstate the Corporate Insolvency Resolution Process (CIRP), or else a need will arise for the creditor to initiate a fresh application under the IBC. Furthermore, the paper also throws light on post-pandemic amendments and their impact on the landscape of out-of-court settlements between creditors and debtors through various rulings. The change in nature of “*debt*” being altered or not in the event of such a settlement agreement breach is deliberated as well.

## II. LEGAL PROVISIONS

Financial creditors, operational creditors, and the corporate debtor themselves may each file an application with the NCLT for initiating the CIRP in accordance with Sections 7, 9 or 10 of the IBC.<sup>5</sup> The application may be settled and withdrawn in the manner specified under the IBC: -

- Before admission of an application under Sections 7, 9 or 10 of IBC, in accordance with Rule 8.
- Under Section 12A of IBC read with Regulation 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations:

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<sup>2</sup> Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, Rule 8, Gazette of India, Extra., pt. II sec. 3 (Nov. 30, 2016).

<sup>3</sup> National Company Law Tribunal Rules, 2016, Rule 11, Gazette of India, Extra., pt. II sec. 3 (Jul 21, 2016).

<sup>4</sup> The Insolvency and Bankruptcy Code, 2016 §12A, No.31, Acts of Parliament, 2016 (India).

<sup>5</sup> The Insolvency and Bankruptcy Code, 2016 § 7, 9 & 10, No.31, Acts of Parliament, 2016 (India).

- Following admission but prior to the creation of the creditors' committee (CoC).
- Following the CoC's formation but before the call to declare interest is sent out.
- Following the release of the request for expressions of interest.

Rule 8 states that the NCLT may allow the withdrawal of an application upon a request made by the applicant prior to the application's admission. Rule 11 of NCLT states *“that these rules shall not limit or affect the inherent powers of the Appellate Tribunal to make orders or give directions as necessary for meeting the goal of justice or to prevent abuse of the process of the Appellate Tribunal”*. By means of the Amendment Ordinance of June 6, 2018, Section 12A was subsequently added, giving the Adjudicating Authority (AA) *“the power to grant a withdrawal on a CIRP applicant's request with 90% voting share approval of the CoC in the manner prescribed.”*<sup>6</sup>

The application has to be filed before the NCLT under Section 12A read with Regulation 30A in two ways: -

- The Interim Resolution Professional (IRP) files on behalf of the applicant in case the application being withdrawn is filed after admission but before establishment of the committee of creditors (CoC).
- IRP or Resolution Professional (RP) files on behalf of the applicant in case the application being withdrawn is filed after composition of CoC.

The application has to be filed with FORM FA<sup>7</sup> of the CIRP Regulation 2016 Schedule which is for the withdrawal of corporate insolvency process. A Bank Guarantee needs to be filed with it as well.

The withdrawal application must be submitted to the AA by the IRP on behalf of the applicant within three days of its receipt if it was filed before the CoC was formulated. In case the withdrawal request is made after the CoC has been established, the CoC must approve the withdrawal by a majority vote of 90% within 7 days of receiving the application. If the application is approved by the CoC with 90% of the voting share, the Resolution Profession (RP) must submit it, along with

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<sup>6</sup> Shivam Jaiswal, *Withdrawal of CIRP Proceeding pursuant to Settlement under Insolvency and Bankruptcy Code, 2016*, IBC LAWS (Aug. 28, 2022, 13:45 PM), <https://ibclaw.in/withdrawal-of-cirp-proceeding-pursuant-to-settlement-under-insolvency-and-bankruptcy-code-2016-by-advocate-shivam-jaiswal/> .

<sup>7</sup> Form FA of the CIRP Regulations, 2016 is utilised for filing an “Application for Withdrawal of Corporate Insolvency Resolution Process.” Available at: <https://ibbi.gov.in/en/home/downloads>.

the CoC's approval, to the AA on the applicant's behalf within three days after the approval. After that, the AA may decide to approve the application by order.

### III. LEGAL ANALYSIS

#### A. *The Conundrum Surrounding Settlement Agreements And Its Evolution*

The question of whether a CIRP against a Corporate Debtor (CD) can be revived if it violates a settlement agreement has led to conflicting decisions across benches of the NCLT. In the case of *Vaishnu Industries Private Limited v. Horizon Global Limited*,<sup>8</sup> the NCLT Delhi denied the revival of the application, instead allowing the Operational Creditor (OC) to submit a new application. Conversely, in *JFE Shoji Steel India Private Limited v. Danke Technologies Private Limited*,<sup>9</sup> the NCLT Ahmedabad permitted the revival of the application in case of a breach of the settlement agreement.

The conflict was resolved in the recent case of *M/s. ICICI Bank Limited v. M/s. OPTO Circuits (India) Limited*,<sup>10</sup> where the National Company Law Appellate Tribunal (NCLAT) Chennai Bench held that the CIRP can be reactivated if the settlement agreement's provisions are violated. The NCLAT referenced its judgment in *Vivek Bansal v. Burda Druck India Private Limited*,<sup>11</sup> stating that an Operational Creditor is free to pursue CIRP revival if the Corporate Debtor defaults on unpaid instalments as per the settlement agreement.

A settlement agreement is a legally binding contract between two or more parties that seeks to resolve a dispute or settle a claim. It specifies the terms, circumstances, rights, obligations, and responsibilities of each party that have been mutually agreed upon. When one party does not carry out its end of the agreement as outlined in the legally binding agreement, it amounts to a breach. The IBC provides a framework for handling the financial crisis of companies with the goal of maximising asset value for creditors. Nevertheless, there are no clear provisions in the IBC for bringing legal action against a business for violating a settlement agreement. This poses a question

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<sup>8</sup> *Vaishnu Industries Private Limited v. Horizon Global Limited*, MANU/NC/3122/2020.

<sup>9</sup> *JFE Shoji Steel India Private Limited v. Danke Technologies Private Limited*, (2021) SCC OnLine NCLT 190.

<sup>10</sup> *M/s. ICICI Bank Limited v. M/s. OPTO Circuits (India) Limited*, Company Appeal (AT) (CH) (Insolvency) No. 146 of 2021.

<sup>11</sup> *Vivek Bansal v. Burda Druck India Private Limited*, (2020) SCC OnLine NCLAT 582.

of whether or not such conflicts can be settled through the IBC. Previously mentioned cases indicate that a settlement agreement default may be regarded as a default under IBC for the purposes of initiating the CIRP. The primary idea is that when parties engage in an agreement with the intention of paying off debt and the default occurs in the execution of the agreement, it is equivalent to a default under IBC and it would either initiate CIRP or revive it.

The maintainability of IBC proceedings in cases of settlement agreement violations has also seen varying interpretations among different NCLT benches. In *SEW & Prasad, Joint Venture v. Gati Infrastructure Private Limited*,<sup>12</sup> the NCLT Hyderabad Bench allowed an application under Section 9 of the IBC based on a breach of the settlement agreement. Conversely, in *M/s Delbi Control Devices (P) Ltd. v. M/s Fedders Electric and Engineering Ltd.*,<sup>13</sup> the NCLT Allahabad Bench held that unpaid instalments under a settlement agreement do not qualify as operational debt under Section 5(21) of the IBC.

The NCLAT Delhi's decision in *Amrit Kumar Agrawal v. Tempo Appliances Pvt Ltd.*<sup>14</sup> clarified that a mere obligation to pay does not constitute a "financial debt" as defined in the IBC. According to this ruling, a financial obligation arises only when a loan is not only due but also carries applicable interest, considering the time value of money. As a result, a party cannot initiate CIRP against another party for breaching a simple payment obligation under a settlement agreement. The decision also emphasised that non-payment of cheques issued in accordance with a settlement agreement cannot be treated as a financial debt.

It can be concluded through the various precedents that merely breaching the terms of a settlement agreement, by which a party was supposed to make a payment, would not be considered a "debt" under IBC. As a result, it has to be noted that merely having an obligation to pay under a settlement agreement would not be tantamount to paying consideration against the time value of money, and that a party would not be entitled to use CIRP against another party for the breach of such an obligation.

*B. Is The Liberty of The Adjudicating Authority Essential For The Re-Initiation of CIRP Proceedings?*

<sup>12</sup> *SEW & Prasad, Joint Venture v. Gati Infrastructure Private Limited*, MANU/NC/1027/2021.

<sup>13</sup> *Fedders Electric and Engineering Limited v. Delhi Control Devices (P) Limited*, (2019) SCC OnLine NCLT 8030.

<sup>14</sup> *Amrit Kumar Agrawal v. Tempo Appliances Pvt. Ltd.*, (2020) SCC OnLine NCLT 1838.

In the realm of CIRP, the question of whether the tribunal's liberty is a prerequisite for the resurgence of proceedings has been a subject of legal scrutiny. This inquiry was particularly delved into in the case of *ICICI Bank Ltd. v. OPTO Circuits (India) Ltd.*,<sup>15</sup> a landmark decision rendered on April 28, 2022, by the NCLAT. In this adjudication, the NCLAT elucidated that when a corporate debtor defaults on the stipulations outlined in a Settlement Agreement governing the payment of outstanding instalments, the financial creditor is vested with the right to seek the revival or restoration of the CIRP.

The genesis of this matter lay in the rejection by the NCLT in Bangalore of the creditor's application, which sought the liberty to revive the application. The NCLT, instead, opined that financial creditors were entitled to file a fresh application for the initiation of CIRP. Subsequently, the NCLAT, upon appellate review, declared the NCLT's order as flawed, asserting that it was passed without due application of mind and without adherence to the principles of natural justice. Consequently, the NCLAT granted the financial creditors the liberty to resuscitate the CIRP proceedings.

Amidst these legal intricacies, a pivotal question emerges: is it imperative to seek the tribunal's liberty to rekindle CIRP proceedings, or can it be pursued as an inherent right by invoking the jurisdiction of the NCLT? The case of *Krishna Garg & Anr. v. Pioneers Fabricators Pvt. Ltd.*<sup>16</sup> provides insights into this matter. Here, the NCLAT declined to revive CIRP proceedings, emphasising that settlement terms must be formally filed and incorporated into the NCLT order with the liberty to revive or restore CIRP in the event of the corporate debtor's non-compliance with the settlement terms.

This discernment leads to a nuanced distinction between cases where CIRP proceedings were withdrawn merely by alluding to a settlement and those where withdrawal was contingent upon incorporating the Settlement Agreement into the record, accompanied by the seeking of liberty to revive CIRP proceedings in case of non-adherence by the corporate debtor.

Further reinforcement of this distinction can be found in the case of *SRLK Enterprises LLP v. Jalan Transolutions (India) Ltd.*<sup>17</sup> In this case, the judiciary underscored the significance of differentiating

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<sup>15</sup> M/s. ICICI Bank Limited v. M/s. OPTO Circuits (India) Limited, Company Appeal (AT) (CH) (Insolvency) No. 146 of 2021.

<sup>16</sup> Krishna Garg & Anr. v. Pioneers Fabricators Pvt. Ltd., Company Appeal (Ins.) Nos. 92 of 2021.

<sup>17</sup> SRLK Enterprises LLP v. Jalan Transolutions (India) Ltd., Company Appeal (AT) (Ins) No. 294 of 2021.

between a straightforward withdrawal stating settlement and a withdrawal where the settlement agreement is an integral part of the withdrawal order, thereby allowing for restoration in the event of default. This perspective emphasises that the IBC isn't akin to a recovery proceeding, where parties can repeatedly approach the court due to non-payment of debt.

An additional precedent, *Pooja Finlease Ltd. v. Auto Needs (India) Pvt. Ltd. & Anr.*,<sup>18</sup> held that when the NCLT accepts the withdrawal of a CIRP application based on a settlement agreement incorporating a clause permitting the revival of CIRP in case of default, it is tantamount to the NCLT granting the liberty of revival in case of default or non-adherence to the settlement agreement. Essentially, when the application is approved based on consent terms and the settlement agreement is officially recorded, it should be considered an integral part of the order. This underscores the creditor's authority to revive the petition in the event of a default in consent terms.

In conclusion, the revival of CIRP proceedings can only be pursued in cases where the settlement agreement is formally brought on record, and the NCLT grants the necessary liberty, marking a dynamic interplay between legal precedent, settlement terms, and the jurisdiction of the tribunal.

### *C. The Nature of The Debt Does Not Undergo A Transformation After It is Settled*

The question of whether the inherent character of a debt undergoes a substantial transformation post-settlement has been the subject of recent legal scrutiny. A noteworthy instance comes from a ruling dated May 4, 2023, handed down by the NCLT in Delhi, in the case of *Finsbury Global FZE v. M/s. Uttam Sucrotech International Pvt. Ltd.*<sup>19</sup> This ruling held that the nature of a debt experiences a discernible shift upon the execution of a settlement agreement. In the specific scenario presented, the parties involved entered into a settlement agreement to address an outstanding operational debt. The NCLT posited that the very moment this agreement was formalised, the debt's classification transitioned from its prior status as operational debt under Section 5(21) of the IBC. Consequently, the debt emanating from the settlement agreement shed its operational debt categorisation under the Code, assuming a more generic status as a straightforward debt.

<sup>18</sup> Pooja Finlease Ltd. vs. Auto Needs (India) Pvt. Ltd. & Anr., Company Appeal (AT) (Ins.) No.103 of 2022.

<sup>19</sup> Finsbury Global FZE v. M/s Uttam Sucrotech International Pvt. Ltd., I.A. 4081/2022 IN Company Petition No. (IB) – 1013 (PB) /2020.

Should this interpretation by the NCLT be embraced, it logically follows that the mechanisms under the IBC cannot be invoked to address dues stemming from the settlement agreement. This, in turn, implies that neither can the previously withdrawn CIRP proceedings be reinstated, nor can a fresh application for CIRP be submitted in response to the non-payment of the debt agreed upon in the settlement.

A comparable standpoint was articulated by the NCLT Allahabad in the case of *M/s Delhi Control Devices (P) Ltd. v. M/s Fedders Electric and Engineering Ltd.*<sup>20</sup> The tribunal held that unpaid instalments as per a settlement agreement should not be construed as operational debt under Section 5(21) of the IBC. According to the NCLT Allahabad, the failure or breach of the settlement agreement does not furnish grounds for instigating the CIRP against the corporate debtor as per the provisions of the IBC. In this context, the appropriate remedy, the tribunal suggested, might lie outside the jurisdiction of the Adjudicating Authority (NCLT).

In *Vinay Gupta v. Ashika Credit Capital Ltd. & Anr.*,<sup>21</sup> the argument presented was that debts arising from a breach of a settlement agreement shouldn't be categorized as '*financial debt*' as there was no disbursement linked to the time value of money. The NCLAT, however, determined that a default in the settlement agreement is merely a consequence of the initial CIRP application, and it does not alter the fundamental nature of the claim within.

However, it is crucial to question the validity of the proposition that the nature of a debt inherently changes after the execution of a settlement agreement. This assertion appears to be at odds with the legal standpoint, as elucidated by the NCLAT in the case of *Priyal Kantilal Patel v. IREP Credit Capital Pvt. Ltd.*,<sup>22</sup> decided on February 1, 2023. The NCLAT, in this instance, maintained that a breach of consent terms in a prior company petition does not erase the financial debt claimed by the financial creditor, nor does it alter the nature and character of the financial debt in question. Notably, the NCLAT emphasised that endorsing such an interpretation would unduly favour the corporate debtor who breached the consent terms. This elucidation seems to offer a more nuanced and legally sound understanding of the matter. Adopting the opposing view, namely that a settlement agreement fundamentally alters the nature of a debt, could have far-reaching

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<sup>20</sup> *M/s Delhi Control Devices (P) Ltd. v. M/s Fedders Electric and Engineering Ltd.*, Company Petition (IB) No. 343/ALD/ 2018.

<sup>21</sup> *Vinay Gupta v. Ashika Credit Capital Ltd. & Anr.*, CA(AT)(I) No. 92 of 2023.

<sup>22</sup> *Priyal Kantilal Patel v. IREP Credit Capital Pvt. Ltd.*, 2023 SCC OnLine NCLAT 51.

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consequences, potentially extinguishing the remedies available under the Code for creditors who, in good faith, opted to settle the debt and subsequently withdrew CIRP proceedings.<sup>23</sup>

Furthermore, in the case of *IDBI Trusteeship Services Limited. v. Nirmal Lifestyle Limited.*,<sup>24</sup> the NCLAT made a significant determination. The essence of the ruling revolves around the NCLAT's clear stance that the failure to grant permission to revive a company petition becomes inconsequential if the settlement agreement in question contains clauses permitting revival in the event of a breach of settlement or consent terms.

This legal precedent underscores the importance of the terms and conditions outlined in settlement agreements. The NCLAT appears to prioritize the substance of the agreement over procedural aspects, emphasizing the contractual provisions that anticipate and address potential breaches.<sup>25</sup> The ruling suggests that parties entering into settlement agreements within the insolvency framework should carefully structure these agreements, including provisions that explicitly outline the consequences of a breach and the process for reviving the petition.

By placing significance on the contractual aspects of settlement agreements, the NCLAT's decision may impact the dynamics of dispute resolution within the insolvency framework. It encourages parties to negotiate and draft settlement agreements with precision, foreseeing potential contingencies and providing mechanisms for resolution in case of non-compliance. This approach aims to streamline the legal process and ensure that the terms agreed upon by the parties are not easily circumvented due to procedural hurdles.

Legal professionals and stakeholders in the insolvency landscape should take note of this ruling as it reflects a nuanced interpretation of the interplay between settlement agreements and the revival of company petitions. As with any legal decision, the implications may vary depending on the specific facts and circumstances of individual cases, but the emphasis on the substance of the agreement sets a noteworthy precedent within the realm of insolvency law.

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<sup>23</sup> Aman Gupta Mayank Kumar, *Revival of insolvency proceedings: Analysis and way forward*, Lakshmisri (Dec. 17, 2023, 9:29 PM), <https://www.lakshmisri.com/insights/articles/revival-of-insolvency-proceedings-analysis-and-way-forward/#>.

<sup>24</sup> *IDBI Trusteeship Services Limited. v. Nirmal Lifestyle Limited.*, Company Appeal (AT) (Insolvency) No. 117 of 2023.

<sup>25</sup> Vajjayant Paliwal, Nikhil Mathur and Kritika Poddar, *India: Breach Of Settlement Terms And Creditor's Right To File For Corporate Insolvency: Striking A Balance Under The Insolvency And Bankruptcy Code, 2016*, MONDAQ, (Dec. 17, 2023, 9:38 PM) <https://www.mondaq.com/india/insolvencybankruptcy/1360342/breach-of-settlement-terms-and-creditors-right-to-file-for-corporate-insolvency-striking-a-balance-under-the-insolvency-and-bankruptcy-code-2016>.

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In light of these considerations, a persuasive argument emerges, asserting that a settlement agreement, in essence, does not modify the fundamental nature of the original debt between the creditor and the corporate debtor. The legal landscape surrounding this issue remains dynamic, and future rulings and interpretations are likely to further shape the contours of this nuanced and complex legal terrain.

#### IV. LANDMARK JUDGEMENT: THE RATIONALE OF THE NCLAT IN PRIYAL KANTILAL PATEL V. IREP CREDIT CAPITAL (P) LTD.

##### *A. Background of the Case*

In the intricate web of corporate legalities, the origin of the dispute can be found in the disagreement between two organisations, Rajesh Landmark Projects Private. Limited. and IREP Credit Capital Private. Limited.,<sup>26</sup> which are designated as the Financial Creditor (FC) and the CD, respectively. The core of the dispute included debentures that the CD had issued to the FC, which set up a financial transaction that later took a legal turn.

The narrative unfolded with the FC invoking Section 7 of the IBC, seeking to initiate the CIRP against the CD. At this point, a pivotal development took place as both parties reached an agreement that was expressed in consent terms. Under this agreement, the FC, in a show of goodwill, opted to withdraw the petition that was started. However, a critical clause granted the FC the authority to revive the petition in case of a default by the CD.

As fate would have it, the CD found itself in default, triggering the FC to file a fresh petition under Section 7. This marked the commencement of a renewed legal battle, leading to the admission of the petition and the initiation of the CIRP. The CD, not one to concede easily, challenged this legal move, asserting that the breach of the previously agreed-upon consent terms should not be construed as constituting a financial debt.

##### *B. Role of the NCLAT And Its Judgement*

The NCLAT assumed the role of arbiter in this complex legal dispute. The bench meticulously examined the consent terms alongside the specifics of the Financial Debt articulated in the Section

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<sup>26</sup> IREP Credit Capital Private. Limited v. Rajesh Landmark Projects Private. Ltd., C.P (IB) NO. 1029 OF 2021.

7 petition in its judicial scrutiny. An astute observation revealed that the Financial Debt being claimed in the fresh petition mirrored the one originally posited in the earlier application. Essentially, the new petition did not seek redress for the breach of the consent terms but rather aimed to assert the legitimacy of the original debt extended by the FC to the CD.

The bench drew a salient distinction between the present case and precedent cases cited by the CD in rendering its judgment, and notably emphasised that the current petition was not primarily based on the default in payment as per the settlement agreement. Consequently, the breach of consent terms, though acknowledged, did not change the nature and character of the financial debt, even in the face of a breach of the settlement agreement.

The culmination of this legal saga saw the Tribunal dismissing the appeal lodged by the CD. This pronouncement affirmed that the nature of the financial debt being claimed remained consistent with the original claim, irrespective of the breach of the settlement agreement. Furthermore, the Tribunal, while upholding the liberty to revive the previous application, underscored that filing a fresh petition under Section 7 could not be hastily rejected solely on the grounds of a breach of the settlement agreement. This comprehensive legal analysis and adjudication highlighted the nuanced and intricate nature of corporate insolvency matters within the ambit of the legal framework.

### *C. Analysis of The NCLAT's Decision*

The NCLAT ruling is a positive step towards upholding the established position that, should a corporate debtor reach a settlement with a creditor after the creditor has filed an application for the commencement of CIRP for a default pertaining to a financial debt or an operational debt, and the debtor is later found to be unable to fulfil its payment obligations under the terms of the settlement agreement, the creditor will be free to renew the application for the commencement of CIRP in accordance with the applicable IBC provisions, or file a new application for the commencement of CIRP against the corporate debtor for breach of the settlement agreement.

This decision essentially makes clear that, even in situations where the parties agree to a "revival" of the proceedings, the creditor may still move forward with filing a new application to initiate CIRP. This protects the interests of the creditor and stops a misbehaving corporate debtor from

abusing or failing to make payments as stipulated in the settlement agreement or terms and using shady tactics to avoid the CIRP.

It is also important to point out that the aforementioned ruling does not express an opinion or deviate from the previously established legal position that states that a mere obligation to pay under a settlement agreement does not equate to paying money or time value, and as such, does not qualify as financial debt for the purposes of initiating the CIRP. Consequently, the terms of the initial debt between the creditor and the corporate debtor would not change as a result of a settlement agreement.

#### **V. OUTSIDE COURT SETTLEMENT REGIME IN INDIA: PRE & POST COVID-19 SCENARIO**

The Covid-19 pandemic triggered a plethora of commercial disputes across the country. The pandemic resulted in serious losses to the income and sales of big, small, formal and informal businesses alike, which led to failure in fulfilling their contractual obligations. Two major steps were taken by the government to mitigate the situation. The first was the issuing of moratorium by the Reserve Bank of India on payment of all term loans, and the second was the suspension issued by the Central Government for the initiation of insolvency and bankruptcy proceedings under the IBC. However, lifting of the moratorium has led to an immense upsurge in the number of disputes between creditors and debtors which is evident from the reports provided by the borrowers expressing their inability to service the debt. In addition to this, there have been instances of employers refusing to pay promised wages and other employment benefits which has led to increase in litigation by the counterparties for compensation.

According to the Chairman of the Insolvency and Bankruptcy Board of India (IBBI), out of a total of 20,008 cases filed under the IBC, 16,000 have been withdrawn before the stage of admission.<sup>27</sup>

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<sup>27</sup> Gaurav Noronha, *IBC has delivered 95% rescue rate: MS Saboo*, THE ECONOMIC TIME (Aug. 28, 2022, 10:30 PM), [https://economictimes.indiatimes.com/news/economy/finance/ibc-has-delivered-95-rescue-rate-ms-sahoo/articleshow/80154751.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/economy/finance/ibc-has-delivered-95-rescue-rate-ms-sahoo/articleshow/80154751.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

The following table is a representation of the status of disputes filed under the IBC:

<b>Withdrawn under Rule 8</b>	16,000
<b>Withdrawn under Rule 11</b>	473
<b>Withdrawn under Section 12A</b>	291
<b>Disposed and Under Adjudication</b>	2,219
<b>Liquidation Commenced</b>	1,025
<b>Total cases admitted</b>	4008
<b>Total</b>	<b>20,008</b>

*Table 1. Statistics of Disputes under the IBC<sup>28</sup>*

From the above table, it can be concluded that approximately 80% of the total cases admitted to the NCLT have been withdrawn for outside of court settlements.

Data collected from the official website of IBBI regarding reasons for withdrawal for CIRPs is tabulated and provided below:

<b>Complete settlement with the applicant</b>	350
<b>Complete settlement with other creditors</b>	55
<b>Agreement to settle at a later date</b>	48
<b>Other settlement with creditors</b>	267
<b>Others</b>	224
<b>Total</b>	<b>947</b>

*Table 2. Reasons for Withdrawal of CIRPs (Data up to September 2023)<sup>29</sup>*

Data provided in the above table indicates that withdrawn or settled cases result in almost full or full recovery of the debt.

<sup>28</sup> Ram Sing & Hiteshkumar Thakkar, *Settlements and Resolutions Under the Insolvency and Bankruptcy Code: Assessing the Impact of Covid-19*, 69(3) IEJ 568, 575 (2021).

<sup>29</sup> THE QUARTERLY NEWSLETTER OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf> (last visited Dec. 11, 2023).

From Table 1 and Table 2, it can be concluded that outside of court settlements are a preferred mode for recovery of debt as it has higher rates of recovery. On the contrary, under CIRPs, the creditors are able to retrieve only a small fraction of their claims. This is substantiated by the fact that through instructions from RBI, twelve major accounts initiated by banks are recovered through resolution. This is because the aggregate claim is that of Rs. 3.45 lakh crores whereas the liquidation value of the assets of the business is only Rs. 73, 220 crore which makes the rate of recovery approximately only 21%.<sup>30</sup>

Even in the pre-Covid period, the instances of outside court settlements are higher, which is evident from Table 1 and 2. However, in the post COVID period, outside of court settlements are bound to decrease, first, because of the increase in the case filing threshold from Rs. 1 lakh to Rs. 1 crore, introduced through the Insolvency and Bankruptcy (Amendment) Act, 2020.<sup>31</sup> As a result of this amendment, most operational creditors (including employees), will not be able to claim their dues through the NCLT. Secondly, debtors have experienced deterioration and decline in their assets as a result of COVID-19 pandemic in addition to accumulation of interests. In other terms, the value of debt relative to value of business has gone up. In view of the said proposition, it can be concluded that even for cases filed before the NCLT, the probability of entering into settlement is going to shrink since the debtors do not possess any resources to even consider the option of outside court settlements. This will further effect businesses as it is already established that the recovery rate through CIRP is substantially lower than in case of settlements.

## VI. CONCLUSION & RECOMMENDATIONS

In the recent case of *IDBI Trusteeship Services Limited. v. Nirmal Lifestyle Limited.*,<sup>32</sup> the NCLAT made a significant determination. The essence of the ruling revolves around the NCLAT's clear stance that the failure to get permission for the company revival petition becomes inconsequential if the settlement agreement in question contains clauses permitting revival in the event of a breach of settlement terms. It highlights the importance of the terms and conditions outlined in settlement

<sup>30</sup> ECONOMIC TIMES BFSI, <https://bfsi.economicstimes.indiatimes.com/news/financial-services/debt-recovery-from-top-corporates-under-ibc-at-dismal-17/100269322> (last visited Dec. 10, 2023).

<sup>31</sup> The Insolvency and Bankruptcy Code (Amendment) Act, 2020, § 4, No. 1, Acts of Parliament, 2020 (India).

<sup>32</sup> *Id.*

agreements. The NCLAT appears to prioritize the substance of the agreement over procedural aspects, emphasizing the contractual provisions that anticipate and address potential breaches. Moreover, the ruling suggests that parties entering into settlement agreements within the insolvency framework should carefully structure these agreements, including provisions that explicitly outline the consequences of a breach and the process for reviving the petition.

The NCLAT's decision may impact the dynamics of dispute resolution within the insolvency framework by placing significance on the contractual aspects of settlement agreements. It encourages parties to negotiate and draft settlement agreements with precision, foreseeing potential contingencies and providing mechanisms for resolution in case of non-compliance. This approach aims to streamline the legal process and ensure that the terms agreed upon by the parties are not easily circumvented due to procedural obstacles.

Legal professionals and stakeholders in the insolvency landscape should take note of this ruling as it reflects a nuanced interpretation of the interplay between settlement agreements and the revival of CIRPs. The implications may vary on a case-to-case basis, as commonly seen with any legal decision, but the emphasis on the substance of the agreement sets a significant precedent within the realm of insolvency law.

As a result of these developments, the landscape of settlement agreements in relation to the IBC has become increasingly clear, delineating the stance of parties involved and their inter-relation with the statute. In cases where a debtor breaches a settlement agreement, thereby triggering IBC proceedings, the creditor, whether financial or operational, has the prerogative to reinstate the CIRP. However, seeking recourse through the IBC due to the violation of settlement agreement terms is not a viable option. The Code seems to lack provisions for creditors to address non-payment issues once the insolvency proceedings have commenced, indicating a gap in the legal framework.

The latter part of this discussion sheds light on the prevalence of debt settlements as a preferred choice for both financial creditors and debtors. Despite the inclination towards settlements, the 2020 amendment to the IBC, aggravated by the financial distress stemming from the pandemic, poses challenges for operational creditors, including small business owners and employees. The increased threshold amount for filing cases before the NCLT limits the recourse available to operational creditors through the IBC, potentially impeding economic growth.

Considering the evolving legal landscape and the challenges posed by recent amendments, the following recommendations are proposed to address the said issues:

*A. Promoting Settlements through Pre-Packs:*

There is a compelling argument for promoting settlements outside the court by giving impetus to "pre-packaged agreements" or "pre-packs." Pre-packs involve negotiating a reorganization plan between the debtor and creditors before declaring insolvency, aiming for court approval. International experiences from countries like the United States, the United Kingdom, and Singapore suggest that the informality of the pre-pack procedure can facilitate quicker resolutions for distressed enterprises.

*B. Legislative Intervention for Pandemic-Related Distress:*

A plausible legislative intervention could involve developing a legislation for targeted protection of businesses and individuals unable to fulfil contractual obligations due to the pandemic. A possible example is the German approach, exemplified by the Covid-19 Mitigation Act, which provides comprehensive protection for businesses affected by the pandemic, offering them an opportunity to avoid bankruptcy while safeguarding lenders from insolvency.

Thus, after thorough examination and deliberation, we can conclusively infer that while the IBC has been a crucial tool for insolvency resolution, it still fails to provide an egress to the creditors against non-payment once the IBC proceedings have commenced. Additionally, there is a definite need for detailed reforms to address gaps, especially in the context of settlement agreements and pandemic-induced economic challenges. Encouraging settlements through pre-packs and introducing legislation to mitigate pandemic-related distress can contribute to a more resilient and effective insolvency framework in India.

## ARTICLE

**'FACE' THE FACTS: SCRUTINIZING FACIAL RECOGNITION  
TECHNOLOGY VIS-À-VIS HUMAN RIGHTS***Tejaswini Kaushal\****ABSTRACT**

*The widespread deployment of facial recognition technology (FRT) in modern times aims to revolutionize criminal identification processes and enhance security. However, it also presents a significant threat to human rights. While the technology faces notable disparities in identification accuracy, the error rates are especially higher for marginalized groups, particularly women of color. FRT, therefore, poses a grave risk of wrongful incrimination to innocent marginalized communities of color globally. It has been observed to implicate minority communities in cases of false arrests, surveil them, and suppress political dissent, leading to widespread misuse and human rights violations. Zooming in on the situation in India, where the government heavily invests in building a nationwide facial recognition system, reports suggesting low accuracy rates and cases of misidentification and wrongful arrests of minority groups fail to support their case. Furthermore, the existing Indian legal framework is evidently inadequate for FRT usage and regulation, coupled with a lack of artificial intelligence (AI) laws and a nascent data protection law. To tackle these dilemmas posed by FRT, the paper adopts a three-pronged approach: firstly, analyzing the ideal or international standards of regulation; secondly, comparing it to the Indian position; and lastly, proposing improvements to the existing framework. India needs to align its laws with global standards and prioritize human rights by enhancing data protection, addressing algorithmic biases, integrating hybridized technologies, regulating the commercial use of facial biometrics, and establishing oversight mechanisms. There is an urgent need for a critical reassessment of FRT vis-à-vis its risks to individual rights and marginalized communities. India's policy must balance security and privacy, emphasizing the urgency to mitigate potential privacy breaches and safeguard personal data protection.*

**Key words:** *algorithms, biases, biometrics, facial recognition technology, human rights*

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## I. INTRODUCTION

An interesting 2023 article on CBC analyzed how siblings, children and parents of several persons were able to hijack the narrators' personal device's Facial Recognition Technology [hereinafter "FRT"] with incessant ease, where these devices unlocked obediently at their sight.<sup>1</sup> While the consequences in these scenarios are rather mundane, these do ignite a flicker of concern and prompt contemplation of a chilling possibility: What if this very technology, with its fallible nature, were to wrongly implicate an innocent individual in a grave criminal matter?

Centered on this precise conundrum, this article analyses the inherent shortcomings of FRT to demonstrate how it is a modern 'devil in disguise' for human rights. Firstly, the article sheds light on the fallibility of FRT, with its menial accuracy rates for marginalized groups, how it poses a risk of wrongful incrimination to communities of color globally and its application in curbing political dissent. Subsequently, the analysis zeroes in on the state of affairs in India, where the government invests heavily in FRT despite human right concerns, and examines the shortcomings of the existing Indian legal framework for FRT regulation coupled with lacking data protection and Artificial intelligence [hereinafter "AI"] laws. Lastly, the article adopts a three-pronged approach to address the concerns surrounding FRT and to advocate the alignment of Indian laws with global standards. While FRT poses other significant issues such as security breaches and unauthorized access, this paper prioritizes human rights violations, considering the urgency of addressing this technology's broader societal implications and ethical concerns regarding systemic discrimination.

## II. GLOBAL INSIGHTS ON INDIVIDUAL FACES : FACIAL RECOGNITION ON THE WORLD STAGE

### A. UNDERSTANDING FRT: FUNCTIONING AND APPLICATION

In a nutshell, FRT is an AI-enabled computer vision technology employed to identify individuals or objects in images or videos by employing a blend of techniques, including deep learning, computer

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<sup>1</sup> Mary-Jean Cormier, *Do we look that much alike? My son's face can open my iPhone*, CBC (May 14, 2023, 9:10 PM), [www.cbc.ca/news/canada/thunder-bay/first-person-face-id-apple-phones-1.6829342](https://www.cbc.ca/news/canada/thunder-bay/first-person-face-id-apple-phones-1.6829342).

vision algorithms, and image processing.<sup>2</sup> This system can recognize or authenticate a person by scrutinizing and comparing patterns, shapes, and proportions of their facial features and contours. FRT which is hailed as a biometric marvel globally, promises to revolutionize identification processes through its three-phase process of detection, attribution, and recognition.<sup>3</sup>

FRT is ubiquitous, found in social media applications with various filters, business software authenticating identity for access or generating attendance records, and in the country's police administration, where it generates a probability match score or confidence score between a suspect and the database of identified criminals available to the police. It has showcased its efficacy in apprehending terrorism suspects,<sup>4</sup> identifying online child sexual abuse victims,<sup>5</sup> and assisting with potential investigative leads<sup>6</sup> to find wanted criminals and protect vulnerable individuals.<sup>7</sup> For instance, in May 2023, the government's *Sanchar Saathi* Application, an AI-based FRT tool, assisted in identifying and disconnecting over 36 lakh mobile connections obtained through fake or forged documents.<sup>8</sup> Evidently, FRT is capable of miracles for the criminal justice system. Regardless, it has remained mired in controversy throughout its history of adoption and development.

Now, it becomes imperative to inquire: What has contributed to this controversy? FRT is primarily a data-driven technology, and this has resulted in the emergence of new biases. Large-scale datasets used to train FRT algorithms often lack proper representation of marginalized demographic groups.<sup>9</sup> Until recently, most available datasets were skewed towards white males, neglecting people of color and women.<sup>10</sup> This systemic bias also extends to how datasets are labeled and annotated, where categories like "race," "ethnicity," and "gender" are unstable and influenced by cultural norms and

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<sup>2</sup> INTERPOL, <https://www.interpol.int/en/How-we-work/Forensics/Facial-Recognition> (last visited Jul. 16, 2023).

<sup>3</sup> Thorin Klosowski, *Facial Recognition Is Everywhere. Here's What We Can Do About It.*, WIRECUTTER: REVIEWS FOR THE REAL WORLD (Jul. 15, 2020), <https://www.nytimes.com/wirecutter/blog/how-facial-recognition-works/>

<sup>4</sup> INTERPOL, <https://www.interpol.int/en/How-we-work/Forensics/Facial-Recognition> (last visited Jul. 19, 2023).

<sup>5</sup> ROYAL CANADIAN MOUNTED POLICE, <https://www.rcmp-grc.gc.ca/en/news/2020/rcmp-use-facial-recognition-technology> (last visited Feb. 27, 2020).

<sup>6</sup> Kristin Finklea et al., *Federal Law Enforcement Use of Facial Recognition Technology (R46586)*, CRS REPORT (Oct. 27, 2020), <https://crsreports.congress.gov/product/pdf/R/R46586>.

<sup>7</sup> METROPOLITAN POLICE, <https://www.met.police.uk/advice/advice-and-information/fr/facial-recognition-technology/> (last visited Jul. 26, 2023).

<sup>8</sup> Danny D'Cruze, Govt launches AI-powered portal 'Sanchar Saathi' to find lost phones, fake phone numbers, BUSINESS TODAY (Aug. 28, 2023, 05:35 PM), <https://www.businesstoday.in/technology/news/story/govt-launches-ai-powered-portal-sanchar-saathi-to-find-lost-phones-fake-phone-numbers-381509-2023-05-16>.

<sup>9</sup> David Leslie, *Understanding bias in facial recognition technologies: An Explainer*, THE ALAN TURING INSTITUTE, [https://www.turing.ac.uk/sites/default/files/2020-10/understanding\\_bias\\_in\\_facial\\_recognition\\_technology.pdf](https://www.turing.ac.uk/sites/default/files/2020-10/understanding_bias_in_facial_recognition_technology.pdf).

<sup>10</sup> Ninareh Mehrabi et al., *A Survey on Bias and Fairness in Machine Learning*, 54 ACM COMPUT. SURV. 1 (2021), <https://doi.org/10.1145/3457607>.

subjective interpretations.<sup>11</sup> These issues can lead to scientific racism and prejudice. Moreover, biases from the human input source naturally seeps into the synthetic algorithms that drive FRT, perpetuating discrimination when the technology is deployed. The actual concern, hence, becomes that whether its pros will sufficiently outweigh its cons.

## B. ASSESSING FRT: CHALLENGES AND CONCERNS

In 2011, Google acknowledged the potential misuse of FRT, stating it was a technology it had refrained from introducing for those reasons.<sup>12</sup> In 2014, San Francisco, United States (“US”) saw the banning of FRT for law enforcement usage altogether.<sup>13</sup> In 2020, Electronic Frontier Foundation released a report expressing concern about the disproportionate harassment of innocents and unauthorized retention of sensitive biometric data through FRT.<sup>14</sup> Heedless to the persisting censure, FRT has developed to become omnipresent today. However, the safeguards are not.

This technology has become implicated in human rights violations worldwide, illustrated in the false arrests of Black men in Detroit, US,<sup>15</sup> the targeting of Black Lives Matter protesters in New York City, US,<sup>16</sup> tracking of Uighur Muslims in China,<sup>17</sup> the China-orchestrated installation of FRT-capable surveillance cameras in Mongolia,<sup>18</sup> and military surveillance in the West Bank by Israel.<sup>19</sup> More commonplace controversies include the controversy of facial scanning of audience members to

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<sup>11</sup> Mehrabi, *supra* note 10.

<sup>12</sup> Bianca Bosker, *The One Technology Google Is Holding Back*, HUFF POST (June 1, 2011), [https://www.huffpost.com/entry/facial-recognition-google\\_n\\_869583](https://www.huffpost.com/entry/facial-recognition-google_n_869583).

<sup>13</sup> *San Francisco Approves Ban On Government's Use Of Facial Recognition Technology*, NPR (May 14, 2019), <https://www.npr.org/2019/05/14/723193785/san-francisco-considers-ban-on-governments-use-of-facial-recognition-technology>.

<sup>14</sup> *Face Off: Law Enforcement Use of Face Recognition Technology*, ELECTRONIC FRONTIER FOUNDATION (Feb. 12, 2018), <https://www.eff.org/wp/law-enforcement-use-face-recognition>.

<sup>15</sup> *The Computer Got It Wrong: How Facial Recognition Led to False Arrest of Black Man*, NPR (June 24, 2020), <https://www.npr.org/2020/06/24/882683463/the-computer-got-it-wrong-how-facial-recognition-led-to-a-false-arrest-in-michig>.

<sup>16</sup> James Vincent, *NYPD used facial recognition to track down Black Lives Matter activist*, THE VERGE (Aug. 18, 2020), <https://www.theverge.com/2020/8/18/21373316/nypd-facial-recognition-black-lives-matter-activist-derrick-ingram>.

<sup>17</sup> *Chinese spyware using tech to spy on Uyghur Muslims, claim experts*, HINDUSTAN TIMES (Nov. 11, 2022), <https://www.hindustantimes.com/technology/chinese-spyware-using-tech-to-spy-on-uyghur-muslims-claim-experts-101668148979974.html>.

<sup>18</sup> *Mongolia installs 2,530 surveillance cameras in capital*, XINHUA NET (Jul. 29, 2023, 07:54 PM), [https://www.xinhuanet.com/english/2018-06/19/c\\_137264873.htm](https://www.xinhuanet.com/english/2018-06/19/c_137264873.htm).

<sup>19</sup> Elizabeth Dvoskin, *Israel escalates surveillance of Palestinians with facial recognition program in West Bank*, WASHINGTON POST (Jun. 20, 2023, 09:33 AM), [https://www.washingtonpost.com/world/middle\\_east/israel-palestinians-surveillance-facial-recognition/2021/11/05/3787bf42-26b2-11ec-8739-5cb6aba30a30\\_story.html](https://www.washingtonpost.com/world/middle_east/israel-palestinians-surveillance-facial-recognition/2021/11/05/3787bf42-26b2-11ec-8739-5cb6aba30a30_story.html).

restrict entry for litigators from a certain law firm by Madison Square Garden Entertainment<sup>20</sup> and the Radio City Music Hall,<sup>21</sup> US, unreasonably impacting their personal lives due to their profession.

There are certain significant shortcomings that FRT faces in its implementation. Firstly, despite an impressive 99.97% accuracy rate,<sup>22</sup> FRT exhibits a grim disparity in identification errors, being 35 times more likely to misidentify a black female than a white male.<sup>23</sup> While the best FRT does surpass human capabilities in image matching to help counter crime, it continues to shadow human rights since it misidentifies minority communities and individuals with darker complexions more than those sharing Caucasian features, causing the minority to bear the brunt of wrongful detentions.<sup>24</sup>

Secondly, the efficacies of FRT systems plunge when confronted with varying camera angles and data-processing algorithms. The technology faces both external (inconvenient camera angles, quality pictures, etc.) and inherent (characterizing faces by age, gender, or race) limitations during ‘facial analysis’ that hampers its accuracy.<sup>25</sup> Nevertheless, even when these systems pinpoint an individual accurately, the implications of discriminatory policing and irrational arrests loom large.<sup>26</sup>

Thirdly, this technology can further be exploited to curb political dissent by identifying and surveilling individuals participating in protests.<sup>27</sup> The problem is compounded when law

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<sup>20</sup>James Barron, *Who’s Using Facial Recognition Technology?*, THE NEW YORK TIMES (Jul.21, 2023, 11:04 AM), <https://www.nytimes.com/2023/03/21/nyregion/facial-recognition-technology-garden.html>.

<sup>21</sup>Max Zahn, *Controversy illuminates rise of facial recognition in private sector*, ABC NEWS (Jul. 7,2023, 01:34 AM), <https://abcnews.go.com/Business/controversy-illuminates-rise-facial-recognition-private-sector/story?id=96116545>.

<sup>22</sup>William Crumpler, *How Accurate are Facial Recognition Systems – and Why Does It Matter?*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Jun.12, 2023, 05:19 AM), <https://www.csis.org/blogs/strategic-technologies-blog/how-accurate-are-facial-recognition-systems-and-why-does-it>.

<sup>23</sup>Larry Hardesty, *Study finds gender and skin-type bias in commercial artificial-intelligence systems*, MASSACHUSETTS INSTITUTE OF TECHNOLOGY NEWS (Jun. 14, 2023, 10:34 PM), <https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212>.

<sup>24</sup>Anabelle Roy, *Ready or Not Congress, Here It Comes: The Expansion of Facial Recognition Technology Makes Its Way Into Police Practices*, 75 FLA. L. REV. 583 (2023), <http://www.floridalawreview.com/2023/ready-or-not-congress-here-it-comes-the-expansion-of-facial-recognition-technology-makes-its-way-into-polic-practices/>.

<sup>25</sup>James Andrew Lewis and William Crumpler, *Facial Recognition Technology: Responsible Use Principles and the Legislative Landscape*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Sept. 29, 2023, 11:34 AM), <https://www.csis.org/analysis/facial-recognition-technology-responsible-use-principles-and-legislative-landscape>.

<sup>26</sup>Adam Satariano & Kashmir Hill, *Barred From Grocery Stores by Facial Recognition*, THE NEW YORK TIMES (Jun. 29, 2023, 10:24 PM), <https://www.nytimes.com/2023/06/28/technology/facial-recognition-shoplifters-britain.html>.

<sup>27</sup>*Issues on the Frontlines of Technology and Politics*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Jun. 24, 2023, 12:34 PM), <https://carnegieendowment.org/2021/10/19/issues-on-frontlines-of-technology-and-politics-pub-85505>.

enforcement agencies utilize FRT to confirm existing biases, blurring the line between dissent and criminal activities.

Fourthly, the technology is built upon the questionable premise of scraping publicly accessible images without consent and authorization or by compelling individuals to contribute to the facial database, aggravating privacy and security risks.<sup>28</sup>

Lastly, FRT's mushrooming spread is concerning. Governments worldwide are intensively investing in FRT regardless of the prevailing human rights quandaries. It is not only being employed by executive authorities for police functions but even by neighborhood stores to prevent trivial shoplifting. In the United Kingdom ("UK"), while ministers are endorsing FRT-enabled police bodycams in 2023,<sup>29</sup> the country is also witnessing the installation of Facewatch surveillance commercial store cameras for monitoring and even sharing the biometric data of individuals deemed as prolific offenders or high-amount thefts with other stores in the locality.<sup>30</sup> With FRT's pervasive usage surpassing expectations even when FRT providers admit its fallibility,<sup>31</sup> human rights groups argue against the normalization of intrusive security measures for mundane tasks.

### III. PICTURE PERFECT PANDEMONIUM: INDIA'S FRT DILEMMA

#### A. SNAPSHOT OF THE CURRENT LANDSCAPE

In FY2022, The India Facial Recognition Market was valued at USD 280.06 million, and it expects a robust 18.71% compound annual growth rate (CAGR). This is so because, over the past two decades, India has made continuous efforts to digitize its governance structure, evident through the widespread deployment of Closed Circuit Television (CCTV) cameras for law enforcement and

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<sup>28</sup>Olivia Solon & Joe Murphy, *Facial recognition's 'dirty little secret': Social media photos used without consent*, NBC NEWS (Jun. 21, 2023, 01:34 AM), <https://www.nbcnews.com/tech/internet/facial-recognition-s-dirty-little-secret-millions-online-photos-scraped-n981921>.

<sup>29</sup>Ryan Morrison, *UK police use of facial recognition software could be expanded despite ethical concerns*, TECH MONITOR (May. 16, 2023, 12:14 AM), <https://techmonitor.ai/technology/ai-and-automation/uk-police-facial-recognition-technology-chris-philp-cctv>.

<sup>30</sup>Tom Chivers, *Facial recognition... coming to a supermarket near you*, THE GUARDIAN (Aug. 4, 2023, 11:34 AM), <https://www.theguardian.com/technology/2019/aug/04/facial-recognition-supermarket-facewatch-ai-artificial-intelligence-civil-liberties>.

<sup>31</sup>Anna Stewart et al., *AI facial recognition tech brings 'airport-style security' to UK stores, says human rights group*, CNN (Jul. 18, 2023 01:38 AM), <https://edition.cnn.com/2023/07/15/business/facewatch-ai-facial-recognition-tech/index.html>.

safety,<sup>32</sup> as well as the implementation of FRT-incorporating policies like the 2018 Aadhar scheme<sup>33</sup> and 2022 Digi Yatra Policy.<sup>34</sup> Furthermore, most states also have domestic FRT systems like Punjab's PAIS,<sup>35</sup> Uttar Pradesh's Pehchaan,<sup>36</sup> Chennai's Face Tagr<sup>37</sup> and Neoface,<sup>38</sup> and Delhi's e-beat book app.<sup>39</sup> The Indian government also aims to build the world's largest countrywide FRT system, the 'National Automated Facial Recognition System' (NAFRS), on an estimated INR 308 crore budget.<sup>40</sup> The aforementioned information sufficiently highlights that the Indian government is knee-deep into investing and employing this technology, but this tendency is backed by FRT's impressive record in criminal investigations.

In 2018, FRT was instrumental in Delhi police identifying approximately 3000 missing children within just four days.<sup>41</sup> The Delhi High Court had then directed further use of FRT to reunite missing children in *Sadhan Haldar v. The State NCT of Delhi*.<sup>42</sup>

Since its introduction, FRT has ignited a contentious debate concerning human rights in India. Once hailed for its miraculous usage, Delhi Police's FRT systems were subsequently questioned on their effectiveness and impact on minority communities when a 2018 report revealed their accuracy rate of a mere 2%.<sup>43</sup> In 2019, CCTV installation in India's government schools sparked facial recognition

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<sup>32</sup>*Facial Recognition Technology in India*, THE CENTRE FOR INTERNET AND SOCIETY (Aug. 31, 2023, 11:16 PM), <https://cisindia.org/internet-governance/facial-recognition-technology-in-india.pdf>.

<sup>33</sup>*What is Face Recognition?*, UNIQUE IDENTIFICATION AUTHORITY OF INDIA | GOVERNMENT OF INDIA (Jul. 27, 2023, 10:21 AM), <https://uidai.gov.in/en/17-english-uk/resident/12722-what-is-face-recognition.html>.

<sup>34</sup>*Digi Yatra- A New Digital Experience for Air Travellers*, INDIA.GOV.IN (Jul. 24, 2023, 01:34 AM), <https://www.india.gov.in/spotlight/digi-yatra-new-digital-experience-air-travellers>.

<sup>35</sup>*PAIS by Punjab Police*, APP ADVICE (Jul. 25, 2023, 11:34 AM), <https://appadvice.com/app/pais/1451172513>

<sup>36</sup>NIC MeitY, Government of India, Pehchan, GOOGLE PLAY (Jul. 29, 2023,, 11:44 PM), [https://play.google.com/store/apps/details?id=com.pehchan.nic.pehchan&hl=en\\_IN&gl=US](https://play.google.com/store/apps/details?id=com.pehchan.nic.pehchan&hl=en_IN&gl=US).

<sup>37</sup>*FaceTagr*, FACETAGR.COM (Jul. 26, 2023, 11:34 PM), <https://www.facetagr.com/>.

<sup>38</sup>*NeoFace Watch: Face Recognition*, NEC (Jul. 26, 2023, 03:39 AM), <https://www.nec.com/en/global/solutions/biometrics/face/neofacewatch.html>.

<sup>39</sup>*e-Saathi Delhi Police Pilot mobile App*, Appsavy Faster And Better Platform (Jul. 25, 2023, 12:17 AM), <https://appsavy.com/new-police-beat-book-app.html>.

<sup>40</sup>*NCRB's National Automated Facial Recognition System*, PANOPTIC - FRT TRACKER (Jul. 24, 2023, 09:44 AM), <https://panoptic.in/case-study/ncrbs-national-automated-facial-recognition-system>

<sup>41</sup>*Facial Recognition System Helps Trace 3,000 Missing Children In 4 Days*, NDTV.COM (Jul. 23, 2023, 06:34 PM), <https://www.ndtv.com/india-news/facial-recognition-system-helps-trace-3-000-missing-children-in-4-days-1841192>.

<sup>42</sup>*Sadhan Haldar v. The State NCT of Delhi*, W.P.(CrI) 1560/2017.

<sup>43</sup>*Delhi police facial recognition software has only 2 per cent accuracy: HC told*, BUSINESS STANDARD (Aug. 28, 2023, 05:35 PM), [https://www.business-standard.com/article/pti-stories/delhi-police-facial-recognition-software-has-only-2-percent-accuracy-hc-told-118082301289\\_1.html](https://www.business-standard.com/article/pti-stories/delhi-police-facial-recognition-software-has-only-2-percent-accuracy-hc-told-118082301289_1.html).

privacy and biometric data misuse concerns.<sup>44</sup> In 2020, persons were forced to undergo unexplained biometric data collection,<sup>45</sup> for instance, in Hyderabad, where the alleged offenders were arbitrarily demanded to remove their facemasks for photographs during the Covid-19 pandemic,<sup>46</sup> and in other instances, where civilians were unreasonably compelled to provide facial scans to create a comprehensive profile of every citizen.<sup>47</sup> These events raised concerns about “*coerced inclusion*” in the FRT database, where individuals were forced to participate without the option to opt out.<sup>48</sup>

Further in 2021, Telangana faced the ‘Ban the Scan’ outcry from Amnesty International<sup>49</sup> in collaboration with Internet Freedom Foundation’s Project Panoptic<sup>50</sup> for its plan to integrate multiple facial recognition datasets into *Samagram*, a smart governance program that aims to establish a *prima facie* intrusive “*360-degree view*” of each individual.<sup>51</sup> Furthermore, the NAFRS technology was also condemned to have failed the ‘legitimacy, proportionality and reasonability, and least intrusiveness’ test established under *Puttaswamy v. Union of India*<sup>52</sup> by eminent scholarship.<sup>53</sup>

Within 2023, Indian banks’ proposal to adopt FRT authentication for transactions has appalled

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<sup>44</sup>Privacy fears as India’s gov’t schools install facial recognition, AL JAZEERA (Jun. 2, 2023, 06:39 PM), <https://www.aljazeera.com/news/2021/3/2/privacy-fears-as-indias-govt-schools-install-facial-recognition>

<sup>45</sup>Agnee Ghosh, Facial Recognition Is Out of Control in India, VICE (Jun. 13, 2023, 08:24 PM), <https://www.vice.com/en/article/akew98/facial-recognition-is-out-of-control-in-india>.

<sup>46</sup>Telangana Is Inching Closer to Becoming a Total Surveillance State, THE WIRE Jul. 13, 2023, 09:32 PM, <https://thewire.in/tech/telangana-surveillance-police-cctv-facial-recognition>).

<sup>47</sup>Balakrishna Ganeshan, Hyderabad cops collect fingerprints from commuters, say it prevents crimes, THE NEWS MINUTE (Jul. 2, 2024, 06:54 AM), <https://www.thenewsminute.com/article/hyderabad-cops-collect-fingerprints-commuters-say-itprevents-crimes-169497>.

<sup>48</sup>Aishwarya Jagani, In India, fears grow that facial recognition systems may be used to target minorities, SCROLL.IN (Jul. 2, 2024, 07:14 PM), <https://scroll.in/article/1006615/in-india-fears-grow-that-facial-recognition-systems-may-used-to-targetminorities>.

<sup>49</sup>BAN THE SCAN (Jul. 23, 2023, 06:34 PM), <https://banthescan.amnesty.org/hyderabad/>.

<sup>50</sup>Anushka Jain, Project Panoptic has partnered with Amnesty International & Article 19 to launch #BanTheScan in India, INTERNET FREEDOM FOUNDATION (Jun. 20, 2023, 03:24 PM), <https://internetfreedom.in/project-panoptic-has-partnered-withamnesty-international-article-19-to-launch-banthescan-in-india/>.

<sup>51</sup>A centralised database of citizens in the state of Telangana is under consideration, FIRSTPOST (Jun. 31, 2023, 08:18 AM), <https://www.firstpost.com/tech/news-analysis/a-centralised-database-of-citizens-in-the-state-of-telangana-isunder-consideration-3696851.html>.

<sup>52</sup>Justice K.S. Puttaswamy (Retd.) v. Union Of India, W.P. (Civil) No. 494 of 2012

<sup>53</sup>Faizan Mustafa and Utkarsh Leo, *On Facial Recognition and Fundamental Rights in India: A Law and Technology Perspective*, SSRN 1 (2021), <https://dx.doi.org/10.2139/ssrn.3995958>.

many.<sup>54</sup> Further, FRT's usage in election polling in Bihar<sup>55</sup> and Karnataka<sup>56</sup> drew criticism from Internet Freedom Foundation<sup>57</sup> for its potential to undemocratically influence elections<sup>58</sup> resembling the 2018 Cambridge Analytica scandal that involved social media data collection without user consent and its exploitation for targeted political advertising in over 200 countries.<sup>59</sup>

In India, skin color, geography, religion, and caste are diverse and innumerable, all of which impact FRT's accuracy. Targeting minorities and crippling dissent, FRT in India raises concerns about discrimination, civil liberties, and balancing security and democratic principles.

## B. PRESENT LEGAL FRAMEWORK

In December 2022, the Ministry of Electronics & Information Technology addressed concerns about FRT by consoling the masses of the existence of a pre-established regulatory framework for FRT under Section 43A of the Information Technology Act, 2000<sup>60</sup> [hereinafter “**IT Act**”], which provides specific provisions to hold body corporates responsible for compensating individuals affected by the wrongful loss or gain of sensitive personal data handled negligently in their computer resources, coupled with the upcoming Data Protection Bill.<sup>61</sup> It further directed compliance by corporates to the prescribed rules for sensitive personal data governance and implementation of security practices like IS/ISO/IEC 27001<sup>62</sup> or Government-approved data protection codes when

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<sup>54</sup>Nikunj Ohri, *India lets banks use face recognition, iris scan for some transactions – sources*, THE PRINT (Jul. 13, 2023, 05:25 AM), <https://theprint.in/india/india-lets-banks-use-face-recognition-iris-scan-for-some-transactions-sources/1312874/>.

<sup>55</sup>*Bihar Local Body Polls: SEC Uses Facial Recognition System During Polls*, ABP NEWS (Jun. 17, 2023, 07:29 PM), <https://news.abplive.com/elections/bihar-nagar-nikay-chunav-2023-sec-uses-facial-recognition-system-duringpolls-to-provide-live-feed-on-june-11-1608235>

<sup>56</sup>*Upload Selfie, Skip Queue: Facial Recognition Technology To Play Key Role in Karnataka Polls*, INDIA.COM (Jul. 8, 2023, 04:26 AM), <https://www.india.com/karnataka/karnataka-election-2023-new-facial-recognition-technology-will-ease-votingprocess-in-bengaluru-heres-how-6038790/>.

<sup>57</sup>Anushka Jain, *We wrote to the Election Commissioner of India on the use of Facial Recognition Technology for voter verification in Karnataka*, INTERNET FREEDOM FOUNDATION (May 13, 2023, 05:38 PM), <https://internetfreedom.in/we-wrote-to-theelection-commissioner-of-india-on-the-use-of-facial-recognition-technology-for-voter-verification/>.

<sup>58</sup>Samantha Lai, *Data misuse and disinformation: Technology and the 2022 elections*, BROOKINGS (Jun. 21, 2024, 05:24 AM), <https://www.brookings.edu/articles/data-misuse-and-disinformation-technology-and-the-2022-elections/?ref=static.internetfreedom.in>.

<sup>59</sup>Sam Meredith, *Facebook-Cambridge Analytica: A timeline of the data hijacking scandal*, CNBC (May 10, 2023, 06:12 PM), <https://www.cnbc.com/2018/04/10/facebook-cambridge-analytica-a-timeline-of-the-data-hijacking-scandal.html>.

<sup>60</sup> Information Technology Act, 2000, §43A, No. 21, Acts of Parliament, 2000 (India).

<sup>61</sup>Ministry of Electronics & IT, *Facial Recognition Technology*, PRESS INFORMATION BUREAU (Jul. 23, 2023, 05:34 AM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1885963..>

<sup>62</sup>*ISO/IEC 27001 Information Security Management (ISMS)*, STANDARDS, TRAINING, TESTING, ASSESSMENT AND CERTIFICATION (Jul. 23, 2023, 07:27 AM), <https://www.bsigroup.com/en-IN/ISOIEC-27001-Information-Security/>.

involved in utilizing biometric information and FRT. However, the significant loopholes in these claims become evident in the forthcoming discussion.

1. *Information Technology Act, 2000*

The IT Act post amendment of 2008,<sup>63</sup> allows for surveillance and data collection under Sections 69 and 69B.<sup>64</sup> However, whether FRT falls within the Act's defined activities is unclear. Applying the definitions of 'information'<sup>65</sup> and 'data,'<sup>66</sup> it is apparent that the state can undertake surveillance of existing computer systems and develop an information database, subject to record destruction timelines specified in Section 69B(8).<sup>67</sup> If FRT is seen as separate from 'interception, decryption, and monitoring,' the IT Act does not explicitly permit its implementation.<sup>68</sup> It would instead depend on the test laid in *Puttaswamy v. Union of India*,<sup>69</sup> i.e., "any circumvention of the right to privacy can only occur in an instance wherein a law mandating it exists." Therefore, the legality of FRT usage would depend on the existence of a specific law mandating it, along with a legitimate state aim and adherence to the proportionality test in Section 57 of the Aadhaar Act.<sup>70</sup> While allowing data collection from CCTV feeds, the IT Act does not explicitly validate establishing a dedicated FRT infrastructure.

2. *Indian Telegraph Act, 1885*

Section 5 of this Indian Telegraph Act, 1885,<sup>71</sup> along with the associated Rule 419A of the Indian Telegraph Rules, 1951,<sup>72</sup> provides the framework and guidelines for intelligence agencies to carry out the interception of communications. The degree to which the Indian Telegraph Act permits the use of FRT depends on whether it can be regarded to fall under the scope of 'monitoring' under the Act, much like in the case of the IT Act. It is questionable if such an argument would pass the

<sup>63</sup> Information Technology (Amendment) Act, 2008, Bill No. 96-C of 2006, Acts of Parliament, 1949 (India).

<sup>64</sup> Information Technology Act, 2000, § 69 and 69B, No. 21, Acts of Parliament, 2000 (India).

<sup>65</sup> Information Technology Act, 2000, § 2(v), No. 21, Acts of Parliament, 2000 (India).

<sup>66</sup> Information Technology Act, 2000, § 2(o), No. 21, Acts of Parliament, 2000 (India).

<sup>67</sup> Information Technology Act, 2000, § 69B(8), No. 21, Acts of Parliament, 2000 (India).

<sup>68</sup> Facial Recognition Technology in India, THE CENTRE FOR INTERNET AND SOCIETY (Aug. 31, 2023, 04:35 PM), <https://cisindia.org/internet-governance/facial-recognition-technology-in-india.pdf> (last visited Jul. 18, 2023).

<sup>69</sup> Ganeshan, *Supra* note 47, at 7.

<sup>70</sup> Supreme Court strikes down some sections of Aadhaar Act: What it means, MINT (Jul. 17, 2023, 06:38 AM), <https://www.livemint.com/Politics/GAxIxF3FpzQr0M4efADMJ/Supreme-Court-strikes-down-some-sectionsof-Aadhaar-Act-Wha.html>.

<sup>71</sup> Indian Telegraph Act, 1885, § 5, No. 13, Acts of Parliament, 1885 (India).

<sup>72</sup> The Indian Telegraph Rules, 1951, r. 419A, DOT1951 (India)

*Puttaswamy* legality test,<sup>73</sup> as with the IT Act. Furthermore, even if it passed this standard, it would still need to fulfill the tests of proportionality and a legitimate state aim.

Scholars, as previously mentioned as well, have analyzed the application of the four-pronged test under *Puttaswamy*, i.e., (i) legality; (ii) need; (iii) proportionality; and (iv) the availability of procedural safeguards, to conclude that FRT does not hold well on any of the four fronts.<sup>74</sup> This is so given that the proportionality test, a standard to gauge the State's accountability, requires that the benefits of deploying FRT significantly outweigh potential harm.<sup>75</sup> However, FRT's inherent need for extensive mass-scale tracking turns public spaces into surveillance zones, raising concerns about its disproportionate impact on democracy. This concern was acknowledged by the United Nations Human Rights Council in 2020 for its chilling effects on the right to protest.<sup>76</sup>

### 3. The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)

Law enforcement in India can use Section 94<sup>77</sup> (to summon a person to produce a document or thing) and 95<sup>78</sup> (to intercept a document or thing in the custody of the postal or telegraph authority) of the Code to access stored data and Section 163<sup>79</sup> to prohibit citizens' actions. The legislative language of the aforementioned sections has remained constant as it was in the Criminal Procedure Code, 1973, and can be anticipated to be applied *mutatis mutandis* in the BNSS regime as well. Unfortunately, given the expansive language of Sections 94 and 95, the police could employ FRT to conduct surveillance using visual data and consequently invoke Section 163 to forbid common law behaviors like assembling for peaceful demonstrations and using FRT against demonstrators. This raises concerns about the potential to abuse these laws, as they could target and surveil individuals exercising their fundamental rights under Article 21.<sup>80</sup>

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<sup>73</sup> Ganeshan, *Supra* note 47, at 7.

<sup>74</sup> A centralized, *supra* note 51, at 8

<sup>75</sup> A centralized, *supra* note 51, at 8.

<sup>76</sup> United Nations High Commissioner for Human Rights, Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests, A/HRC/44/24, ¶ 26-40, (Jun. 24, 2020).

<sup>77</sup> The Code of Criminal Procedure, 1973, § 91, No. 2, Acts of Parliament, 1973 (India).

<sup>78</sup> The Code of Criminal Procedure, 1973, § 92, No. 2, Acts of Parliament, 1973 (India).

<sup>79</sup> The Code of Criminal Procedure, 1973, § 144, No. 2, Acts of Parliament, 1973 (India).

<sup>80</sup>INDIA CONST. art. 21.

#### IV. ‘SAY CHEESE, BUT NOT FOR SURVEILLANCE’: REGULATING FRT FOR A SAFER TOMORROW

In his ‘diffusion of innovation’ theory, sociologist Everett Rogers identified five key variables that influence the successful and rapid adoption of new technology: the innovation itself, the adopters, communication channels, time, and the social system.<sup>81</sup> With advancements across these variables to create a favorable environment for FRT’s widespread embrace, 2023 has been its year to shine.<sup>82</sup> FRT’s gradual implementation across the globe is necessary to shed its label of being a nightmare for dissent and speech, as this technology cannot develop in a cocoon but only with greater exposure and use. Banning the use of FRT is an impractical solution, given its potential to significantly expedite investigations.

The sole option that remains is the establishment of regulations and safeguards to reduce misuse if not entirely terminate it. To achieve this, a three-pronged approach is employed in the forthcoming analysis: analyzing the ideal or international standards of regulation and legislation, comparing it to the Indian position, and proposing improvements to the existing framework.

##### A. ADDRESSING THE VOID: ENHANCING INDIA’S LAWS TO ALIGN WITH GLOBAL STANDARDS

###### 1. *Bolstering Data Protection*

The right to privacy has been declared a fundamental right but the legal framework defining what this right entails is still in its infancy. Indian courts are yet to acknowledge the impact of surveillance conducted over time from various points of observation as privacy infringement. The US Supreme Court has far developed what is known as the ‘mosaic theory of privacy’ in *United States v. Jones*.<sup>83</sup> The theory propounds that consideration of each item of information separately yields less

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<sup>81</sup>Jatin Srivastava & Jennifer J. Moreland, *Diffusion of Innovations: Communication Evolution and Influences*, 15(4) THE COMMUNICATION REVIEW, (2012), [https://www.researchgate.net/publication/263372754\\_Diffusion\\_of\\_Innovations\\_Communication\\_Evolution\\_and\\_Influences](https://www.researchgate.net/publication/263372754_Diffusion_of_Innovations_Communication_Evolution_and_Influences).

<sup>82</sup> Adam Guttentag, 2023: *The Year of Widespread Facial Recognition Adoption*, OOSTO (Jan. 24, 2023, 12:17 AM), <https://oosto.com/2023-widespread-facial-recognition-adoption/>.

<sup>83</sup>*United States v. Jones*, 565 U.S. 400 (2012).

insight than comprehensively aggregating even seemingly unimportant material.<sup>84</sup> India witnessed a passing reference to this argument by Justice Chandrachud in the *Puttaswamy* ruling, who said, “*Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships, ways of dress and political affiliation. In aggregation, information provides a picture of the being: of things which matter and those that do not, of things to be disclosed and those best hidden.*” However, this comment remains isolated and has not witnessed practical legislative manifestation.

Globally, the US’s Federal Trade Commission Act, 1914,<sup>85</sup> coupled with federal sector-specific laws, like the Driver’s Privacy Protection Act, 1994<sup>86</sup> and Cable Communications Policy Act, 1984,<sup>87</sup> as well as state-specific guidelines on data protection, like the California Consumer Privacy Act, 2018,<sup>88</sup> exhibit a decent state of data protection and privacy.<sup>89</sup> Similarly, European Union (“EU”) enjoys the General Data Protection Regulation (“GDPR”) to take action against both state and corporates for data misuse.<sup>90</sup>

Specifically for FRT, the UK Court of Appeal, in the case of *Ed Bridges v. South Wales Police*,<sup>91</sup> emphasized the need for a clear legal framework and adequate safeguards when authorizing FRT. Subsequently, the European Data Protection Board (EDPB) finalized and adopted the Guidelines on Facial Recognition in the Area of Law Enforcement in May 2023.<sup>92</sup> The guidelines provide a comprehensive compilation of three annexures: (1) a template for evaluating the extent to which FRT impacts fundamental rights; (2) practical advice for authorities involved in the procurement and operation of FRT; and (3) a collection of hypothetical scenarios and associated considerations

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<sup>84</sup>Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 THE SUPREME COURT REVIEW 205, (2016), <https://doi.org/10.1086/686204>.

<sup>85</sup>The Federal Trade Commission Act, 1914, No. 311, Acts of Congress, 1914 (United States of America).

<sup>86</sup>Driver’s Privacy Protection Act, 1994, § 2721, Acts of Congress, 1994 (United States of America).

<sup>87</sup>Cable Communications Policy Act, 1984, § 551, Acts of Congress, 1984 (United States of America).

<sup>88</sup>California Consumer Privacy Act, 2018, § 1798, California State Legislature, 2018 (United States of America).

<sup>89</sup>F. Paul Pittman et al., *Data Protection Laws and Regulations Report 2023 USA*, INTERNATIONAL COMPARATIVE LEGAL GUIDES INTERNATIONAL BUSINESS REPORTS (2023), <https://iclg.com/practice-areas/data-protection-laws-and-regulations/usa>.

<sup>90</sup>General Data Protection Regulation, 2016, European Parliament, 2016 (European Union).

<sup>91</sup>*Ed Bridges v. South Wales Police*, [2020] EWCA Civ 1058.

<sup>92</sup>EDPB adopts final version of Guidelines on facial recognition technology in the area of law enforcement, EUROPEAN DATA PROTECTION BOARD (May 17, 2023, 09:18 PM), [https://edpb.europa.eu/news/news/2023/edpb-adopts-final-version-guidelines-facial-recognition-technology-area-law\\_en](https://edpb.europa.eu/news/news/2023/edpb-adopts-final-version-guidelines-facial-recognition-technology-area-law_en)

pertaining to FRT applications.<sup>93</sup> Undeniably, while the EU and the US are much ahead in FRT-specific deliberations, India has not yet begun to consider the issue. In August 2023, even China, amidst its drive to enhance data control through a series of regulations, including the Personal Information Protection Law, 2021,<sup>94</sup> has drafted regulations for FRT in response to privacy concerns.<sup>95</sup>

In India, while privacy is recognized as a fundamental right, there is a lack of comprehensive data protection laws in general and FRT-specific regulations in particular. Although lagging in international data protection and privacy law standards, India has eagerly adopted the technology capable of acutely endangering the biometric privacy of citizens nationally and globally without due consideration of adequate safeguards. This has left the Indian population worse off than their European and American counterparts, who have stringent regulations and well-established adjudicatory mechanisms to rely upon for judicial remedy.

Traditionally, Indian courts have supported the executive's justifications to infringe privacy under the procedural safeguards exception. For instance, in *Govind v. State of Madhya Pradesh*,<sup>96</sup> the Supreme Court upheld a national regulation allowing surveillance of suspected individuals. However, recent judicial trends reflect a fortunate shift in the court's outlook. For instance, the Supreme Court in *People's Union for Civil Liberties v. Union of India*<sup>97</sup> recognized privacy as a fundamental right and demanded stricter scrutiny of surveillance procedures. Similarly, the Bombay High Court in *Vinit Kumar v. Central Bureau of Investigation*<sup>98</sup> echoed the need to closely examine surveillance practices. While the Indian courts have shifted towards prioritizing individual

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<sup>93</sup>Guidelines 05/2022 on the use of facial recognition technology in the area of law enforcement, EUROPEAN DATA PROTECTION BOARD (May 2022), [https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-052022-use-facial-recognition-technology-area\\_en](https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-052022-use-facial-recognition-technology-area_en).

<sup>94</sup> Personal Information Protection Law of the People's Republic of China, 2021, Chairman's Order No. 91, 2021 (China).  
<sup>95</sup> Josh Ye, China drafts rules for using facial recognition technology, REUTERS (Aug. 8, 2023, 08:13 AM), <https://www.reuters.com/technology/china-drafts-rules-using-facial-recognition-technology-2023-08-08/>. <sup>96</sup> Govind v. State of Madhya Pradesh, W.P. No. 72 of 1970.

<sup>96</sup> Govind v. State of Madhya Pradesh, W.P. No. 72 of 1970.

<sup>97</sup> People's Union for Civil Liberties v. Union of India, W.P. (civil) 490, 509, 515 of 2002.

<sup>98</sup> Vinit Kumar v. Central Bureau of Investigation and Ors., W.P. No. 2367 of 2019.

privacy rights while still supporting State actions, albeit with greater scrutiny of procedures, their response to the absence of a framework for data protection and FRT still remains uncertain.<sup>99</sup>

Another significant area of contention is the Indian Digital Personal Data Protection Act, 2023,<sup>100</sup> [hereinafter “**DPDPA**”], which was finally passed by the Parliament in August 2023 after undergoing deliberations for over the six years following the Supreme Court’s recognition of privacy as a fundamental right in 2017.<sup>101</sup>

The disconcerting factor that is witnessed in the DPDPA is the extension of extensive powers to access and store personal data without free, prior, and informed consent not just to the government but also to its ‘intermediaries,’ a term conveniently open to the broadest interpretation under Article 12 of the Indian Constitution.<sup>102</sup> These powers raise concerns with respect to potential surveillance and misuse of personal data under Section 18 of the DPDPA.<sup>103</sup> While this provision has remained in the legislation’s scheme since beginning, the DPDPA’s version of this provision is even more perturbing since it no longer requires it to be ‘just, fair, and reasonable’ (as under the 2019 draft)<sup>104</sup> or follow ‘procedure, safeguards and oversight mechanism’ (as under the 2022 draft)<sup>105</sup> for availing state exemption. *Prima facie*, the exemption powers have broadened, although the material and practical impact remains unclear at present.

Furthermore, unlike India’s DPDPA, comparable legal regimes such as the EU’s GDPR do not grant blanket exemptions to state agencies or private corporations.<sup>106</sup> While the GDPR allows for exemptions in specific criminal offenses and public safety cases under Article 49,<sup>107</sup> India’s Bill proposes broader grounds for exemptions. Additionally, legislation in the EU and the US allows security agencies to claim exemptions on a case-by-case basis, depending on the purpose of data collection subject to adequate oversight of state surveillance.

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<sup>99</sup> Mustafa Rajkotwala and Tejas Naik, Conundrum of expectations: are courts prepared for challenges against facial recognition technology?, THE LEAFLET (Sep. 20, 2023, 06:58 AM), <https://theleaflet.in/conundrum-of-expectations-are-courts-prepared-for-challenges-against-facial-recognition-technology/>.

<sup>100</sup>Digital Personal Data Protection Act, 2023, §17, Act of Parliament, 2023 (India).

<sup>101</sup> Ganeshan, *supra* note 47, at 7.

<sup>102</sup>INDIA CONST. art. 12.

<sup>103</sup>The Digital Personal Data Protection Bill, 2023, §18, Bill of Parliament, 2023 (India).

<sup>104</sup>The Digital Personal Data Protection Bill, 2019, § 14, Bill of Parliament, 2019 (India).

<sup>105</sup>The Digital Personal Data Protection Bill, 2022, § 8(9), Bill of Parliament, 2019 (India).

<sup>106</sup>United States, *supra* note 83, at 11.

<sup>107</sup>General Data Protection Regulation, 2016, art. 49, European Parliament, 2016 (European Union).

The aforementioned factors put India in a precarious position. On the one hand, India urgently needs a data protection bill to be enacted, but the current scenario only offers sub-standard protection against state abuse. On the other hand, delaying implementation and awaiting a better draft is bound to cause irreparable damage in the meantime.

## 2. *Combatting Algorithmic Biases*

Algorithmic bias denotes consistent and reproducible errors in algorithms, leading to unjust outcomes by favoring specific user groups at the expense of others.<sup>108</sup> Algorithmic bias in India can result in unfair outcomes across employment, law enforcement, finance, healthcare, education, and social media, highlighting the need for stringent regulations and measures to ensure fairness and transparency in algorithmic systems.<sup>109</sup> India is severely underequipped in matters of technological governance. While the European and American legal systems reflect the foresight of needing to regulate upcoming technological trends of AI and Data Processing, Indian jurisprudence is far behind.

Though yet to be passed, the US's Algorithmic Accountability Act, 2019<sup>110</sup> mandates moderators of high-risk algorithmic decision systems like FRT systems to assess their algorithms' accuracy, bias, privacy impacts, and security risks. At state levels, Arizona has proposed a Bill requiring state and local authorities to seek approval for surveillance technologies.<sup>111</sup> Similarly, in Washington, agencies must notify legislative authorities before procuring a facial recognition technology system.<sup>112</sup> A similar proactiveness is demonstrated by the EU, which aims to be the first to regulate AI, and under its ambit, the FRT, by initiating the adoption of the Artificial Intelligence Act,<sup>113</sup> ensuring improved conditions for developing and utilizing this innovative technology under its digital

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<sup>108</sup> Yoshita Sood, *Addressing Algorithmic Bias in India: Ethical Implications and Pitfalls*, SSRN 1 (2022).

<sup>109</sup>Nicol Turner Lee, Paul Resnick, and Genie Barton, *Algorithmic bias detection and mitigation: Best practices and policies to reduce consumer harms*, BROOKINGS (May 20, 2023, 08:58 PM) [www.brookings.edu/articles/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms](http://www.brookings.edu/articles/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms).

<sup>110</sup>Algorithmic Accountability Act, 2019, H.R.2231, 116th Congress, 2019-2020 (United States of America).

<sup>111</sup>Arizona SB 1583, Senate of State of Arizona, Fifty-fifth Legislature, 2021 (United States of America).

<sup>112</sup>Facial Recognition, 2020, ch. 43.386 RCW, Act of Washington State Legislature, 2020 (United States of America)

<sup>113</sup>*Proposal for a Regulation Of The European Parliament And Of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts (Document 52021PC0206)*, EUROPEAN COMMISSION (Apr. 21, 2021, 12:48 PM), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021PC0206>.

strategy.<sup>114</sup> It is imperative for India to swiftly address this gap and implement necessary regulations to ensure responsible and ethical use of technology. Failing to do so puts India at risk of unethical practices and a considerable lag behind global standards in the ever-evolving technological landscape.

### 3. *Modulating Commercial Use of Facial Biometrics*

In 2020, Clearview AI presented security concerns by feeding its FRT systems with photos scraped from across the internet, including social media, news sites, and employment platforms, and without proper human oversight to identify suspects.<sup>115</sup> Today, most government FRT systems utilize publicly accessible photographs and security camera feeds to track individuals without clear consent,<sup>116</sup> raising ethical and privacy concerns.<sup>117</sup> FRT propagates potential biases and gets used disproportionately against civil society, activists, and protesters, subsequently fostering distrust in these parts of society against the government and the police.<sup>118</sup>

Further, international jurisprudence is much in consonance with the ideal proactiveness to protect non-consensual commercial use of biometric data. In *Martinez v. Snapchat*,<sup>119</sup> the application company was reprimanded for storing its user's biometric identifiers without consent, use specification, or timeline for retention. In China, *Guo v. Hangzhou Safari Park*<sup>120</sup> established the purpose specification and consent requirement for biometric data collection. *In re Facebook Biometric Information Privacy Litigation*,<sup>121</sup> Facebook violated the Illinois Biometric Information Privacy Act (BIPA), 2008,<sup>122</sup> by using facial recognition technology to extract and store biometric identifiers of up to six million Illinois users without their written consent. In *Patel v.*

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<sup>114</sup>Tambiama Madiega, *Artificial Intelligence Act*, EU LEGISLATION IN PROGRESS BRIEFING (Jun. 2023), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698792/EPRS\\_BRI\(2021\)698792\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698792/EPRS_BRI(2021)698792_EN.pdf).

<sup>115</sup>Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, THE NEW YORK TIMES (Jan. 18, 2023, 10:43 PM), <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html>.

<sup>116</sup>Thorin Klosowski, *Your Visitors Deserve to Know They're on Camera*, THE NEW YORK TIMES (Oct. 7, 2023, 12:48 PM), <https://www.nytimes.com/2019/10/07/opinion/security-camera-privacy.html>.

<sup>117</sup>Grant Clauser, *Security Cameras, Ethics, and the Law*, WIRECUTTER: REVIEWS FOR THE REAL WORLD (Sept. 23, 2023, 02:38 PM), <https://www.nytimes.com/wirecutter/blog/security-cameras-ethics-and-the-law/>

<sup>118</sup>Shravishtha Ajaykumar, *Ethical and Regulatory Considerations in the Collection and Use of Biometric Data*, ORF ONLINE (Oct. 12 2023, 10:18 AM), [www.orfonline.org/research/ethical-and-regulatory-considerations-in-the-collection](http://www.orfonline.org/research/ethical-and-regulatory-considerations-in-the-collection).

<sup>119</sup>Jose Luis Martinez et al v. Snapchat, Inc., Case No. 2:16-cv-05182.

<sup>120</sup>Guo v. Hangzhou Safari Park, [2020].,

<sup>121</sup>In re Facebook Biometric Information Privacy, Litigation No. 3:15-cv-03747-JD (N.D. Cal.).

<sup>122</sup>Biometric Information Privacy Act, 2008, SB2004, Act of Illinois State Legislature, 2008 (United States of America)

*Facebook*,<sup>123</sup> the court established that collecting biometric data without notice or consent through the ‘Tag Suggestions’ tool violated BIPA, 2008.

A similar position is reflected in the legislative domain. Some jurisdictions have banned the commercial use of FRT.<sup>124</sup> For instance, the EU proposes to ban intrusive FRT usage across the 27-member bloc in the AI Act, 2019.<sup>125</sup> Others have regulated the deployment and management of biometric data.<sup>126</sup> Consent requirements are a common theme, with laws mandating opt-in, informed, specific, and free consent, display of privacy notices, expression of data retention policies, limitation in data sharing, and enforcement of penalty, like in the GDPR.<sup>127</sup> In the US, the proposed federal legislation of the Commercial Facial Recognition Privacy Act, 2019,<sup>128</sup> mandates operators to implement human review for facial recognition decisions that could cause harm to users and to provide an API for independent testing of system accuracy and bias.<sup>129</sup> The efforts to regulate commercial facial recognition use have been undertaken, focusing on both government and private operators in western jurisdictions. India thoroughly needs the introduction of similar regulations to modulate FRT use and establish an improved governance mechanism from the outset.

## B. MITIGATING RISKS: REGULATING FRT SERVICE PROVIDERS

### 1. *Testing For Accuracy*

In the US, law enforcement officers used Clearview AI, which obtained its database by unethically and non-consensually scraping public images, to solve cases related to shoplifting, identity theft, credit card fraud, murder, and child sexual exploitation, despite having limited knowledge of its

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<sup>123</sup> *Patel v. Facebook, Inc.*, Case No. 18-15982 (9th Cir. 2019).

<sup>124</sup> *Portland, Oregon First to Ban Private-Sector Use of Facial Recognition Technology*, PRIVACY & INFORMATION SECURITY LAW BLOG (Sep. 10 2023, 02:46 PM), <https://www.huntonprivacyblog.com/2020/09/10/portland-oregon-becomes-first-jurisdiction-in-u-s-to-ban-the-commercial-use-of-facial-recognition-technology/>.

<sup>125</sup> *EDPB adopts final version of Guidelines on facial recognition technology in the area of law enforcement*, EUROPEAN DATA PROTECTION BOARD (May 17, 2023, 02:45 AM), [https://edpb.europa.eu/news/news/2023/edpb-adopts-final-version-guidelines-facial-recognition-technology-area-law\\_en](https://edpb.europa.eu/news/news/2023/edpb-adopts-final-version-guidelines-facial-recognition-technology-area-law_en)

<sup>126</sup> Taylor Kay Lively, *Facial Recognition in the US: Privacy Concerns and Legal Developments*, ASIS (Dec. 1, 2023, 11:35 PM), <https://www.asisonline.org/security-management-magazine/monthly-issues/securitytechnology/archive/2021/december/facial-recognition-in-the-us-privacy-concerns-and-legal-developments/>.

<sup>127</sup> *Consent*, GENERAL DATA PROTECTION REGULATION (Jul. 17, 2023, 12:48 PM), <https://gdpr-info.eu/issues/consent/>.

<sup>128</sup> Commercial Facial Recognition Privacy Act, 2019, §847, Acts of Congress, 2019 (United States of America).

<sup>129</sup> *Smarter human oversight is crucial in facial recognition AI*, WITS UNIVERSITY (29 Jun. 2023, 10:48 PM), <https://www.wits.ac.za/news/latest-news/research-news/2023/2023-06/smarter-human-oversight-is-crucial-in-facial-recognition-ai.html>.

workings and creators.<sup>130</sup> Learning from history, Indian law enforcement agencies should prioritize seeking FRT software that provides highly accurate results and is developed by companies whose missions, visions, and values align with their own. The database is required to feed a greater amount of images from the Indian population for it to be able to perform more accurately in the non-Caucasian setup. To make an informed decision, law enforcement agencies must conduct thorough market research, including conducting product trials and conversing with existing customers to evaluate the software's performance in real-world scenarios. Till then, India must proactively undertake a step similar to the US's Ethical Use of Facial Recognition Act, 2019,<sup>131</sup> which seeks to establish guidelines to prevent “*inaccurate results*” and calls for a moratorium on government FRT use until regulatory measures are in place.

## 2. *Pitching For Human Rights*

FRT has reached unimagined levels of innovation. Japan's NEC Corporation claimed that their algorithms could identify individuals even when their faces are partially obscured by facemasks to have kept up with the pandemic crime rage.<sup>132</sup> The Indian Ministry of Defence asserted a similar claim regarding the ‘Face Recognition System under Disguise’<sup>133</sup> in its 2022 report ‘AI in Defence.’<sup>134</sup> Several private companies, including IDEMIA,<sup>135</sup> NEC India,<sup>136</sup> Staqu,<sup>137</sup> Vision-Box,<sup>138</sup> and Innefu Labs,<sup>139</sup> provide FRT support to Indian government agencies. Staqu allegedly supplied facial

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<sup>130</sup>The New York Times, *Clearview AI is the latest viral hit among law enforcement agencies which could end privacy as we know it-Tech News*, FIRSTPOST (Jun. 20, 2023, 11:08 PM), <https://www.firstpost.com/tech/news-analysis/clearview-ai-is-the-latestviral-hit-among-law-enforcement-agencies-which-could-end-privacy-as-we-know-it-7930781.html>.

<sup>131</sup>Ethical Use of Facial Recognition Act, 2020, § 3284, Acts of Congress, 2020 (United States of America).

<sup>132</sup>Nisha Shroff, *NEC upgrades face recognition technology*, BUSINESS TRAVELLER (Sep. 29, 2023, 08:48 PM), <https://www.businessstraveller.com/business-travel/2020/09/29/nec-upgrades-face-recognition-technology/>.

<sup>133</sup>Rahul Verma, *DRDO has developed a facial recognition system that claims to see through masks and disguise*, BUSINESS INSIDER (Aug. 23, 2023, 11:28 PM), <https://www.businessinsider.in/science/research/news/drdo-has-developed-a-facial-recognition-system-that-claims-to-see-through-masks-and-disguise/articleshow/93726351.cms>.

<sup>134</sup>Ministry of Defence, *AIDef*, GOVERNMENT OF INDIA (July 6, 2023, 06:28 PM), <https://www.ddpmod.gov.in/sites/default/files/ai.pdf>.

<sup>135</sup>*The leader in identity technologies*, IDEMIA (Jul. 27, 2023, 10:06 PM), <https://www.idemia.com/>.

<sup>136</sup>*Innovative ICT services provider & Digital Transformation Solution Provider in India, IT Consulting Services* (Jul. 26, 2023, 01:58 AM), NEC, <https://in.nec.com/>.

<sup>137</sup>*Video Analytics Solution*, STAQU TECHNOLOGIES (Jul. 24, 2023, 10:18 PM). <https://www.staqu.com/>.

<sup>138</sup>VISION-BOX – CONNECTING THE WORLD (Jul. 17, 2023, 08:49 AM), <https://www.vision-box.com/>.

<sup>139</sup>INNEFU: SECURITY, ANALYTICS, AND INTELLIGENCE (Jul. 27, 2023, 09:42 PM), <https://www.innefu.com/>.

recognition technology to law enforcement agencies in multiple states, including during protests,<sup>140</sup> most prominently the infamous ‘Anti-CAA’ protests in Delhi and Uttar Pradesh.<sup>141</sup> The rapid advancement and widespread deployment of FRT exhibited above by private companies to supplement harassment of dissenters and protestors raises concerns about potential human rights violations and warrants the development of unambiguous, stringent, and reasoned guidelines governing facial data acquisition, storage, and utilization.

### C. CAPTURING CONTROL: ESTABLISHING OVERSIGHT MECHANISMS TO REGULATE FRT

In addition to regulatory legislation establishing penal provisions, introducing executive or judicial oversight mechanisms is a *sine qua non* to stop the wrong before it unfolds. India must analyze, interpret and implement policies and structures akin to the international jurisprudence on FRT.

#### 1. *Executive Oversight Mechanism*

Under an executive oversight mechanism, only a limited number of authorized organizations should be allowed to utilize FRT. Any other agency wishing to perform a facial recognition search should be required to submit a request to an “*independent oversight board*” before acting as an authorized operator.<sup>142</sup> This approach reduces the number of organizations possessing FRT systems and facilitates the establishment of consistent governance over their use. An example of this can be seen in the US, where for certain states, local police departments are required to submit written requests to state agencies for conducting facial recognition searches on their behalf.<sup>143</sup> Prior scholarship has detected the unusual delegation of surveillance functions to the private sector in India coupled with

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<sup>140</sup>Alexandra Ulmer Zeba Siddiqui, *India's use of facial recognition tech during protests causes stir*, U.S. (Feb. 17, 2020, 02:24 PM), <https://www.reuters.com/article/us-india-citizenship-protests-technology/indias-use-of-facial-recognition-tech-during-protests-causes-stir-idUSKBN20B0ZQ>.

<sup>141</sup>*Delhi Police Is Now Using Facial Recognition Software to Screen 'Habitual Protestors'*, THE WIRE (Dec. 29, 2019, 02:46 PM), <https://thewire.in/government/delhi-police-is-now-using-facial-recognition-software-to-screen-habitual-protestors>.

<sup>142</sup>Raushan Tara Jaswal, *Automated Facial Recognition Systems: Not the win we were rooting for*, THE LEAFLET (Jun. 19, 2023, 09:45 PM), <https://theleaflet.in/automated-facial-recognition-systems-not-the-win-we-were-rooting-for/>.

<sup>143</sup>*Kashmir, supra note 115, at 15.*

opaqueness and inadequate documentation,<sup>144</sup> and this system can go a long way in putting corrective measures into place to ensure responsible delegation and transparency.

## 2. *Judicial Oversight Mechanism*

A judicial oversight mechanism would mandate that law enforcement officers obtain a warrant or court order prior to utilizing facial recognition technology. This system is currently in practice in Massachusetts,<sup>145</sup> and there are three federal-level bills, namely the Ethical Use of Facial Recognition Act, 2019,<sup>146</sup> the FACE Protection Act, 2019,<sup>147</sup> and the Facial Recognition Technology Warrant Act, 2019,<sup>148</sup> that are in discussion and aim to establish warrant requirements for facial recognition searches conducted by federal law enforcement.

## D. SETTING A PARADIGM: ESTABLISHING A *SUI GENERIS* FRAMEWORK FOR INDIA

### 1. *Establishing regulatory guidelines in India*

The suitability of FRT for accurately identifying individuals of diverse ethnic backgrounds, particularly in the context of the Indian population, has come under scrutiny. To address this issue, it is imperative to enhance the algorithm's capabilities to better recognize and differentiate people of color. However, it is crucial to acknowledge that attaining perfection in FRT is a perpetual endeavor due to inherent complexities. Therefore, establishing robust regulatory frameworks that incorporate distinct checks to govern the detention of individuals in proportion to the charges they face is paramount. This becomes especially crucial in light of India's notorious track record regarding undertrial prisoners in correctional facilities,<sup>149</sup> further compounded by the prevailing caste

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<sup>144</sup>Ameen Jauhar and Jai Vipra, *Procurement of Facial Recognition Technology for Law Enforcement in India: Legal and Social Implications of the Private Sector's Involvement*, VIDHI CENTRE FOR LEGAL POLICY (Jun. 17, 2023, 07:46 PM), <https://vidhilegalpolicy.in/research/procurement-of-facial-recognition-technology-for-law-enforcement-in-india-legal-and-social-implications-of-the-private-sectors-involvement/>

<sup>145</sup>An Act Relative To Justice, Equity And Accountability In Law Enforcement In The Commonwealth, 2020, ch. 253, Commonwealth of Massachusetts, 2020 (United States of America).

<sup>146</sup>In re Facebook, *supra* note 121, at 17.

<sup>147</sup>FACE Protection Act, 2019, H.R.4021, Acts of Congress, 2019 (United States of America).

<sup>148</sup>Facial Recognition Technology Warrant Act, 2019, §2878, Acts of Congress, 2019 (United States of America).

<sup>149</sup>Madhurima Dhanuka, Undertrial prisoners and the criminal justice system, 2 COMMONWEALTH HUMAN RIGHTS INITIATIVE (2010), <https://www.humanrightsinitiative.org/download/1457162682Undertrial%20Prisoners%20and%20the%20Criminal%20Justice%20System.pdf>.

dynamics.<sup>150</sup> Consequently, implementing comprehensive review mechanisms becomes indispensable to ensure that due process is diligently followed, with technology serving as a facilitator rather than a determinant in adjudication processes.<sup>151</sup>

Center for Strategic and International Studies recommends an industrious approach to this, involving the establishment of clear guidelines encompassing laws, rules, and policies based on the tenets of permissible use, transparency, consent and authorization, data retention, autonomous use, redress and remedy, human oversight and auditing, algorithmic review, and assessment of training data, to govern the application of FRT so that aligns unequivocally with constitutional safeguards.<sup>152</sup> Therefore, some legislative guidelines, preferably at the Parliamentary level to ensure nationally consistent and cohesive application and enforcement, are necessary prior to the widespread utilization of such technology in India. To supplement its enforcement, specialized training to review the accuracy of the FRT system, an independent authority to limit the procurement of technology and an auditing mechanism will be required to be established, coupled with collaboration between FRT system providers, legal professionals, technology experts, and concerned governmental entities.

## 2. *Integrating hybridized technology*

Despite efforts to protect data, citizens, and their anonymity, concerns have been raised about FRT.<sup>153</sup> Individuals have developed methods to deceive these systems, such as specialized makeup algorithms<sup>154</sup> and clothing patterns.<sup>155</sup> Hacks using masks<sup>156</sup> and printed images<sup>157</sup> have also been

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<sup>150</sup> Rohini Roy, Undertrial Prisoners in India: Why Are 66% From Marginalised Castes?, THE QUINT (Dec. 24, 2023, 12:36 AM), <https://www.thequint.com/news/law/indias-undertrial-prisoners-why-are-are-66-percent-from-marginalisedcastes>.

<sup>151</sup> Facial Recognition Technology and Law Enforcement: Select Constitutional Considerations (R46541), CRS REPORT (2020), <https://crsreports.congress.gov/product/pdf/R/R46541>.

<sup>152</sup> James Andrew Lewis and William Crumpler, *Facial Recognition Technology: Responsible Use Principles and the Legislative Landscape*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Sep. 29, 2023, 02:46 PM), <https://www.csis.org/analysis/facial-recognition-technology-responsible-use-principles-and-legislative-landscape>.

<sup>153</sup> MAJOR CITIES CHIEFS ASSOCIATION, *Facial Recognition Technology In Modern Policing*, 2021, <https://majorcitieschiefs.com/wp-content/uploads/2021/10/MCCA-FRT-in-Modern-PolicingFinal.pdf>

<sup>154</sup> *Top Yandex engineer develops anti-facial recognition technology*, EAST-WEST DIGITAL NEWS (Jul. 24, 2017, 01:35 AM), <https://www.ewdn.com/2017/07/24/top-yandex-engineers-develops-anti-facial-recognition-technology/>.

<sup>155</sup> *CV Dazzle*, ADAM HARVEY STUDIO (Jul. 21, 2023, 11:39 PM), <https://adam.harvey.studio/cvdazzle>.

<sup>156</sup> Thomas Brewster, *Apple Face ID 'Fooled' By \$150 Mask -- But Big Questions Remain*, FORBES (Jun. 13, 2023, 02:16 AM), <https://www.forbes.com/sites/thomasbrewster/2017/11/13/apple-face-id-hacked-by-vietnamese-researchersmask/>.

<sup>157</sup> *Generate look-a-like photos to protect your identity*, ANONYMIZER (Jul. 24, 2023, 12:56 PM), <https://generated.photos/anonymizer>

successful, though not easily scalable. Researchers have created algorithms<sup>158</sup> and apps<sup>159</sup> that disrupt facial recognition, while synthetic portraits and simple techniques like wearing masks and sunglasses can render individuals 'invisible' to the technology.<sup>160</sup> While the FRT industry works on anti-spoofing measures, the future lies in hybridizing technology use by integrating lateral technology solutions into FRT usage.

By harnessing the power of diverse biometric techniques, the gaps in FRT use can be filled, ensuring unparalleled security and utmost privacy for all stakeholders within the ecosystem. The need of the hour is for the development and adoption of cutting-edge software which can leverage geolocation, Internet Protocol (IP) addresses, and unique keying patterns to create an impregnable authentication framework and allow FRT to actually achieve what it was created for in the first instance.

## V. CONCLUSION

March and Olsen's 1988 work introduced the concept of the 'logic of appropriateness,'<sup>161</sup> which in our case highlights the tightrope walk that the world performs between FRT implementation, lured by the transformative approach it brings to criminal prosecution and justice system, and the consequent challenges it poses for human rights. The ostensible promises of FRT falter in the face of stark disparities and systemic injustices, leaving vulnerable communities in the crosshairs of a biased and inherently flawed system. FRT presents a paradoxical situation as it simultaneously improves the identification of criminals and raises concerns about misidentification, creating a self-contradictory argument for its implementation. A critical reassessment of the indiscriminate adoption of FRT becomes imperative as India strives to forge a path forward that champions equity, accountability, transparency, and the preservation of fundamental rights. By upholding these

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<sup>158</sup>Jesse Damiani, *AI Researchers Create 'Privacy Filter' That Disrupts Facial Recognition Technology*, FORBES (May 31, 2018, 11:46 AM), <https://www.forbes.com/sites/jessedamiani/2018/05/31/ai-researchers-create-privacy-filter-that-disruptsfacial-recognition-technology/?sh=245339316d96>

<sup>159</sup>James Vincent, *Cloak your photos with this AI privacy tool to fool facial recognition*, THE VERGE (Aug. 4, 2023, 09:35 AM), <https://www.theverge.com/2020/8/4/21353810/facial-recognition-block-ai-selfie-cloaking-fawkes>

<sup>160</sup>Thomas Smith, *This Simple Technique Made Me Invisible to Two Major Facial Recognition Systems*, ONEZEROMEDIUM (Jul. 28, 2023, 02:35 AM), <https://onezero.medium.com/you-can-fool-a-popular-facial-recognition-systemswith-sunglasses-4905ed3a59b0>

<sup>161</sup>*The Institutional Dynamics of International Political Orders*, CAMBRIDGE CORE (Apr. 04, 2005, 09:38 AM), <https://www.cambridge.org/core/journals/international-organization/article/abs/institutional-dynamics-of-international-political-orders/4EB840D89B711C1376D82563BE59C881>.

principles, FRT may play a desired role in aiding law enforcement to apprehend criminals, provide closure to victims, and demonstrate remarkable efficacy in solving diverse crimes. However, if no action is taken soon,, India will likely find itself on the brink of another 2018 Aadhar-like data breach, where citizens' data was up for as little as \$8, but this time from its national facial recognition database.<sup>162</sup>

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<sup>162</sup>Huizhong Wu, *Alleged breach of India's biometric database could put 1.2bn users at risk*, CNN (Jun. 11, 2023, 07:56 AM), <https://www.cnn.com/2018/01/11/asia/india-security-breach-biometric-database-intl/index.html>.

## ARTICLE

**THE MELD MODEL, RENT, AND THE CONSTITUTIONAL SEPARATION  
OF POWERS IN INDIA: BUILDING ON THE CASE FOR TAKING  
STATUTES SERIOUSLY IN INDIAN CORPORATE LAW ADJUDICATION**

*Saumya Singh\**

**ABSTRACT**

*The 'Meld Model' provides an analytical framework for an adjudicator to analyse and decide Indian corporate law disputes, and for an evaluator to normatively assess the adjudicator's judgement. The Model's ELP-based prong requires the adjudicator to follow a specific three-step approach in determining and applying the law pertaining to the dispute. The Law-and-Economics prong focuses on two economic and social implications of adjudicators' acting inconsistently with the ELP-based prong. I build on the Law-and-Economics prong of the Meld Model. I examine the 'rent'-related implications of adjudicators' deviating from the ELP-based prong, specifically while deciding disputes that relate only to implementing and enforcing the Indian corporate law statutes. To this end, I examine the interrelationships between 'rent-seeking' and 'rent-accrual', the ELP-based prong, and the constitutional separation of powers in India. I argue that such an adjudicatory approach would incentivise economic actors to shift their rent-seeking behaviour to the adjudicatory authorities from Parliament, and to increase the amount of rent-seeking conducted. This shift and increase will have two sets of implications, ceteris paribus. Firstly, a higher proportion of successful rent-seeking efforts, which will in turn spur higher levels of economic stagnation and social inequality. Secondly, an increase in certain forms of deadweight social losses. I exemplify my arguments through analysing the rent-related implications, ceteris paribus, of the Supreme*

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*Court's decision on the aspect of 'shadow directorship' in the Tata v. Mistry case. Further, I highlight certain crucial areas for future empirical research.*

**Keywords:** Separation of Powers, Meld Model, Exclusive Legal Positivism, Rent, Corporate Law.

## I. INTRODUCTION

The Meld Model provides an analytical framework for an adjudicator<sup>1</sup> to analyse and decide Indian corporate law disputes, and for an evaluator to normatively assess the adjudicator's judgement.<sup>2</sup> It comprises a synthesis of Exclusive Legal Positivism ('ELP') and Law-and-Economics.<sup>3</sup>

*The ELP-based prong of the Model* ('the ELP-based prong') requires the adjudicator to adopt an ELP-based lens for determining and applying the law pertaining to a corporate dispute.<sup>4</sup> This lens entails a specific three-step approach that broadly mandates giving weight to and reasoning from the binding source(s) of law involved in the dispute, as opposed to extra-legal moral or normative conceptions regarding the appropriate outcome.<sup>5</sup>

*The Law-and-Economics prong of the Model* focuses on two economic and social implications of adjudicators' acting inconsistently with the first prong. These are, *firstly*, a rise in some specific forms

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<sup>1</sup> In this paper, 'adjudicatory authorities' refers to the Competition Commission of India ('the CCI'), the National Company Law Tribunal ('the NCLT'), the Special Courts constituted for trying certain company law and insolvency law offences, the National Company Law Appellate Tribunal ('the NCLAT'), the state High Courts ('the HCs'), and the Supreme Court of India ('the SC'). 'Adjudicator' refers to the personnel in this machinery who is seized of the specific corporate law dispute in question.

<sup>2</sup> See Rahul Singh, *The Meld Model: The Holy Grail of Indian Corporate Jurisprudence*, 7 NLSBLR 21 (2021).

<sup>3</sup> Rahul Singh, *The Supreme Court of India's Respite to the State of Mizoram from Competition Law Proceedings*, OXFORD LAW FACULTY (2022), (May 23, 2023), <https://www.law.ox.ac.uk/business-law-blog/blog/2022/02/supreme-court-indias-respite-state-mizoram-competition-law>.

<sup>4</sup> Rahul Singh, *supra* note 2 at 5–6.

<sup>5</sup> *Id.* at 3–4.

of transaction costs<sup>6</sup> for certain categories of State and non-State actors;<sup>7</sup> and *secondly*, potential adverse implications for the achievement of wealth-maximisation from a Kaldor-Hicks efficiency perspective.<sup>8</sup>

Hence, the Meld Model both provides a methodological framework for adjudicators to decide Indian corporate law disputes, and theorises the economic and social consequences of their diverging from this framework. Therefore, it is both relevant and significant to build further on the Model. This is especially so since the three Indian corporate law legislative enactments/ statutes presently in force<sup>9</sup> have only recently been enacted and enforced,<sup>10</sup> and the development of the judicial doctrine pertaining to their provisions is still at a nascent stage. Consequently, whether or not a sound methodological approach is adopted in Indian corporate law adjudication at present, will foreseeably determine the quality of the judicial doctrine that will govern this area of law for the decades to follow: as the judicial doctrine posited at present will serve as the base for future corporate adjudication.

In this paper, I build on the Law-and-Economics prong of the Meld Model. I focus specifically on disputes that relate only to implementing and enforcing the Indian corporate law statutes ('corporate statute implementation disputes').<sup>11</sup> I explore a third set of potential economic and social consequences of adjudicators' diverging from the ELP-based prong while deciding such disputes. This set of

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<sup>6</sup> The term refers to the costs borne by a person in a bargain to identify a partner for the transaction concerned, reach an agreement with them, exclude free-loaders, and enforce the transaction through law: *Id.* at 4. The term 'bargain' is understood broadly: Rahul Singh, *Webinar on The Holy Grail of Jurisprudence in Indian Corporate/ Competition/ Insolvency Laws*, (2020), <https://www.youtube.com/watch?v=BnlqNKqFdhA> (last visited Apr 23, 2023).

<sup>7</sup> Rahul Singh, *supra* note 2 at 9, 11–12, 14–15, 18–19.

<sup>8</sup> *Id.*

<sup>9</sup> In this paper. 'Indian corporate law statutes' refers to *The Companies Act 2013*, (2013); *Competition Act*, (2002); *The Insolvency and Bankruptcy Code*, (2016).

<sup>10</sup> Different provisions of the Companies Act have been enforced from different points in time, ranging from September 12, 2013 to as recently as December 21, 2020: *Companies Act*, footnote 1 (2013) (IndiaCode version).

A similar pattern of enforcement has been adopted for the Insolvency and Bankruptcy Code, various provisions of which have been in force from different points between August 5, 2016 and December 1, 2019: *The Insolvency and Bankruptcy Code*, *supra* note 9 at footnote 1 (IndiaCode version).

For the Competition Act, broadly, the conduct-related aspects have been in force from May 20, 2009; while the provisions pertaining to merger control were notified for enforcement from June 1, 2011: Rahul Singh, *supra* note 2 at 2.

<sup>11</sup> The judicial and quasi-judicial authorities which are empowered to decide such disputes are the CCI, the NCLT, or the Special Courts at the first instance; the NCLAT at the stage of first appeal; the SC under its second appeal or special leave jurisdictions; and the HCs under their respective writ jurisdictions. *See Companies Act*, *supra* note 10 at 410, 421, 423, 430, 435–36; *Competition Act*, *supra* note 9 at 18–20, 26–28, 53A, 53T; *The Insolvency and Bankruptcy Code*, *supra* note 9 at 60–63, 236; *The Constitution of India 1950*, 136, 226.

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consequences pertains broadly to the concept of ‘rent’, its accumulation with certain economic actors, and the phenomenon of ‘rent-seeking’ that has been explored in the economic theory of legislation.

To this end, in *Section I*, I discuss the specific three-step approach that the ELP-based prong prescribes for how corporate statute implementation disputes ought to be decided. I further explore the convergence between the ELP-based prong and the constitutional separation of powers in India on this issue. In *Section II*, I examine the meaning, causes, and implications of the related phenomena of ‘rent-seeking’ and ‘rent-accrual’. In *Section III*, I explore the theoretical relationship between these phenomena and the separation of powers. I further examine when and how the separation of powers can potentially militate against these phenomena by increasing the transaction costs for economic actors to pursue rent-seeking. In this context, in *Section IV*, I examine the relative transaction costs that rent-seeking economic actors would face in pursuing favourable legal changes where adjudicators adhere to the ELP-based prong (and *ipso facto* the constitutional separation of powers) while deciding corporate statute implementation disputes, vis-à-vis where they adhere to neither.

Based on this analysis, in *Section V*, I argue that where adjudicators deviate from the ELP-based prong while deciding corporate statute implementation disputes, they incentivise economic actors to *shift* their rent-seeking behaviour to the adjudicator(s) concerned from Parliament, and *increase* the amount of rent-seeking conducted in absolute terms. This shift and increase will follow, *ceteris paribus*, because economic actors would anticipate facing lower transaction costs in conducting rent-seeking before the adjudicator(s) concerned as compared to Parliament, if the same adjudicatory methodology is continued to be deployed. This shift and increase will have two sets of implications, *ceteris paribus*. *Firstly*, the shift in rent-seeking to adjudicators will result in a higher proportion of successful rent-seeking efforts, and thus higher amounts of rent-accrual. This will spur higher levels of economic stagnation and social inequality. *Secondly*, the increase in the extent of rent-seeking conducted will result in an increase in the various forms of deadweight social losses that rent-seeking entails.

I exemplify the conclusions reached and arguments advanced in this paper through analysing the rent-related implications that will follow, *ceteris paribus*, if adjudicatory authorities continue to deploy the adjudicatory methodology that was adopted by the Supreme Court while deciding on the issue of

‘shadow directorship’ in *Tata Consultancy Services Limited v. Cyrus Investments Pvt Ltd* [*Tata v. Mistry*].<sup>12</sup> For more general empirical conclusions to be drawn, there exists a need for more broad-based empirical analysis on many of the implicated issues. To this end, I conclude with highlighting the important avenues for future empirical research.

## II. THE ELP-BASED PRONG OF THE MELD MODEL, AND THE CONSTITUTIONAL SEPARATION OF POWERS IN INDIA: RELATIONSHIP AND ADJUDICATORY APPROACH

### (A). THE CASE FOR TAKING STATUTES SERIOUSLY: THE ELP-BASED PRONG OF THE MELD MODEL

The analytical framework of the Meld Model comprises the ELP-based and the Law-and-Economics prongs. The ELP-based prong requires an adjudicator to adopt a specific three-step approach in determining what the law pertaining to a corporate dispute *is*, and applying it to the facts of the dispute.<sup>13</sup> In the context of deciding corporate statute implementation disputes, these steps, in the order of relative priority and primacy in case of any conflict, are:

*First*, “*taking the text of the statutes seriously*”.<sup>14</sup> This step requires the adjudicator to give weight to and reason from the statutes involved in the dispute, as opposed to extra-legal moral or evaluative conceptions regarding the appropriate outcome.<sup>15</sup> This interpretive position is grounded in ELP’s ‘sources thesis’. The sources thesis posits that those (and only those) norms count as ‘law’ which pass the legal system’s test<sup>16</sup> for identifying the content of the law: a test which, as per this thesis, can have

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<sup>12</sup> SCC Online SC 272 (2021).

<sup>13</sup> Rahul Singh, *supra* note 2, at 5–6.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 3–6.

<sup>16</sup> At various points, Prof. Raz refers to a single legal system as the unit at which a test for the identification of the content of the law exists. See Joseph Raz, “Legal Positivism and the Sources of Law” *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), at pp. 42, 47.

only social facts as conditions for determining what counts as ‘law’.<sup>17</sup> Such facts, which identify the law’s content and establish the validity of a norm as law, are referred to as the ‘sources’ of law.<sup>18</sup> Statutes comprise one, though not the only, of these sources.<sup>19</sup>

*Secondly*, following the statutory mandates, if any, relating to the ways of doing particular acts; and not necessarily confining the interpretation exercise to singular words of the involved statute(s).<sup>20</sup> Instead, this second step requires the adjudicator to construct the meaning of “*a sentence, paragraph, or a whole page or more text*” of the involved statute(s) as a whole where required.<sup>21</sup>

*Thirdly*, “*taking law-and-economics based consequences (such as Kaldor-Hicks efficiency, transaction costs) seriously.*”<sup>22</sup> This step acquires relevance in, and only in, situations where the law pertaining to the dispute concerned is not ‘settled’ i.e. the involved statutes do not provide a single solution to the implicated question(s) of law.<sup>23</sup> In such scenarios, the adjudicator ought to adopt the interpretation that entails relatively desirable consequences from a Law-and-Economics lens.<sup>24</sup>

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<sup>17</sup> *Id.* at 40–41, 46.

<sup>18</sup> *Id.* at 47–48.

<sup>19</sup> *Id.* at 48. In the context of the Indian legal system, *see infra* note 28–29 and accompanying text.

<sup>20</sup> Rahul Singh, *supra* note 2 at 6.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* This step may *prima facie* appear incompatible with the sources thesis, since it requires taking extra-legal standards as the base for choosing between multiple possible interpretations of the involved statute(s).

However, ELP recognises that where the law pertaining to a dispute is unsettled, the adjudicators’ decisions “*rely at least partly on moral and other extra-legal considerations*”: Joseph Raz, *supra* note 16 at 49–50. Such reliance does not violate the sources thesis where, and only where, the norm which mandates this reliance qualifies as ‘law’: *Id.* at 46. Where this requirement is satisfied, ELP considers such law as providing the adjudicator with the ‘directed’ power to apply moral considerations in adjudication: Rahul Singh, *supra* note 2 at 17.

Providing a detailed justification of how the excerpted norm under Step 3 is ‘law’ is beyond the scope of this paper, which is limited to building on the Law-and-Economics prong as the Meld Model currently stands. For the present purposes, it would suffice to highlight that Step 3’s mandate to rely on Law-and-Economics based consequences has statutory tethers and grounding in the Indian corporate law statutes. In this context, *see infra* note 25.

<sup>23</sup> Prof. Raz discusses the existence of such situations in Joseph Raz, *supra* note 16 at 45–46, 49–50.

<sup>24</sup> Rahul Singh, *supra* note 6. *See also* Prof. Singh’s analysis of the Supreme Court’s failure in *CCI v. Mizoram* to conduct a meaningful analysis of the “*Chadwick-Demsetz scheme*”, which is a concept from the field of Law-and-Economics: Singh, *supra* note 3.

(B). THE ELP-BASED PRONG'S RELATIONSHIP WITH THE CONSTITUTIONAL SEPARATION OF POWERS IN INDIA

The ELP-based prong takes a particular stance on how the institutional relationship between the legislature and adjudicatory authorities ought to be, when the latter decide on corporate statute implementation disputes. It considers the legislature as the law-making constitutional organ, and the adjudicatory authorities' role as limited to interpreting and applying (as opposed to modifying) legislative enactments. Even where the involved statute(s) are unsettled on a question of law, the ELP-based prong requires the adjudicator(s) to adopt and apply one of the statute's possible interpretations, based on a Law-and-Economics approach that itself has a statutory basis.<sup>25</sup>

This understanding of how corporate statute implementation disputes ought to be decided is congruent with the Indian Constitution's separation of powers between the legislature and the judiciary ('the constitutional separation of powers'). In the Indian constitutional design, Parliament and state legislatures are vested with the power to promulgate laws ('law-making').<sup>26</sup> In the Indian corporate law context, this power has been exercised by Parliament, which has promulgated the three Indian corporate law statutes. Therefore, only Parliament is constitutionally empowered to amend or repeal their provisions.<sup>27</sup> While deciding legal disputes that relate to the implementation and enforcement of statutes, the judiciary must interpret the pertinent statutes, and apply them to the facts of the case. A judgement that fails to do so is considered 'per incuriam'.<sup>28</sup> Such judgements are theoretically devoid of precedential value, and are liable to be overruled by larger benches.<sup>29</sup>

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<sup>25</sup> The IBC posits the "maximisation of value of assets" as a core objective of the statute, which mirrors the concept of Kaldor-hicks efficiency: see The Insolvency and Bankruptcy Code, *supra* note 9 at preamble. The *Competition Act* highlights the statutory objectives of preventing "practices having adverse effect on competition", and promoting and sustaining "competition in markets": Competition Act, *supra* note 9 at preamble. In the context of the *Companies Act, 2013*, the Preamble does not specifically refer to Law-and-Economics concepts. However, the purpose of companies is "maximising aggregate welfare", a standard that mirrors the concept of Kaldor-Hicks efficiency: John Armour et al., *What Is Corporate Law?*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2017).

<sup>26</sup> The Constitution of India 1950, *supra* note 11 art 245, 246; MR Madhavan, *Parliament*, in RETHINKING PUBLIC INSTITUTIONS IN INDIA, 1, 13 (Devesh Kapur, Pratap Bhanu Mehta, & Milan Vaishnav eds., 1 ed. 2017).

<sup>27</sup> The Constitution of India 1950, *supra* note 11 at arts 245, 246, and 254.

<sup>28</sup> Central Board of Dawoodi Bohra Community v. State of Maharashtra, 2 SCC 673, [7] (2005).

<sup>29</sup> Shah Faesal v. Union of India, 4 SCC 1, [29] (2020); See also AR Antulay v. RS Nayak, 2 SCC 602 (1988).

As it presently stands, the Law-and-Economics prong highlights two economic and social consequences of the adjudicators in Indian corporate law disputes acting inconsistently with the ELP-based interpretive framework. These pertain respectively to specific forms of transaction costs, and wealth-maximisation from a Kaldor-Hicks efficiency perspective. However, the convergence between the ELP-based prong and the constitutional separation of powers when it comes to deciding corporate statute implementation disputes opens the avenue to ‘weld’ a third perspective into the Law-and-Economics prong. This perspective relates to the phenomena of ‘rent-seeking’ and ‘rent-accrual’. This is because the ways and degrees to which these phenomena and their consequences unfold in a jurisdiction are integrally tied to the prevalent constitutional relationships between the organs of the State.<sup>30</sup> Therefore, an adjudicatory approach to Indian corporate statute implementation disputes that disregards the ELP-based prong, and *ipso facto* the constitutional separation of powers, is likely to have certain impacts on rent-seeking and rent-accrual. These impacts will be explored in the following sections.

### III. UNEARNED RETURNS IN ECONOMIC PRODUCTION: THE MEANING, CAUSES, AND CONSEQUENCES OF RENT-ACCRUAL AND RENT-SEEKING

#### (A). THE PHENOMENA OF RENT-ACCRUAL AND RENT-SEEKING: MEANING AND CAUSES

The concept of rent is linked to the phenomenon of economic production. ‘Rent’ refers to the income or reward (‘returns’) received by an economic actor who contributes a factor input<sup>31</sup> to economic production, to the extent that such returns exceed their respective contribution to the creation of value in the production process (‘value-creation’).<sup>32</sup> Since it does not correspond with value-creation, rent is

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<sup>30</sup> As discussed in *infra* Section III.

<sup>31</sup> In economic theory, the factor inputs required for production are land and natural resources, labour, physical capital, and human capital: N GREGORY MANKIW, PRINCIPLES OF MACROECONOMICS 24–26, 197, 241–243, 436 (6 ed. 2011).

<sup>32</sup> MARIANA MAZZUCATO, JOSH RYAN-COLLINS & GIORGOS GOUZOULIS, THEORISING AND MAPPING MODERN ECONOMIC RENTS (WORKING PAPER WP 2020—13) 3, 16 (2020).

considered ‘unearned’ income.<sup>33</sup> For the purposes of this paper, ‘rent-accrual’ refers to the receipt of rent by an economic actor, and ‘rentier’ refers to an economic actor who receives rent.

A situation of rent-accrual may arise because of either, or both, of two underlying causes:<sup>34</sup> *firstly*, that the rentier owns a scarce asset which is required for production, and is thus able to demand returns from the producer in excess of the rentier’s contribution to value-creation; and *secondly*, that there exist legal rights and obligations which create the conditions for rent-accrual. The phenomenon of ‘rent-seeking’, which has been explored in the economic theory of legislation,<sup>35</sup> acquires significance in the context of the second cause. This phenomenon refers to the attempt by economic actors to obtain rents by driving legislators to promulgate statutes that cause the transfer of resources or entitlements from other economic actors to themselves.<sup>36</sup> Whether or to what extent economic actors engage in rent-seeking depends on the relative expected costs and benefits of pursuing returns through rent-seeking vis-à-vis through value-creating activities.<sup>37</sup>

Under the economic theory of legislation, the potential success of rent-seeking is enabled by how the legislators discharge their official functions in their self-interest, as rational utility-maximising individuals.<sup>38</sup> As per this theory, legislators act in favour of those economic actors who supply them with adequate political support (as campaign contributions, express or implied promises of favours, votes etc.) to promulgate the statutes concerned.<sup>39</sup> Therefore, the enacted statutes reflect the relative influence of rival economic actors.<sup>40</sup>

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<sup>33</sup> *Id.* at 1, 3, 4, 5.

<sup>34</sup> *Id.* at 3, 5, 16.

<sup>35</sup> Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model*, 74 VA LAW REV 471, 471–472 (1988). *See also* Daniel Farber & Philip Frickey, *Interest Groups and the Political Process*, in LAW AND PUBLIC CHOICE (1991).

<sup>36</sup> Farber and Frickey, *supra* note 35 at 15; Macey, *supra* note 35 at 472–3.

Such rent-seeking is often undertaken by ‘interest groups’, which are organised groups of persons with common demands and interests: Interest Group, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/interest-group> (last visited Apr 28, 2022). Such interest groups coalesce when the potential benefit of the desirable laws exceeds the transaction costs of their coalescence: Macey, *supra* note 35 at 475. In this paper, the term ‘economic actor’ will connote both persons and interest groups, unless expressly specified otherwise.

<sup>37</sup> Macey, *supra* note 35 at 477–478, 500.

<sup>38</sup> Farber and Frickey, *supra* note 35, at 22–24.

<sup>39</sup> *Id.* at 15, 22.

<sup>40</sup> Macey, *supra* note 35 at 477.

To be certain, the economic theory of legislation does not provide an exhaustive account of the behaviour of legislators in all situations.<sup>41</sup> In practice, legislators act based on both ideology (beliefs about the public interest) and self-interest, with self-interest spurring them to act in the interests of the members of their constituencies and/or rent-seeking economic actors.<sup>42</sup> The relative weight of these factors in legislators' decision-making varies across time and across different issues.<sup>43</sup> Nevertheless, the economic theory of legislation captures some significant realities of the legislative process. In specific, rent-seeking economic actors who represent relatively concentrated economic interests enjoy legislative influence that is disproportionately high vis-à-vis their numerical significance.<sup>44</sup> Such economic actors, in turn, belong predominantly to the relatively economically privileged sections of society.<sup>45</sup>

The pervasiveness of the phenomena of rent-accrual and rent-seeking has led to rising scholarly attention to their potential economic and social consequences. These have been discussed in the next sub-section.

## B. THE POTENTIAL ECONOMIC AND SOCIAL IMPLICATIONS OF RENT-ACCRUAL AND RENT-SEEKING

Both phenomena – rent-accrual and rent-seeking – have mixed potential economic and social implications.

### 1. *The Possible Implications of Rent-Accrual*

The possibility of rent-accrual can enhance growth for some sectors of the economy (such as renewable energy), provided that it is possible to earn only limited amounts of rent and for short periods of time.<sup>46</sup> This is because such a possibility provides a heightened incentive for other economic

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<sup>41</sup> Daniel Farber & Philip Frickey, *Introduction*, in *LAW AND PUBLIC CHOICE*, 7 (1991); Farber and Frickey, *supra* note 35 at 17, 33.

<sup>42</sup> Farber and Frickey, *supra* note 41 at 7; Farber and Frickey, *supra* note 35, at 22, 23, 32, 33.

<sup>43</sup> Farber and Frickey, *supra* note 35, at 33.

<sup>44</sup> *Id.* at 24, 33.

<sup>45</sup> *Id.* at 19–20, 36–37.

<sup>46</sup> MAZZUCATO, RYAN-COLLINS, AND GOUZOULIS, *supra* note 32 at 2, 4, 10–11, 13.

actors to undertake investment and research in the sector, so as to avail themselves of such rent.<sup>47</sup> However, in other situations, rent-accrual by rentiers who supply factor inputs to one sector of production can have significant adverse implications for both economic production in this and other sectors, and social equality.

Rent-accrual by the supplier(s) of one factor of production increases the overall cost of production.<sup>48</sup> This constrains the producer to either increase the price of the product, or offset the increased cost of production in other ways.<sup>49</sup> Of these, the first option would be unfeasible for a producer in the long term, since it would reduce their competitiveness vis-à-vis other producers that manage to keep the price at the same level.<sup>50</sup> Therefore, only offsetting the increased costs of production would be feasible for the producer in the long run. This can be done through the producer's decreasing, *firstly*, the returns provided to other factor(s) of production ('first case');<sup>51</sup> and/or *secondly*, the producer's retained profits ('second case').<sup>52</sup>

In the *second case*, the fall in the producer's retained profits would lead to a decrease in the corpus available for investment and research.<sup>53</sup> This would lead *ceteris paribus*<sup>54</sup> to a decrease in capital formation in the sector concerned, and thus supply-side economic stagnation.<sup>55</sup>

In the *first case*, the factor of production which will receive reduced returns would most often be labour.<sup>56</sup> This is because there exists a marked inequality of bargaining power between the producer and the labour, which enables the producer to dictate the labour's terms of employment for the most part.<sup>57</sup> The decrease in returns to labour while the returns to the rentier(s) increase will have two significant consequences, *ceteris paribus*: *firstly*, a decrease in the labour's demand for products<sup>58</sup> and

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at abstract, 4, 17.

<sup>49</sup> *Id.* at 4–5.

<sup>50</sup> *Id.* at 6–7.

<sup>51</sup> *Id.* at 5–6.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.* at 6–7, 13.

<sup>54</sup> The phrase '*ceteris paribus*' does not have any single settled meaning. For the purposes of this paper, it has been used in one of its possible connotations, that other external circumstances/ exogenous variables are presumed to remain constant: John Whittaker, *Ceteris Paribus*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* 1494 (3rd ed. 2018).

<sup>55</sup> MAZZUCATO, RYAN-COLLINS, AND GOUZOUULIS, *supra* note 32 at 6–7, 17.

<sup>56</sup> *Id.* at 5–6.

<sup>57</sup> Hugh Collins, "*Labour Is Not a Commodity*", in *EMPLOYMENT LAW*, 6–8, 13 (2nd ed. 2010).

<sup>58</sup> MAZZUCATO, RYAN-COLLINS, AND GOUZOUULIS, *supra* note 32 at 6–7, 10, 11, 13, 16–17.

*secondly*, an increase in the degree of inequality in society.<sup>59</sup> This is especially so since the economic actors who exercise a disproportionate influence in legislative outcomes through rent-seeking, and are therefore more likely to benefit from rent-accrual, are already economically privileged.<sup>60</sup> Both of these consequences will cause a decrease in the incentives to undertake investment and research for the producers in the sector(s) affected by the fall in demand. This decrease in incentives will lead, *ceteris paribus*, to a fall in capital formation for the affected sector(s), and thus demand-side economic stagnation in these sector(s).<sup>61</sup>

The same set of implications will follow where a producer receives rent as a result of their economic transactions with consumers.<sup>62</sup> The higher payments by consumers to such a rentier would, *ceteris paribus*, induce a drop in their expenditure on other product(s), and therefore a decrease in demand for the respective sector(s).<sup>63</sup> This reduction in demand would, *ceteris paribus*, result in a demand-side economic stagnation in the respective sector(s).

## 2. *Rent-Seeking: Potential Economic and Social Impacts*

Rent-seeking benefits the rentiers who receive rent as a consequence. Further, where the resultant rent-accrual conforms to the limitations discussed earlier, rent-seeking can contribute to enhancing the growth in some sectors of the economy.

However, where the rent-accrual resulting from rent-seeking extends beyond these limitations, the phenomenon of rent-seeking will *ceteris paribus* lead to economic stagnation and social inequality. Further, rent-seeking itself entails significant social costs in the form of the wasted productive power of the resources that are used by economic actors during such attempts, or by other economic actors to frustrate such attempts/ shift to a different sector of production to avoid their consequences.<sup>64</sup>

Constitutional structures with differing relationships among the organs of the State could have vastly disparate impacts on rent-accrual and rent-seeking. In specific, the separation of powers is considered

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<sup>59</sup> *Id.* at abstract, 6-7, 13, 17.

<sup>60</sup> *See supra* 44, 45.

<sup>61</sup> MAZZUCATO, RYAN-COLLINS, AND GOUZOU LIS, *supra* note 32 at 6-7, 17.

<sup>62</sup> This scenario is theoretically distinct from the wage dynamics discussed in the text accompanying *supra* note 56, 57.

<sup>63</sup> MAZZUCATO, RYAN-COLLINS, AND GOUZOU LIS, *supra* note 32 at 6-7.

<sup>64</sup> *See* Macey, *supra* note 35 at 478-480.

effective in militating against these phenomena.<sup>65</sup> This effect must be examined for exploring the rent-related implications of disregarding the ELP-based prong while deciding corporate statute implementation disputes, for the prong converges with the constitutional separation of powers in this context. Analysis on this aspect will be conducted in the next section.

### III. RAISING THE BAR: THE SEPARATION OF POWERS' IMPLICATIONS FOR RENT-SEEKING AND RENT-ACCRUAL

#### A. THE DIFFICULTIES IN SEEKING RENT: CONCEPTUALISING TRANSACTION COSTS

The effect of the separation of powers on rent-seeking and rent-accrual is integrally linked to the concept of 'transaction costs'. In the political context, Berggren and Karlson define the term as "*the costs associated with reaching a collective decision in accordance with some pre-specified decision mechanism*".<sup>66</sup> Berggren and Karlson do not specify the types of costs that they consider as falling within the rubric of transaction costs. However, the various types of transaction costs that would be faced by economic actors undertaking rent-seeking can be extrapolated from these scholars', and the Meld Model's, analysis of the types of transaction costs involved in market transactions. Such an extrapolation is theoretically tenable as the economic theory of legislation, on which the analysis pertaining to rent-seeking and rent-accrual in this paper is based, conceptualises the legislature as a marketplace where statutes are bought and sold.<sup>67</sup>

Based on this analysis, there are four types of transaction costs that would have to be borne by an economic actor that undertakes rent-seeking. These are, *firstly*, the costs of gathering sufficient information for convincing the required number of decision-makers to agree to the economic actor's desired collective decision ('information costs');<sup>68</sup> *secondly*, the costs of finding decision-makers in

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<sup>65</sup> *Id.* at 474.

<sup>66</sup> Niclas Berggren and Nils Karlson, *Constitutionalism, Division of Power and Transaction Costs*, 1/2 PUBLIC CHOICE 99, 103 (2003). Though the Meld Model does not expressly define transaction costs in the political context, it adopts a congruent understanding of the term in the context of a 'legal system': Rahul Singh, *supra* note 2 at 4.

<sup>67</sup> Macey, *supra* note 35 at 476–477; Farber and Frickey, *supra* note 35 at 14–15.

<sup>68</sup> See Niclas Berggren and Nils Karlson, *supra* note 66 at 103.

sufficient numbers to support the collective decision desired by the economic actor ('search costs');<sup>69</sup> *thirdly*, the costs of reaching a bargain with such decision-makers for supporting the desired collective decision ('bargaining costs');<sup>70</sup> and *fourthly*, the costs borne for the enforcement and implementation of the collective decision reached<sup>71</sup> ('enforcement and adjudication costs').

Transaction costs in the political context stem from two sources, both of which make reaching collective decisions more difficult: *firstly*, differences in political actors' preferred decisions;<sup>72</sup> and *secondly*, the political institutions that are involved in the decision-making process, where their institutional design(s) imposes difficulties in reaching collective decisions.<sup>73</sup>

The mechanism of the separation of powers acquires relevance in the context of the second source of transaction costs. The relationship of this mechanism with the transaction costs for rent-seeking, and its consequent impact on rent-seeking and rent-accrual, will be discussed in the next section.

#### B. THE SEPARATION OF POWERS AS A MECHANISM MILITATING AGAINST RENT-SEEKING AND RENT-ACCRUAL

Broadly, the separation of powers distributes the powers of law-making, the implementation and enforcement of the enacted laws ('law-implementation'), and the resolution of legal disputes which relate to law-making and/or law-implementation ('legal dispute adjudication') in different organs of the State.<sup>74</sup> Further, this mechanism provides for constitutional checks on each organ's powers by the other organs.<sup>75</sup>

<sup>69</sup> See *Id.* (corresponding to the "costs for contact" in the marketplace context).

<sup>70</sup> See *Id.* (corresponding to the "costs for contract" in the marketplace context).

<sup>71</sup> See *Id.* (corresponding to the "costs for control" in the marketplace context). For the Meld Model's congruent understanding of the types of costs that fall under the rubric of transaction costs in the context of market transactions, see *supra* note 6.

<sup>72</sup> For the factors influencing these differences in the context of legislators, see *supra* Section IIA.

<sup>73</sup> Niclas Berggren and Nils Karlson, *supra* note 66 at 103, 104.

<sup>74</sup> Justice Ruma Pal, *Separation of Powers*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 253–254 (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds., 1st ed. 2016).

<sup>75</sup> *Id.*

In this formulation, the separation of powers can increase the transaction costs for economic actors to obtain the making and implementation of a legal norm that facilitates rent-accrual.<sup>76</sup> This is because this mechanism requires multiple organs of the State to be convinced that a proposed legal norm (collective decision) is desirable and/or constitutionally and legally valid, for such a norm to be successfully made, implemented, and favourably adjudicated on by the judiciary. To generate an agreement of this nature, economic actors who undertake rent-seeking would need to convince a sufficient number of decision-makers in each of the involved organs of the State to make, implement, or favourably adjudicate on the legal norm.<sup>77</sup> Therefore, such economic actors will face higher information, search, bargaining, and enforcement and adjudication costs in undertaking rent-seeking, than if the constitutional structure concentrated the powers to make and implement laws, and adjudicate legal disputes, in a single organ of the State.

The rise in transaction costs would, *ceteris paribus*, make obtaining returns through rent-seeking more costly than through pursuing value-creating activities, at least to some extent.<sup>78</sup> This change in relative costs would, *ceteris paribus*, induce economic actors to commensurately shift resources from rent-seeking to value-creating activities,<sup>79</sup> and thus decrease the extent of rent-seeking being conducted by them. Therefore, the separation of powers can play a significant role in constraining rent-seeking and rent-accrual, where incorporated in a jurisdiction's constitutional structure.<sup>80</sup>

Even constitutional structures that adhere to the separation of powers broadly could have vastly different impacts on rent-seeking. *Ceteris paribus*, rent-seeking is deterred by changes in constitutional structure that increase the number and/or representativeness of the decision-makers that need to be convinced for a legal norm to be made, implemented, or favourably adjudicated on.<sup>81</sup> This is because such changes increase one or more of the information, search, bargaining, or enforcement and adjudication costs that a rent-seeking economic actor would face in the making, implementation, or

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<sup>76</sup> Farber and Frickey, *supra* note 41 at 10; Macey, *supra* note 35 at 494, 499–500.

<sup>77</sup> Macey, *supra* note 35 at 494–495, 499–500.

<sup>78</sup> See *Id.* at 477–478.

<sup>79</sup> See *supra* note 37.

<sup>80</sup> Macey, *supra* note 35 at 474, 493, 504–505.

<sup>81</sup> *Id.* at 500–502, 513–514.

favourable adjudication of their desired legal norm.<sup>82</sup> Conversely, changes in constitutional structure that concentrate decision-making powers, and/or make the decision-making process less representative, are conducive to increased rent-seeking.<sup>83</sup> In this context, the next section will discuss the relative transaction costs that rent-seeking economic actors would face where adjudicators follow the ELP-based prong, and *ipso facto* the constitutional separation of powers, in deciding corporate statute implementation disputes, than where adjudicators adhere to neither.

#### IV. THE PARLIAMENT-ADJUDICATORY AUTHORITY RELATIONSHIP IN INDIA: STRUCTURAL DESIGN, AND IMPLICATIONS FOR TRANSACTION COSTS

##### A. ENFORCING DEFERENCE AND GRATITUDE IN *TATA V. MISTRY*: EXEMPLIFYING THE ADJUDICATORY AUTHORITIES' INCONSISTENCY WITH THE ELP-BASED PRONG

There does not presently exist sufficient empirical literature on whether and how far adjudicators act inconsistently with the ELP-based prong, and *ipso facto* the constitutional separation of powers, while deciding corporate statute implementation disputes. However, the individual orders and judgements of the adjudicatory authorities suggest that such an adjudicatory approach is far from rare.

As a recent example from Indian company law, consider the SC's analysis and decision on the issue of 'shadow directorship' in *Tata Consultancy Services Limited v. Cyrus Investments Pvt Ltd* [*Tata v. Mistry*].<sup>84</sup> In this case, the petitioners *inter alia* claimed that Mr. Ratan Tata had acted as a 'shadow director' of Tata Sons. They raised this claim to substantiate their primary claim of 'oppression and mismanagement' under the Companies Act.<sup>85</sup>

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<sup>82</sup> See *Id.*

<sup>83</sup> *Id.* at 513–514.

<sup>84</sup> SCC Online SC 272 (2021) 159, 230.

<sup>85</sup> *Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. and others* C.P. No. 82(MB)/2016, 18, 57, 58, 77, 85, 90, 91, 93, 94, 181, 200, 387 (2018).

The use and understanding of the term ‘shadow director’ in the Indian corporate law context have been influenced by the United Kingdom’s company law jurisprudence, where the concept has been statutorily incorporated and defined.<sup>86</sup> The Companies Act does not expressly mention or define ‘shadow director’. Nevertheless, the statutory definitions of ‘officer who is in default’ and ‘promoter’ incorporate the British understanding of the concept.<sup>87</sup> Therefore, these provisions serve as the source for the meaning and preconditions for shadow directorship in Indian company law jurisprudence. Consequently, as the first step, the ELP-based prong would require the adjudicators in *Tata v. Mistry* to interpret and apply these statutory provisions in deciding whether Mr. Tata acted as the ‘shadow director’ (as alleged). However, the SC completely ignored these statutory definitions. Instead, it dismissed the allegation based on its perceptions of the level of deference and gratefulness that Mr. Cyrus Mistry should have borne towards Mr. Tata in the facts of the case: considerations that the implicated statutory definitions do not accord any significance.

*Tata v. Mistry* is one crucial instance from Indian corporate law where the adjudicatory authority concerned acted inconsistently with the ELP-based prong, and *ipso facto* the constitutional separation of powers. The case is certainly not the only such instance.<sup>88</sup> This raises crucial issues regarding how such an adjudicatory approach will *ceteris paribus* impact the ways and extent to which the economic actors governed by the Indian corporate law statutes pursue rent-seeking, than if the adjudicators followed the ELP-based prong. The answer will depend on the kind and extent of incentives that these competing possibilities generate for such actors to pursue rent-seeking. This relative level of incentives will depend, in turn, on the relative transaction costs that such actors would face in obtaining suitable law-making and legal dispute adjudication under the constitutional separation of powers, than if both of these functions are undertaken by only the adjudicatory authorities.

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<sup>86</sup> See Priya Garg & Vishal Hablani, *The Legislative Vacuum on the Honorary Position of a Chairman Emeritus: Assessing the Need to Introduce Statutory Regulations*, 11 NUJS LAW REVIEW 667 (2018); A RAMAIYA, GUIDE TO THE COMPANIES ACT (19 ed. 2020).

<sup>87</sup> See Companies Act, *supra* note 10 at 2(60), 2(69).

<sup>88</sup> For detailed discussions on how certain other individual decisions by adjudicatory authorities in different fields of Indian corporate law have been inconsistent with the ELP-based prong, see Rahul Singh, *supra* note 2; Singh, *supra* note 3; Rahul Singh, *supra* note 6.

An assessment of these relative transaction costs reveals that in the Indian corporate law context, the constitutional separation of powers between Parliament and the adjudicatory authorities increases both the number of decision-makers who are involved in law-making, and the representativeness of the decision-making process, than if only adjudicatory authorities perform the law-making function. The following features of the constitutional separation of powers cause this increase in relative transaction costs.

### B. STAGE 1: RESEARCH AND PUBLIC CONSULTATION IN THE DRAFTING OF THE INDIAN CORPORATE LAW STATUTES

In the Indian constitutional context, the Union Executive undertakes the drafting of statutes.<sup>89</sup> Within the Union executive, the Ministers take decisions on legal policy, and may also sometimes be involved in the drafting of statutes.<sup>90</sup> The Ministers are Members of Parliament (“MPs”) who are chosen in practice by the Prime Minister.<sup>91</sup> In performing their functions, the Ministers are advised by members of the bureaucracy.<sup>92</sup>

The Union executive has often undertaken and relied on extensive research while drafting the Indian corporate law statutes, or the amendments thereto.<sup>93</sup> Further, though the Indian legal system does not

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<sup>89</sup> M Mohsin Alam Bhat, *The Parliament and State Legislatures of India*, in ROUTLEDGE HANDBOOK OF ASIAN PARLIAMENTS , 185, 186 (Po Jen Yap & Rehan Abeyratne eds., 1 ed. 2023).

<sup>90</sup> Ashutosh Kumar, *Why Is the Indian Parliament in a State of Decline?*, in THE INDIAN PARLIAMENT AND DEMOCRATIC TRANSFORMATION , 70 (Ajay K. Mehra ed., 2018).

<sup>91</sup> Shubhankar Dam, *Executive*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds., 1st ed. 2016).

<sup>92</sup> TV Somanathan, *The Administrative and Regulatory State*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds., 1st ed. 2016).

<sup>93</sup> *In the Insolvency Law context*, see Krati Rajoria, *Insolvency and Bankruptcy Code of India: The Past, the Present, and the Future*, THOMAS REUTERS AND CONTRIBUTORS, 64–65 (2018), [https://www.researchgate.net/publication/323999366\\_INSOLVENCY\\_AND\\_BANKRUPTCY\\_CODE\\_OF\\_INDIA\\_THE\\_PAST\\_THE\\_PRESENT\\_AND\\_THE\\_FUTURE](https://www.researchgate.net/publication/323999366_INSOLVENCY_AND_BANKRUPTCY_CODE_OF_INDIA_THE_PAST_THE_PRESENT_AND_THE_FUTURE) (last visited Sep 15, 2022) (discussing the key recommendations of the various committees which have influenced the development of insolvency law in India); Insolvency Law Committee seeks to overhaul IBC, reduce timeline for disposal of cases, ECONOMIC TIMES BFSI (2022), <https://bfsi.economictimes.indiatimes.com/news/policy/insolvency-law-committee-seeks-to-overhaul-ibc-reduce-timeline-for-disposal-of-cases/93866802> (last visited Feb 27, 2023) (discussing the recommendations of the Insolvency Law Committee constituted by the Ministry of Corporate Affairs).

*In the Competition Law context*, see Dorothy Shapiro, *A Competition Act by India, for India: The First Three Years of Enforcement under the New Competition Act*, 5 INDIAN J. INT’L ECON. L. 59, 65–66 (2012) (discussing the role of the Raghavan Committee’s recommendations in catalysing the promulgation of the Competition Act 2002); Nivedita Mukherjee, ‘Competition Amendment’ among Key Bills Held up in Parliament, THE SUNDAY GUARDIAN LIVE (Mar. 18, 2023), <https://sundayguardianlive.com/news/competition-amendment-among-key-bills-held-up-in-parliament> (last visited Apr

require pre-legislative public consultations during the drafting of these statutes,<sup>94</sup> the Union executive has often conducted extensive public consultations in the process.<sup>95</sup>

The conduct of and reliance on research during statutory drafting increase the gamut of implications and concerns that are factored into the framing of the statute. Therefore, these enhance the representativeness of the decision-making process at the drafting stage. This increase in representativeness is further bolstered where the Union executive conducts public consultations as part of the statutory drafting. Such consultations provide an avenue to members of the public in general, and domain experts and the affected stakeholders in specific, to critically analyse the proposed statutory measure's implications, and represent their specific views, concerns, or suggestions before the Union Government.<sup>96</sup>

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24, 2023) (discussing the role of the Competition Law Review Committee in the formulation of the Competition [Amendment] Act 2022).

*In the Company Law context*, see Deva Prasad M, *Companies Act, 2013: Incorporating Stakeholder Theory Approach into the Indian Corporate Law*, 39 STATUTE LAW REVIEW 292, 296–297 (2018) (analysing the role of the JJ Irani Committee report in the incorporation of stakeholder responsibility under the Companies Act, 2013); The Companies (Amendment) Bill, 2016, PRS LEGISLATIVE RESEARCH (2016), <https://prsindia.org/billtrack/prs-products/prs-legislative-brief-2599> (last visited Mar 27, 2023) (discussing the influence of the Company Law Committee's recommendations on the provisions of the Companies [Amendment] Bill 2016).

<sup>94</sup> M Mohsin Alam Bhat, *supra* note 89 at 185.

<sup>95</sup> *In the Insolvency Law context*, see Govt proposes slew of changes to insolvency law, THE ECONOMIC TIMES, Jan. 18, 2023, <https://economictimes.indiatimes.com/news/economy/policy/govt-proposes-slew-of-changes-to-insolvency-law/articleshow/97094004.cms> (last visited Mar 30, 2023); Govt Plans More Consultations To Finalize Amendments To IBC, THE MINT (2021), <https://www.livemint.com/economy/govt-plans-more-consultations-to-finalize-amendments-to-ibc-1163993987776.html> (last visited May 5, 2022).

*In the Competition Law context*, see Manjushree RM & Vedika Mittal, *Competition Law 2.0: The Competition (Amendment) Bill, 2022*, VIDHI CENTRE FOR LEGAL POLICY (Aug. 24, 2022), <https://vidhilegalpolicy.in/blog/competition-law-2-0-the-competition-amendment-bill-2022/> (last visited Mar 25, 2023); Invitation for Public Comments on the Competition Act 2002, MINISTRY OF CORPORATE AFFAIRS (2018), [https://www.mca.gov.in/Ministry/pdf/InvitingComments\\_16112018.pdf](https://www.mca.gov.in/Ministry/pdf/InvitingComments_16112018.pdf) (last visited Sep 20, 2022).

*In the Company Law context*, see E-Consultation, MINISTRY OF CORPORATE AFFAIRS, <https://www.mca.gov.in/content/mca/global/en/econsultation.html> (last visited Oct 3, 2022); Gireesh Chandra Prasad, *Companies Law Tweaks to Raise Governance*, LIVEMINT (2022), <https://www.livemint.com/news/india/companies-law-tweaks-to-raise-governance-11653068428427.html> (last visited Sep 21, 2022).

<sup>96</sup> Sucheta Dalal, *Bankruptcy Law Changes: Without Extensive Public Consultation, a Hurried Amendment Will Be Full of New Loopholes and Issues*, MONEYLIFE (2022), <https://www.moneylife.in/article/bankruptcy-law-changes-without-extensive-public-consultation-a-hurried-amendment-will-be-full-of-new-loopholes-and-issues/69110.html> (last visited Apr 30, 2023).

There have been at least some recent occasions where the Union executive's proposed corporate law statutory changes have been vociferously opposed in the public domain.<sup>97</sup> However, two factors suggest that the reach and depth of public consultations, and the public scrutiny of proposed Indian corporate law statutory changes, has been limited.

*Firstly*, as noted in scholarship on comparative law, legal changes in the commercial law domain generally witness less scrutiny by the members of the public across jurisdictions, as compared to other areas of law that are more directly linked with social values and culture (such as family law and criminal law).<sup>98</sup>

*Secondly*, at least on some occasions, the Union executive has allegedly conducted public consultations for proposed corporate law statutory changes as only a cosmetic exercise.<sup>99</sup> In such situations, the views, concerns, and suggestions collected through the public consultation have allegedly not been factored into the drafting process.<sup>100</sup>

These factors suggest that as a mechanism, public consultations have limited effectiveness in making the drafting of Indian corporate law statutory changes more representative. However, to the extent that the Union executive conducts research and public consultations and does rely on the collected corpus of (more representative) information during drafting, there is an increase in the expected transaction costs (namely information and bargaining costs) for economic actors to undertake rent-seeking. This is because in these contexts, the economic actor would need to collect more information, and spend more resources, to convince the involved decision-makers within the Union executive that the former's proposed statutory measure is desirable, and constitutionally and legally valid. These increased efforts and resources will be required especially because Ministers make decisions on

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<sup>97</sup> See, for e.g., Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASHINGTON UNIVERSITY LAW REVIEW 1765, 1793 (2021) (in the context of the 2014 amendment to the Companies Act for relaxing checks on related-party transactions).

<sup>98</sup> O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 THE MODERN LAW REVIEW 1, 10 (1974).

<sup>99</sup> Sucheta Dalal, *supra* note 96.

<sup>100</sup> *Id.*

complex motives that span both ideology and self-interest;<sup>101</sup> and the senior bureaucrats have strong incentives to base their advice to Ministers on expertise and domain knowledge.<sup>102</sup>

### C. STAGE 2A: THE PARLIAMENTARY LAW-MAKING PROCESS: SCRUTINY BY THE OPPOSITION, AND BICAMERALISM

#### 1. *The Party-State Fusion<sup>103</sup> in the Lok Sabha*

The Constitution of India establishes a bicameral Parliament, with the two houses being the House of the People ('the Lok Sabha'), and the Council of States ('the Rajya Sabha').<sup>104</sup> Once a proposed Indian corporate law statute ('Bill')<sup>105</sup> is introduced in Parliament, it must be passed by both the Houses,<sup>106</sup> with a majority of the members present and voting.<sup>107</sup>

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<sup>101</sup> See *supra* note 41, 42 and accompanying text.

<sup>102</sup> For a discussion on the incentives of bureaucrats in Parliamentary forms of Government to develop a reputation for 'neutral competence' i.e. making decisions, and providing advice, based on expertise and domain knowledge, See Bruce Ackerman, *The New Separation of Powers*, 113 HARVARD LAW REVIEW 633, 698–699, 710, 713 (2000). The Constitution of India adopts a Parliamentary form of Government: M Mohsin Alam Bhat, *supra* note 89 at 178, 180.

It has been pointed out that the Union executive is possibly outsourcing some drafting work pertaining to corporate law statutes to external organisations: Sucheta Dalal, *supra* note 96. Adopting such a procedure will dilute the influence of expertise and professionalism in statutory drafting if, and to the extent that, the senior bureaucracy is sidelined or sidestepped in the process; and the organisations concerned do not have the same level of expertise and professionalism as senior bureaucrats, and/or incentives to undertake drafting based on these considerations.

<sup>103</sup> The term connotes a situation where "*party loyalists take over the functioning of these institutions [here the Lok Sabha] and make them pliant to the executive*" (words in brackets added): Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 LAW & ETHICS OF HUMAN RIGHTS 49, 51 (2020).

<sup>104</sup> The Constitution of India 1950, *supra* note 11 at 79.

<sup>105</sup> For the rest of this section, 'Bill' does not include a proposed statute categorised by the Speaker (presiding officer) of the Lok Sabha as a 'money bill'.

The Union executive has sometimes sought to rely on the constitutionally untenable categorisation of some Bills as 'money bills' to bypass the intricacies of the Parliamentary process: Rehan Abeyratne, *Turbulent Democracies*, in ROUTLEDGE HANDBOOK OF ASIAN PARLIAMENTS, 63–64 (1 ed. 2023). The Constitution of India prescribes a distinct procedure for money bills that vests the Lok Sabha with the law-making power over such bills, and the Rajya Sabha with only a recommendatory role in the process: The Constitution of India 1950, *supra* note 11 at 109. However, this tool of colourable classification has been sparsely used in the Indian corporate law context. Therefore, it will not be explored in further detail in this paper.

<sup>106</sup> The Constitution of India 1950, *supra* note 11 at 107(2). A Bill that is passed by both Houses of Parliament must further receive the assent of the President of India: *Id.* at art 111.

<sup>107</sup> The Constitution of India 1950, *supra* note 11 at 100(1).

The Union political executive must enjoy the support of a majority of MPs in the Lok Sabha to remain in office.<sup>108</sup> Contrary to first impressions, this requirement does not *per se* guarantee that the ruling party/ coalition will be able to steamroll Bills through the Lok Sabha. This is because MPs decide on how to vote for a particular Bill based on a complex mix of their own ideology and self-interest, which varies across time and different issues.<sup>109</sup> This facet of legislative decision-making is especially likely to lead to different political positions and decisions amongst Indian MPs, since Parliament is gradually becoming increasingly representative along some markers of identity.<sup>110</sup> Therefore, the MPs who generally support the ruling party/coalition, including its members, may not necessarily align themselves with every statutory measure proposed by it.<sup>111</sup> In this context, the Parliamentary procedure theoretically assists MPs in making an informed choice. This is because it posits a multi-stage legislative procedure for the promulgation of statutes, which provides scope for thorough discussions and debates on various aspects of the Bill.<sup>112</sup>

Or so it is theoretically. Two developments across Indian constitutional history have weakened the checks that the Lok Sabha places on the ruling party/coalition's proposed Bills.<sup>113</sup>

*First*, the Constitution of India requires that MPs follow the course of action prescribed by their respective political party (if any) while, *inter alia*, voting on Bills.<sup>114</sup> Breaching this requirement renders them liable to disqualification from the House.<sup>115</sup> This mandate has significantly curtailed the scope of

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<sup>108</sup> *Id.* at 75(1), (3).

<sup>109</sup> See *supra* note 41, 42 and accompanying text.

<sup>110</sup> For a discussion on the higher diversity in Parliament in the recent past along the markers of caste, occupation, and region, see Ajay K Mehra, *Parliament as a representative institution: an assessment*, in THE INDIAN PARLIAMENT AND DEMOCRATIC TRANSFORMATION, 100, 109 (Ajay K. Mehra ed., 2018); Ashutosh Kumar, *supra* note 85 at 61–62. This increased representativeness is enabled, *inter alia*, by the constitutional mandate that every Indian citizen who meets the constitutionally specified age-limit is entitled to stand for elections to either House of Parliament, subject to the (dis)qualifications legislated by Parliament: The Constitution of India 1950, *supra* note 11 at 84, 102; The Representation of the People Act 1951, 3–4, 7–11.

*But of* the discussion on the persistent under-representation of religious minorities and economically underprivileged persons in Parliament: Ajay K Mehra, *supra* note at 111–112; Ashutosh Kumar, *supra* note 85 at 62, 71.

<sup>111</sup> MR Madhavan, *supra* note 26 at 32.

<sup>112</sup> The Constitution of India 1950, *supra* note 11 at 118(1); For a brief overview of this three-stage process, see MR Madhavan, *supra* note 26 at 12.

<sup>113</sup> This practical dominance of the Union political executive over the legislative process in the Lok Sabha has been noted in MR Madhavan, *supra* note 26 at 32.

<sup>114</sup> The Constitution of India 1950, *supra* note 11 at 102(2) read with Schedule X(2)(1)(b).

<sup>115</sup> *Id.* at 102(2) read with Schedule X(2)(1)(b).

even meaningful deliberation on Bills in the Lok Sabha,<sup>116</sup> much less autonomous voting on the part of MPs.<sup>117</sup>

*Secondly*, over the past decade, there has been a marked decline in both the quantity and quality of legislative debates in the Lok Sabha, which has substantially distorted the representative character of the law-making process.<sup>118</sup> At its extreme, this decline has manifested in some Bills being passed through the House without any debate.<sup>119</sup> In such cases, the deficiencies in the Bills concerned are not even highlighted on the floor of the House for MPs<sup>120</sup> and the general public's consideration,<sup>121</sup> much less being factored into MPs' decision to vote on the Bill.

Cumulatively, these constitutional developments have practically reduced the number and representativeness of the decision-makers that need to support the passage of a Bill in the Lok Sabha. Therefore, these developments have reduced the transaction costs (namely search, information, and bargaining costs) of undertaking rent-seeking before the Lok Sabha. The alleged lack of internal democracy within the present ruling party and pre-poll coalition,<sup>122</sup> including at the Cabinet level,<sup>123</sup> further accentuates this reduction of transaction costs.<sup>124</sup>

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<sup>116</sup> Rehan Abeyratne, *supra* note 105 at 63.

<sup>117</sup> Ashutosh Kumar, *supra* note 90 at 70.

<sup>118</sup> Po Jen Yap & Rehan Abeyratne, *Introduction*, in ROUTLEDGE HANDBOOK OF ASIAN PARLIAMENTS, 1, 4–5 (1 ed. 2023). For the different causes of this decline, see MR Madhavan, *supra* note 26; Ashutosh Kumar, *supra* note 90 at 69–70, 73; Ajay K Mehra, *supra* note 110 at 101, 103–104, 113, 114–117, 120, 122.

<sup>119</sup> MR Madhavan, *supra* note 26 at 15; Ajay K Mehra, *supra* note 110 at 104.

<sup>120</sup> Ajay K Mehra, *supra* note 110 at 104.

<sup>121</sup> The educative role of Parliament's criticism for the general public has been highlighted in *Id.* at 130.

<sup>122</sup> Rehan Abeyratne, *supra* note 105 at 62 (characterising the post-2014 period in Indian politics as dominated by a single party); M Mohsin Alam Bhat, *supra* note 89 at 185 (describing the current phase in Indian politics as one of 'single party domination'); Khaitan, *supra* note 103 at 50, 72 (discussing the comments of Upendra Kushwaha, a Cabinet Minister from one of the BJP's ex-ally parties).

<sup>123</sup> The Constitution of India 1950, 74(1) (establishes the Council of Ministers). The Council of Ministers comprises all the Ministers forming part of the Union political executive: Rehan Abeyratne, *supra* note 105 at 61. The Cabinet is the key sub-group within this Council.

<sup>124</sup> For a general discussion of the lack of internal democracy within the present ruling pre-poll coalition and ruling party specifically, See Khaitan, *supra* note 103 at 72–73. See also M Mohsin Alam Bhat, *supra* note 89 at 184 (noting the existence of "excessive prime-ministerial control over the Executive" in recent times).

For a specific discussion on the preponderance of the upper or dominant castes within the leadership of the Indian polity-wide parties, including the BJP, see Ashutosh Kumar, *supra* note 90 at 64.

## 2. *The Rajya Sabha's Representative Role: Potential and Practice*

In the context of the party-State fusion in the Lok Sabha, the Rajya Sabha acts as a significant forum for increasing both the number of decision-makers whose support is required for law-making, and the representativeness of the decision-making process. Most members of the Rajya Sabha are elected by the legislatures of the Indian states,<sup>125</sup> with a third of the members being replaced every 2 years.<sup>126</sup> This system of representation is markedly different from that of the Lok Sabha, which is based predominantly on direct election<sup>127</sup> based on universal adult suffrage (subject to constitutional and statutory disqualifications)<sup>128</sup> usually every five years.<sup>129</sup>

Owing to these differences in the systems of representation across both the Houses, the MPs who are elected to the Rajya Sabha are theoretically expected to differ significantly in their ideologies vis-à-vis their counterparts in the Lok Sabha. Further, various tools are theoretically available to the MPs under the Rajya Sabha's procedures for them to express these differing ideologies. The most significant of these are, *firstly*, a multi-stage and intricate legislative debate process;<sup>130</sup> and *secondly*, allocated time to ask pointed questions and follow-ups from Ministers.<sup>131</sup>

Cumulatively, all of these features of the Rajya Sabha make the institution theoretically conducive to serving two of the (interrelated) objectives that animated its inclusion into the Indian constitutional framework, and the specific manner of its constitutional design. These are *firstly*, providing a second forum for discussion and deliberation on Bills, where the MPs do not face imminent electoral pressure of the same kind and degree as their Lok Sabha counterparts;<sup>132</sup> and *secondly*, precluding the ruling party/coalition that enjoys majority support in the Lok Sabha from riding roughshod over the

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<sup>125</sup> INDIA CONST., art. 80(1), (4).

<sup>126</sup> *Id.* at 83(1).

<sup>127</sup> *Id.* at 81(1), (2).

<sup>128</sup> *Id.* at 326; The Representation of the People Act 1951, *supra* note 110 at 11A, 11B. For a discussion on the historical circumstances leading to the Constituent Assembly's adoption of 'universal adult suffrage' for elections to the Lok Sabha, see M Mohsin Alam Bhat, *supra* note 89 at 180–181.

<sup>129</sup> INDIA CONST. art. 83(2).

<sup>130</sup> *Id.* at 118(1).

<sup>131</sup> Ashutosh Kumar, *supra* note 90 at 68, 80.

<sup>132</sup> M Mohsin Alam Bhat, *supra* note 89 at 184.

concerns and interests of the groups not represented by them.<sup>133</sup> In practice, the Rajya Sabha's effectiveness in discharging these functions has been bolstered by how in the Indian political scenario, no single party or coalition alliance holds a majority of seats in both Houses.<sup>134</sup> Therefore, the approval of any Bill requires at least a measure of cross-political support.<sup>135</sup> Owing to these political dynamics, the Rajya Sabha provides a crucial space for the political Opposition to influence the law-making process, and hold the ruling party/coalition to account.<sup>136</sup>

These constitutionally envisaged purposes are marked by the common theme of enriching the representativeness of the legislative process, vis-à-vis if the Lok Sabha had been the sole repository of legislative power. Consequently, the more effectively the Rajya Sabha is able to discharge these functions, the higher will be the increase in the transaction costs (namely search, information, and bargaining costs) for economic actors to undertake rent-seeking before the forum.

In practice, at least in the past decade, the Rajya Sabha has not been fully effective as an avenue for the political Opposition to influence law-making, and therefore in effectively performing the aforesaid functions.<sup>137</sup> This is primarily because of *firstly*, a decrease in the quantity and quality of legislative debates and discussions in the House;<sup>138</sup> and *secondly*, the present ruling party's increased attempts to bypass the Parliamentary process by providing binding advice to the President to (re-)promulgate temporary legislative enactments called 'Ordinances', even where enacting the same is not immediately

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<sup>133</sup> *Id.*

<sup>134</sup> Ajay K Mehra, *supra* note 110 at 101–102; Rehan Abeyratne, *supra* note 105 at 63. For the link between the different bases of representation of the two Houses and their different party compositions, see *Id.* at 38; Ashutosh Kumar, *supra* note 90 at 64. For the latest party-wise composition of the Rajya Sabha, see Party Wise, RAJYA SABHA (2022), <https://rajyasabha.nic.in/Members/PartyWiseSummary> (last visited Apr 8, 2023).

<sup>135</sup> MR Madhavan, *supra* note 26 at 36.

Owing to their lack of majority in the Rajya Sabha, the BJP and its allies have had to rely on the support of other parties to ensure that their proposed statutes are passed by the House: BJP's tryst with 100-member mark in Rajya Sabha, THE HINDU (2022), <https://www.thehindu.com/news/national/bjps-tryst-with-100-member-mark-in-rajya-sabha/article65468012.ece> (last visited Apr 8, 2023). Where such parties have supported these statutes, the same has been governed by strategic considerations: Kaushik Datta, *Why the BJP's Rajya Sabha Majority Is Safe till July 2022*, INDIA TODAY (2020), <https://www.indiatoday.in/india-today-insight/story/why-the-bjp-s-rajya-sabha-majority-is-safe-till-july-2022-1647498-2020-02-18> (last visited Apr 8, 2023).

<sup>136</sup> Khaitan, *supra* note 103 at 65–66.

<sup>137</sup> See Rehan Abeyratne, *supra* note 105 at 61.

<sup>138</sup> See *supra* note 118-124 and accompanying text.

necessary.<sup>139</sup> Even as an Ordinance has a finite lifespan unless promulgated by Parliament in its next session,<sup>140</sup> it has the same legal force as a statute in its lifetime.<sup>141</sup> Therefore, the abuse of this mechanism may allow the ruling party/coalition to make legal changes that are extremely difficult or impracticable to repeal *ex post facto*.

Overall, the transaction costs for an economic actor to undertake rent-seeking in the Lok Sabha have declined in the recent past. The corresponding transaction costs are higher when the Bill is placed before the Rajya Sabha. However, the Rajya Sabha has also witnessed a rise in institutional lacunae that have relatively reduced these transaction costs. Further, in the Indian corporate law context, the present ruling party has sometimes temporarily bypassed Parliament altogether, through the Ordinance route. Nevertheless, there remains a significant Parliamentary mechanism that continues to bolster the transaction costs of pursuing rent-seeking before both the Lok Sabha and the Rajya Sabha. This is the scrutiny of Bills by Parliamentary Committees, where such Bills are referred to them.

#### D. STAGE 2B: THE PARLIAMENTARY LAW-MAKING PROCESS: SCRUTINY BY PARLIAMENTARY COMMITTEES

Besides the floors of the two Houses, the Parliamentary Committee mechanism is another significant arena for legislative debate and discussions on proposed or potential statutes.<sup>142</sup> These Committees comprise MPs from both the ruling party/ coalition and the Opposition. The power to refer Bills to Parliamentary Committees is discretionary, and vests with the presiding officers of both the Houses.<sup>143</sup> The Parliamentary Committees' findings and recommendations on Bills are not binding on the Union executive.<sup>144</sup>

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<sup>139</sup> Rehan Abeyratne, *supra* note 105 at 65; Ashutosh Kumar, *supra* note 90 at 67–68. These ordinances are promulgated under the *Constitution of India 1950*, at art. 123 read with 74(1), as interpreted in *Samsher Singh v. State of Punjab* (1974) 2 SCC 831 [30].

<sup>140</sup> The Constitution of India 1950, *supra* note 11 at 123(2).

<sup>141</sup> *Id.*; Rehan Abeyratne, *supra* note 105 at 64.

<sup>142</sup> MR Madhavan, *supra* note 26 at 88–90.

<sup>143</sup> Ministry of Parliamentary Affairs, 9. *Legislation*, in *MANUAL OF PARLIAMENTARY PROCEDURES IN THE GOVERNMENT OF INDIA*, 9.11.6 (2018).

<sup>144</sup> MR Madhavan, *supra* note 26 at 89.

Overall, the Parliamentary Committees have proved a significant avenue for thorough debates and discussions on the proposed or potential statutory measures that are examined by them.<sup>145</sup> This is because, *first*, MPs have tended to undertake deliberations and decisions before Parliamentary Committees in a relatively non-partisan manner vis-à-vis other forums.<sup>146</sup> Therefore, the findings and recommendations of the Committee are likely to be based more on the respective ideologies of the MPs constituting it vis-à-vis their self-interest. *Secondly*, some Parliamentary Committees undertake public consultations as part of their examination of Bills.<sup>147</sup> For both of these reasons, the Parliamentary Committees' involvement in the journey of any Bill through Parliament increases the representativeness of the Bill's legislative process.

In terms of their impacts on the legislative process, the Parliamentary Committees' reports have served as a key source for MPs to develop their critical appraisal of Bills, especially for MPs from the Opposition.<sup>148</sup> Hence, where the ruling party/coalition does not have a majority in the Rajya Sabha, it tends to defer to the Committees' recommendations at the risk of the Opposition otherwise stalling the Bill in the Rajya Sabha.<sup>149</sup> Further, the findings and recommendations of Parliamentary Committees have formed a key source of information for the Union executive in drafting Bills, including in the Indian corporate law context.<sup>150</sup> For all of these reasons, the Parliamentary Committee mechanism increases the transaction costs (namely search, information, and bargaining costs) for economic actors to undertake rent-seeking where Bills are referred to it.

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<sup>145</sup> *But cf* Ashutosh Kumar, *supra* note 90 at 68–69 (arguing that the committee system appears to be “in a state of steady decay”).

<sup>146</sup> MR Madhavan, *supra* note 26 at 95. *But cf* Ashutosh Kumar, *supra* note 90 at 70, 80 (arguing that MPs have recently been taking partisan positions in Parliamentary committees).

<sup>147</sup> MR Madhavan, *supra* note 26 at 95.

<sup>148</sup> *Id.* at 89.

<sup>149</sup> *Id.*

<sup>150</sup> *See, for e.g.*, Rituraj Baruah & Gireesh Chandra Prasad, *Centre to Modify Competition Amendment Bill Based on House Panel Report*, LIVEMINT (2023), <https://www.livemint.com/news/india/centre-to-modify-competition-amendment-bill-based-on-house-panel-report-11674581532312.html> (last visited Jun 26, 2023).

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### E. COUNTERFACTUAL: LAW-MAKING BY ADJUDICATORS IN THE INDIAN CORPORATE LAW DOMAIN

Where adjudicators act inconsistently with the ELP-based prong while deciding corporate statute implementation disputes, they effectively undertake the constitutionally separated functions of law-making and legal dispute adjudication by themselves. However, to the extent that such an adjudicatory approach is routinely deployed, Indian corporate law litigation becomes an avenue for reductions in all the forms of transaction costs related to law-making (search, information, and bargaining costs) that the rent-seeking economic actors would otherwise face before Parliament. This is because of the following features of the litigation process.

*Firstly, the systemic advantages that rent-seeking economic actors would develop over time:* By definition, rent-seeking economic actors would approach litigation as a means for legal changes that facilitate rent-accrual. However, such ‘rule-gains’ are (and can be) pursued by only ‘repeat players’<sup>151</sup> i.e. parties who have the resources to attempt to secure their long-term interests through litigation, and who undertake the process repeatedly to this end.<sup>152</sup> Over the course of multiple cases, repeat players tend to develop various advantages that would, for rent-seeking economic actors as a subset, reduce the transaction costs to pursue rent-accrual through litigation. These include, *firstly*, the institutional memory and expertise to litigate in a manner that best serves their desired ends;<sup>153</sup> *secondly*, the foresight to discern which legal changes would have a tangible impact on the ground, and are therefore worth pursuing;<sup>154</sup> *thirdly*, a steady base of competent legal professionals;<sup>155</sup> and *fourthly*, informal relationships with (quasi-)-judicial officers that lead to the repeat players’ claims being taken more seriously.<sup>156</sup>

*Secondly, the ‘adversarial’ approach that marks Indian corporate law adjudication:* In contrast with the intricate Parliamentary decision-making procedure for law-making, Indian corporate law adjudication involves a few adjudicators at most<sup>157</sup> who rely for their decision-making on mostly the parties and

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<sup>151</sup> Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOCIETY REVIEW 95, 100–103 (1974).

<sup>152</sup> *Id.* at 97–98.

<sup>153</sup> *Id.* at 98, 125.

<sup>154</sup> *Id.* at 103.

<sup>155</sup> *Id.* at 98, 115–16.

<sup>156</sup> *Id.* at 99.

<sup>157</sup> The minimum quorum for the CCI’s ‘meetings’ is 3 members, of which at least 2 must concur for a decision to be made by the forum: Competition Act, *supra* note 9 at 22(3). On the other hand, the NCLT’s benches comprise *only* two members, while the NCLAT’s benches comprise a minimum of 2 members: Companies Act 2013, *supra* note 9 at 418A(1),

their arguments, and perhaps limited empirical research.<sup>158</sup> Such an ‘adversarial’ model of adjudication limits the gamut of interests that get represented in the decision-making process, to those that the parties represent (with effectiveness) before the adjudicators.<sup>159</sup> Therefore, this model results in a heavy reduction in transaction costs for rent-seeking economic actors: especially where the opposite parties in the case do not enjoy the same level of strategic advantages in litigation as them.<sup>160</sup>

## V.

### CONCLUSION: WELDING A ‘RENT’-RELATED PERSPECTIVE INTO THE MELD MODEL

As it presently stands, the Law-and-Economics prong of the Meld Model highlights two economic and social consequences of the adjudicators in Indian corporate law disputes acting inconsistently with the ELP-based interpretive framework. These are, *firstly*, an increase in various specific forms of transaction costs for certain categories of State and non-State actors; and *secondly*, potential adverse implications for wealth-maximisation from a Kaldor-Hicks efficiency perspective. This paper focusses on a third set of economic and social consequences of adjudicators’ deviating from the ELP-based prong, specifically while deciding corporate statute implementation disputes. This set of consequences

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419(3). The Supreme Court usually hears cases in benches of 2 judges: Nick Robinson, *Judicial Architecture and Capacity*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds., 1st ed. 2016). The High Courts usually hear writ petitions in benches of 1- 2 judges: *see, for e.g.*, Rules of the High Court of Judicature for Rajasthan 1952, 54, 55, 59, 61, 385B.

<sup>158</sup> Rahul Singh, *supra* note 2 at 20. For instance, in at least some cases, the NCLT has considered itself bound to rely on only the ‘affidavits’ provided by parties (statements made on oath): *Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd. and others* C.P. No. 82(MB)/2016, 567, 568 (2018). This is despite its statutorily having the powers to undertake fact-finding processes, such as the examination of witnesses and requiring the production of documents: *Companies Act*, *supra* note 10 at 424(2).

<sup>159</sup> Theoretically, the institutional structure of Indian competition law adjudication directly expands the gamut of the interests that get represented in corporate statute implementation disputes, beyond the parties. This is because it constitutes the office of the ‘Director General’ to assist the CCI in “*investigating into any contravention of the provisions of this Act*”: *Competition Act*, *supra* note 9 at 41.

However, both the DG and the CCI have generally remained mired by a host of violations of procedural administrative safeguards, such as the principles of natural justice: *See* Parveer Singh Ghuman & Udai Mehta, *Institutional Design of Select Competition Authorities in South Asia*, 54 REVIEW OF INDUSTRIAL ORGANIZATION 283, 297, 300 (2019); Anusha Ramesh, “*Tribunalisation*” of India’s Competition Regime’, 9 NUJS L REV 259, 261, 280–281, 287–288 (2016). Many of these safeguards are integrally linked to effective representation: Saumya Singh, *Empowering The ‘Lok’ In Permanent Lok Adalats*, CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION, RGNUL (Jan. 28, 2023), <https://www.rgnulcadr.in/post/empowering-the-lok-in-permanent-lok-adalats> (last visited May 14, 2023).

<sup>160</sup> *See* Galanter, *supra* note 151 at 119–121, 124–125.

relates to litigants' attempts to obtain rent by convincing the adjudicator to *de facto* modify or repeal the involved statutory provisions, even as the adjudicator lacks the authority to do so under the constitutional separation of powers.

Where Indian corporate adjudicators disregard the ELP-based prong (and *ipso facto* the constitutional separation of powers) while deciding corporate statute implementation disputes, they effectively undertake the constitutionally separated functions of law-making and legal dispute adjudication by themselves. In doing so, they systemically circumvent the various mechanisms for more representative decision-making as compared to adjudication, by a higher number of decision-makers, that are built into the Parliamentary law-making process at the statutory drafting and deliberation stages. Such adjudicators *de facto* supplant this Parliamentary procedure with an adversarial decision-making process that limits the gamut of represented interests to the parties, and allows rent-seeking economic actors to acquire various systemic advantages over time. Therefore, to the extent that economic actors anticipate that the adjudicator(s) concerned will continue to deploy the same adjudicatory methodology, these actors will expect to face lower transaction costs in conducting rent-seeking before these adjudicator(s) as compared to before Parliament.

Therefore, adjudicators who disregard the ELP-based prong while deciding corporate statute implementation disputes provide an avenue to rent-seeking economic actors to obtain the benefits of modifications or repeals to the involved statute(s), but at lower (transaction) costs. For these reasons, such an adjudicatory approach will induce economic actors to *shift* their rent-seeking efforts to the adjudicator(s) concerned from Parliament. Further, it will induce economic actors to *increase* rent-seeking by diverting higher amounts of resources from productive activities, to the extent that rent-seeking is now expected to be more profitable.

These shifts and increases in rent-seeking will have an array of impacts on the Indian economy and society, *ceteris paribus*. The increase in rent-seeking will, *ceteris paribus*, cause a rise in the deadweight social losses that accompany the activity. Further, to the extent that the (increased) rent-seeking will now shift to the adjudicatory authorities, the proportion of successful rent-seeking efforts (i.e. those resulting favourable legal changes) will increase than if Parliament had remained the forum for the

activity. This is because over the course of multiple cases, litigation will allow for the economic actors who undertake rent-seeking before ‘adversarial’ adjudicatory authorities to increasingly obtain legal changes in their favour, by virtue of their position as repeat players.<sup>161</sup> This is because of *firstly*, the multiple systemic advantages that they would obtain in undertaking litigation over time; *secondly*, their heightened incentives to obtain favourable legal changes, as compared to other litigants who may be more interested in obtaining favourable tangible outcomes in the immediate case; and *thirdly*, their financial and strategic capacity to trade off tangible losses in the immediate case with tangible gains in future cases.<sup>162</sup> Gradually, as the heightened proportion of successful rent-seeking efforts results in increasing levels of rent-accrual, the Indian economy and society are likely to witness higher levels of the economic stagnation and social inequality that flow from rent-accrual.

Consider the implications for the Indian economy and society, *ceteris paribus*, if the adjudicatory authorities continue with the *Tata v. Mistry* approach while deciding whether a person is a ‘shadow director’ for the purposes of Indian company law. This would entail deciding such claims based on extra-statutory standards, such as those of deference and gratitude that the SC posited in *Tata v. Mistry*. Litigants can potentially raise allegations pertaining to shadow directorship as part of their claims under various Companies Act provisions which affix shadow directors with obligations and liabilities. For instance, various provisions provide for the responsibilities, and civil or penal liabilities, of ‘promoters’<sup>163</sup> and ‘officers who are in default’.<sup>164</sup> The definitions of these terms *inter alios* include shadow directors.

In this context, if the adjudicatory authorities continue with the *Tata v. Mistry* adjudicatory methodology, the same will *ceteris paribus* impact shadow directors’ incentives relating to rent-seeking in two ways. The shadow directors will be incentivised to *firstly*, conduct increased rent-seeking before the respective adjudicatory authorities; and *secondly*, shift their rent-seeking behaviour to the respective

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<sup>161</sup> Galanter, *supra* note 151.

<sup>162</sup> Galanter, *supra* note 151 at 99–100.

<sup>163</sup> See, for e.g., Companies Act 2013, *supra* note 9 at s 35(1) (civil liability for misstatement in prospectus); *Id.* at s 284 (promoters’ obligation to cooperate with company liquidator).

<sup>164</sup> See, for e.g., Companies Act 2013, *supra* note 9 at s 12 (pertaining to the registered office of the company); *Id.* at s 15(2) (pertaining to alterations in the Memorandum or Articles of Association of the company); *Id.* at s 53(3) (pertaining to prohibition on the issuance of shares at a discount).

adjudicatory authorities from Parliament. Such an increase and shift will occur because convincing a handful of adjudicators to modify the applicable criteria for shadow directorship in Indian company law would entail less transaction costs (in the form of search, information, and bargaining costs) than pursuing the amendment of the statutory provisions concerned before Parliament. Through such rent-seeking, the shadow directors would attempt to avoid being classified as a ‘shadow director’, so as to gain rent (as returns that they would otherwise be proscribed from earning under the Indian company law regime) without the accompanying statutory liabilities.

The shift and increase in shadow directors’ rent-seeking behaviour before the respective adjudicatory authorities will *ceteris paribus* lead to two types of economic and social implications.

*Firstly*, both shadow directors, and the persons adversely affected by their statutorily proscribed activities, will divert increased amounts of economic resources to litigating the applicable criteria for shadow directorship. This will lead to deadweight social losses.

*Secondly*, over the course of multiple cases, the shadow directors who pursue rent-seeking through litigation will begin to enjoy a higher proportion of successful rent-seeking efforts. This will entail that the respective shadow directors will be able to gain higher amounts of rent, while evading the concomitant statutory liabilities, based on the different extra-statutory grounds carved out by the adjudicatory authorities. The higher proportion of successful rent-seeking efforts will be made possible by the three factors discussed hereinabove.<sup>165</sup>

Over time, as shadow directors gain higher amounts of rent, there will *ceteris paribus* ensue higher levels of demand-side and/or supply-side economic stagnation: possibly in different sectors of the economy. This is because the respective producer-company will *ceteris paribus* be constrained to offset the higher levels of rent that the shadow directors gain, through curtailing (I) the returns provided to persons who supply the other factors of production, especially labour; and/or (II) expenditure on research and development. Further, where option (I) is adopted, there will ensue higher social inequalities between the shadow directors and the respective suppliers of the other factors of production: most likely the labour.

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<sup>165</sup> See *supra*, note 161-162 and accompanying text.

This paper will refrain from commenting about whether, or the extent to which, the rent-related economic and social implications that have been discussed in this paper are normatively (un)desirable. For the present purposes, it suffices to highlight that any such normative examination will require a reference to, and taking a stance on, the examiner's political positions and priorities.<sup>166</sup> Rather, the purpose of this paper is methodological: to highlight the possible economic and social consequences that can result where adjudicators deviate from the Meld Model's ELP-based prong while deciding corporate statute implementation disputes, for various stakeholders in the Indian corporate law domain and society at large. To what extent adjudicators in such cases generally act inconsistently with the ELP-based prong, and under what conditions and how this adjudicatory methodology affects rent-seeking and rent-accrual in practice, remain important areas for future empirical research.

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<sup>166</sup> The inherently political character of "*Questions of distribution of gains and losses*" has been noted in TV Somanathan, *supra* note 92.

## ARTICLE

**THE 50% RESERVATION CEILING: A HINDRANCE TO EQUALITY  
AND ‘TRANSITIONAL JUSTICE’**

*Ravi Shankar Pandey & Tanya Verma\**

## ABSTRACT

*The formulation of reservation policy in India has been actively influenced by the State while utilising its legislative, executive, and constitutional amendment powers. Though the judiciary has largely entrusted these matters to the State, it has occasionally intervened to uphold constitutional principles, and to curb the potential misuse of reservation policies for political gains. A significant measure in this direction is imposing a 50% reservation ceiling. By positioning reservation as a form of “affirmative action”, this article extends the concept to encompass “transitional justice”, and examines how the imposition of a ceiling has affected the pursuit of affirmative action as a means of transitional justice. It delves into the potential drawbacks of the Indian reservation system, particularly the limitations set by the ceiling which has implications for the broader notion of transitional justice. The ceiling being a protective barrier for “substantive equality of opportunity” is explored in detail with parallel insights drawn from the U.S. federal system to enhance the depth of discussion. At its core, it investigates whether the ceiling bolsters or obstructs equality. This unfolds through prisms of contemporary socio-economic landscape of India, affirmative action, and equality within transitional justice. The interplay between reservations, economic mobility, and social upliftment can be traced by scrutinising the evolving socio-economic context of 21<sup>st</sup> century India, and traditional critiques against reservations. This article, in conclusion, underscores the complexities entwining reservations and the ceiling, and their implications for equality and transitional justice. It underscores the socio-economic imperative to transcend conventional paradigms and embrace innovative strategies so as to empower marginalised communities within a dynamically evolving socio-economic framework.*

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## I. INTRODUCTION

In September 2020, the Academy for Motion Picture Arts and Sciences (‘Academy’) announced a new set of diversity criteria for a film’s eligibility for an Oscar under the Best Picture category.<sup>1</sup> As interesting as it may seem, it was a welcome move showing a departure from the Academy’s prior attitude formerly questioned for its colour-biasness.<sup>2</sup> Can this be termed as a non-governmental affirmative action measure meant to uplift the marginalised races? Arguably, yes, it can be. Can this be termed as a substantive measure for ensuring justice as a part of the “transitional justice” project? Not necessarily. Nevertheless, the Academy’s move has stopped critics’ long-standing complaints regarding the lack of diversity. It may be argued that the Academy could have alternatively fixed a quota for nominating blacks and whites, or turns as per the black population could have been fixed. Would that have been stigmatising? Yes. Could that have ensured substantive equality? Again, yes, it could have. This shows the evergreen contradiction existing between the goals and the measures adopted in the context of affirmative action. This contradiction provides varied texture to the debate under which affirmative action has been referred to as a “political lightning rod”,<sup>3</sup> an issue “so burning yet boring...smacking of hypocrisy or speaking in code”,<sup>4</sup> an area of law which is a matter of “embarrassment to teach”,<sup>5</sup> and an idea which is “necessary but not sufficient in the quest of social justice”.<sup>6</sup>

The debate on affirmative action presents an interestingly complex issue. The question of putting a bar on the extent of reservation in India at 50% (‘the 50% ceiling’) is no different. Regarding the 50% ceiling, making a few observations at the outset would aid later lines of argumentation. The Hon’ble Supreme Court of India, in *Dr Jaishri Laxmanrao Patil v. Chief Minister* (‘Maratha Reservations Judgement’),<sup>7</sup> made it clear that there is no requirement to revisit the 50% reservation ceiling (‘ceiling’). The judgement contained an extensive discussion on the contours of equality.

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<sup>1</sup> *Academy Establishes Representation and Inclusion Standards for Oscars® Eligibility*, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES (September 10, 2020), <https://www.oscars.org/news/academy-establishes-representation-and-inclusion-standards-oscar-eligibility>.

<sup>2</sup> Kara Warner, *Academy President Cheryl Boone Isaacs on Selma Snubs, Lack of Diversity*, VULTURE (January 15, 2015), <https://www.vulture.com/2015/01/academy-president-on-selma-snubs-diversity.html>.

<sup>3</sup> David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 922 (1996) [hereinafter “Oppenheimer”].

<sup>4</sup> Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997) [hereinafter “Rubenfeld”].

<sup>5</sup> Antonin Scalia, *The Disease as Cure: In Order to Get beyond Racism, We Must First Take Account of Race*, 1979 WASH. U.L.Q. 147, 147 (1979).

<sup>6</sup> Deepak Nayar, *Discrimination and Justice: Beyond Affirmative Action*, 46 (42) E.P.W. 52, 52 (2011) [hereinafter “Nayar”].

<sup>7</sup> *Dr Jaishri Laxmanrao Patil v. Chief Minister, Maharashtra*, S.L.P. (C) 15737/2019 [hereinafter “Maratha Reservations Judgement”].

However, it had failed to discuss whether the 50% ceiling inhibits or protects equality. We must acknowledge that the 50% ceiling question warrants a dynamic and comparative treatment. Due to the reliance of the Indian affirmative action literature on the United States' (U.S.) jurisprudence, this article would refer to race theories whenever applicable to the Indian caste structure. Since the U.S. federal system resembles the Indian system "in which responsibility for administering preferential policies is divided across multiple layers of government",<sup>8</sup> lessons from the U.S. have got satisfactory weight in discussing this article.

Throughout this article, the authors intend to engage with the reservation conceptions in order to explore whether the 50% reservation ceiling protects or hinders equality. For doing so, the authors explore the notion of equality in the context of affirmative action, equality as an aspect of transitional justice (Section I), the emergence and concretisation of the reservation ceiling as it appears today (Section II), the changing socio-economic equation in the India of 21<sup>st</sup> century and the traditional counters to the reservation project (Section III), the futility of the ceiling conundrum (Section IV), and the need to think beyond traditional ways for uplifting the marginalised through the aid of weak-distributive, facilitative and universal measures (Section V).

## II. THE PRIMER: UNDERSTANDING AFFIRMATIVE ACTION

Both supporters and detractors of the Indian reservation policy fail to understand the argument of the other side. For instance, by importing one U.S. lesson, in *Grutter v. Bollinger*,<sup>9</sup> Associate Justice Sandra O'Connor observed that affirmative action measures will not be required after 25 years, *i.e.*, by 2028. In 2024, we do not find such a sensible observation in India. By upholding the Constitutional validity of the 103<sup>rd</sup> Constitutional Amendment in *Janhit Abhiyan v. Union of India* (Janhit Abhiyan), it can be considered as an important move which can lead the ceiling debate to a sensible conclusion.<sup>10</sup> The dictum in *Maratha Reservations Judgement* can be imported for determining its validity.

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<sup>8</sup> Laura Dudley Jenkins, *Race, Caste and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 CONN. L. REV. 747, 759 (2004).

<sup>9</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>10</sup> *Janhit Abhiyan v. Union of India*, W.P.(C) 55/2019; INDIA CONST. arts. 15 & 16, *amended by* The Constitution (One Hundred and Third Amendment) Act, 2019.

All of this shows inherent contradictions. If the 50% ceiling is to be implemented stringently, then governments breaching the limit with new policies are securing the vote bank without showing any care for equality.<sup>11</sup> If the ceiling comes with subjective exceptions, then maybe it is not a ceiling at all. The authors intend to establish that reservation as a form of affirmative action in India, must be treated as a measure for transitional justice. As any “rational discourse on affirmative action ought to begin”,<sup>12</sup> it would be beneficial to understand what Indian reservations are all about.

### 1. *Reservation as Affirmative Action*

In India, apart from the political reservations provided under the Indian constitution,<sup>13</sup> affirmative action measures have been effected in the form of quotas. Quotas, forming a major part of Indian affirmative action measures, have not been beyond controversies.<sup>14</sup> There has been massive agitation by the unreserved communities against Indian reservations by demanding to revisit the rationale for reservation.<sup>15</sup> The controversy enveloping reservation policies has affected political outcomes.<sup>16</sup> Thus, while a political will can change the chemistry of reservations in India by providing reservations to the comparatively educationally and economically better communities as well, 50% ceiling accompanied with vote bank politics factors have made governments drop such an idea until recently.<sup>17</sup>

Hereupon, a constitutional bench of the Supreme Court, comprising the former Chief Justice of India U.U. Lalit, Justices Dinesh Maheshwari, S. Ravindra Bhat, Bela M. Trivedi, and J.B. Pardiwala heard the cases challenging the constitutional validity of reservation for Economically Weaker Sections, and with a 3:2 majority upheld the same. According to Prof. (Dr) Mohan Gopal, restricting the Economically Weaker Section (‘EWS’) quota solely to the privileged sections while neglecting the economically disadvantaged sections within the Scheduled Castes (‘SC’) or Scheduled Tribes (‘ST’) or Other Backward Class (‘OBC’) groups could potentially erode the

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<sup>11</sup> Alok Ranjan, *Existing reservation quota limit of the Indian states*, INDIA TODAY (July 27, 2023), <https://www.indiatoday.in/news-analysis/story/existing-reservation-quota-limit-of-the-indian-states-1799705-2021-05-07>.

<sup>12</sup> Oppenheimer, *supra* note 3, at 926.

<sup>13</sup> INDIA CONST. art. 334.

<sup>14</sup> Oppenheimer, *supra* note 3; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) [hereinafter “Bakke”].

<sup>15</sup> Nayyar, *supra* note 6, at 52-59.

<sup>16</sup> India Today Web Desk, *RSS chief Bhagwat's reservation remark damaged BJP in Bihar: C.P. Thakur*, INDIA TODAY (June 27, 2023), <https://www.indiatoday.in/assembly-elections-2015/bihar-polls/story/rss-chief-bhagwat-reservation-remark-damaged-bjp-in-bihar-cp-thakur-271854-2015-11-06>.

<sup>17</sup> *Janhit Abhiyan v. Union of India*, W.P.(C) 55/2019.

foundation of social equality.<sup>18</sup> This approach weakens the fundamental purpose of reservation as a means of ensuring fair representation. Commenting on the claims of the middle class, Kumar makes an insightful remark. He observes:

Acceding to the demand of the agitating communities...would fundamentally change the rationale for reservations in India...which are meant to be a means to address historical inequalities, and bring socially and educationally backward communities into the mainstream. They are not meant to allow dominant castes (with numbers and political power on their side) to “capture” a section of college seats or government jobs for themselves.<sup>19</sup>

This argument is complete in itself. It fulfils two objectives for this analysis. First, it makes it clear that submitting to agitations would go contrary to the constitutional spirit which seeks to ensure equality through reservations as a remedy for historical inequality. Second, it ousts any prospect of making purely economic arguments on the reservation project. However, it seems to be an incomplete argument in a different domain since it fails to explore reservations as a part of the larger “transitional justice project”.<sup>20</sup> Also, the argument is not in line with the end-goal of affirmative action which is to ensure “substantive equality”,<sup>21</sup> and not merely that of “formal equality”<sup>22</sup> as it focuses on historical inequality only. Further, it does not answer the anxiety of the Apex Court in the *Maratha Reservations Judgement* wherein the Court made it clear that reservations ought not to operate as a method to impose “caste rule”, by the dominant in population or dominant in society, in the country.<sup>23</sup>

## 2. *Affirmative Action as “Transitional Justice” vis-à-vis 50% ceiling*

Indian affirmative action jurisprudence is static and monotonous because first, the Indian Constitution is fairly recent compared to that of the U.S., hence, the underlying theories and contours of the notion of equality in the reservation paradigm are comparatively recently

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<sup>18</sup> Manu Sebastian, *EWS Quota is Reservation for the Over-Represented excludes the Real Unrepresented: Mohan Gopal on Supreme Court Judgement*, LIVE LAW (NOV. 13, 2022, 9:14 AM), <https://livelaw/interviews/ews-quota-is-reservation-for-the-over-represented-excludes-the-real-unrepresented-mohan-gopal-on-supreme-court-judgment-interview-213981>.

<sup>19</sup> Alok Prasanna Kumar, *Revisiting the Rationale for Reservations Claims of ‘Middle Castes’*, 51 (47) E.P.W. 10 (2016).

<sup>20</sup> Yuvraj Joshi, *Affirmative Action as Transitional Justice*, WIS. L. REV. 1 (2020) [hereinafter “Joshi”]; Yuvraj Joshi, *Racial Justice and Peace*, 110 GEO. L.J. 1325 (2022).

<sup>21</sup> B.K. Pavitra v. Union of India (2019) 16 SCC 129 [hereinafter “Pavitra”].

<sup>22</sup> See, Section III.

<sup>23</sup> Maratha Reservations Judgement, *supra* note 7, at 143.

developed. The courts merely reiterate their previous findings, and cite incongruous socio-economic theories. Second, the Indian courts have referred to foreign jurisprudence for shaping the constitutional boundaries of reservations so far as theoretical aspects are concerned. Third, apart from Constituent Assembly Debates, Courts seem reluctant to refer to sociological studies on affirmative action beyond that provided via quotas nor do they comment on proportionate representation and the existence of creamy layer among SCs and STs. Though the Indian reservation quotas were initially based upon recommendations of two backward commissions, the resultant protests, agitations, and political components have diluted the academic rigour for such measures, thus, the scope for judicial creativity in the context of the reservation ceiling has been very limited contrary to the challenges and innovations of Supreme Court of the United States ('SCOTUS'), and African courts. That being said, the authors seek to establish that the contours of reservations should not be restricted to the 50% ceiling by grappling with the notion of transitional justice.

Joshi defines transitional justice as a conception that “concerns how societies move beyond histories of oppression and violence towards a more just and peaceful order”.<sup>24</sup> This must be contrasted with affirmative action which translates to mean those “measures that promote the inclusion and participation of excluded groups in societal institutions”.<sup>25</sup> Now, let us evaluate the concept of “affirmative action as a supplement to transitional justice”. Reservations act as a bargain between those who need reservations, and those who agitate against them. This bargain is similar to the other ordeals faced by a democratic nation with limited resources. A but-for analysis concerning transitional justice would mean that the 50% ceiling would promote peace, thus forming a “just” society. Nevertheless, this is not the case as Indian reservation policies cannot be effectively portrayed as peace-establishing projects. Comparative literature offers some insights in this regard. For instance, affirmative action in the U.S. is not concerned with historical injustice but comprise forward-looking remedies.<sup>26</sup> South Africa recognises affirmative action as a “post-apartheid transitional measure” in a different domain.<sup>27</sup> Both African and U.S. developments are that of a peace and justice project in a true sense since they are concerned with future peace rather than paving the way for further stigmatisation and oppression in one form or another. Such an

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<sup>24</sup> Joshi, *supra* note 20, at 1.

<sup>25</sup> Robert Fullinwider, *Affirmative Action*, S.E.P (Apr 28, 2018), <https://plato.stanford.edu/entries/affirmative-action/>.

<sup>26</sup> Kimberly Reyes, *Affirmative Action Shouldn't Be About Diversity*, THE ATLANTIC (December 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/affirmative-action-about-reparations-not-diversity/578005/>. (arguing that “the point of affirmative action should be justice, not diversity”).

<sup>27</sup> Joshi, *supra* note 20, at 6.

outlook effectively contradicts the Indian Supreme Court's jurisprudence which looks at reservations as an affirmative action measure whose end goal is in "establishing equality through fostering diversity".<sup>28</sup> The shift from "justice" to "diversity" masks the "ways we might think about affirmative action as transitional justice", and hence, diversity arguments become misplaced.<sup>29</sup>

In extension, it can be argued that Indian reservations which limit the extent of affirmative action by means of the 50% reservation ceiling have caused much damage to the ideals of transitional justice. This the authors argue with two insights. First, restricting reservations by referring to observations of Dr Ambedkar<sup>30</sup> from Constituent Assembly Debates, and judgements like *M.R. Balaji v. State of Mysore* ('Balaji')<sup>31</sup> [section II (a)] undermine the conception of transformative constitutionalism. They restrict the possibilities of effective transitional justice. Second, attaching judicial wisdom to the ceiling does not cater to the aspirations of Indian society at large [section III]. Before we conclude whether the 50% ceiling hinders or protects equality, it would be wise to look at the traditional yet evolving counters to the reservations, *i.e.*, efficiency, merit, the possibility of caste-rule, the "common good",<sup>32</sup> and the notion of equality itself. At the outset, making sense of the 50% ceiling would be beneficial.

### III. MAKING SENSE OF THE 50% CEILING

The affirmative action debate is a multi-dimensional issue. To understand all of the dimensions better, and for the sake of later argumentation, understanding the genesis and concretisation of the ceiling would be fruitful.

#### 1. *The Genesis*

Indian reservations adopt a "backward-looking approach".<sup>33</sup> Backward-looking approach concerns redressing the impact of past atrocities felt by the marginalised.<sup>34</sup> This can be contrasted with a

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<sup>28</sup> Pavitra, *supra* note 21; Maratha Reservations Judgement, *supra* note 7.

<sup>29</sup> Joshi, *supra* note 20, at 6.

<sup>30</sup> Maratha Reservations Judgement, *supra* note 7, at 210.

<sup>31</sup> *M.R. Balaji v. State of Mysore* AIR 1963 SC 649 [hereinafter "Balaji"].

<sup>32</sup> MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* 19 (Farrar, Straus and Giroux 2020) [hereinafter "SANDEL"].

<sup>33</sup> Joshi, *supra* note 20.

<sup>34</sup> Joshi, *supra* note 20, at 20.

forward-looking outlook which conforms with the objectives of transitional justice. As Sachs argues, the goal of affirmative action is not about establishing “a form of anachronistic or disjunctive compensation for past injustices”. Instead, its true goal is “to rectify how these injustices continue to permeate the world we live in.”<sup>35</sup> This statement regarding affirmative action certainly departs from the current scheme of Indian reservations.

The lack of quantitative heft,<sup>36</sup> and socio-economic jurisprudence on caste inequality in India would show why the 50% ceiling hinders equality. However, there is more to the picture than what meets our eyes. One such dimension for rethinking reservations is the idea of “forward-looking affirmative action”.<sup>37</sup> A simple analogy for understanding the same can be made in light of the arguments stating that former invaders and colonial powers should pay reparations to their previous colonial states.<sup>38</sup> Though containing academic value, this argument is filled with divided opinions.<sup>39</sup> The invaders of the past have apologised publicly, as the religious leaders have, but not all of them. The reliance on the United National Instruments to battle inequality has changed the reparations debate from a backward-looking approach to a forward-looking method. The same can be utilised in the context of Indian reservations. In the absence of any literature on treating the 50% ceiling as a forward-looking approach, it would be plausible to trace the ceiling jurisprudence by adopting the forward-looking lens which has been backed by affirmative action scholars as a useful tool for changing “attitudes about race (read caste) while promoting racial integration”.<sup>40</sup>

The 50% ceiling emanated from the judgement in *Balaji*.<sup>41</sup> In *Balaji*, the Court was dealing with the validity of the order passed by the Mysore Government allowing for 68% reservations in engineering and medical college seats. The validity of the order was answered by the Court in the negative with *Balaji* categorically holding that “special provision should be less than 50%, how

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<sup>35</sup> Albie Sachs, *Foreword*, in ELAINE KENNEDY-DUBOURDIEU, RACE AND INEQUALITY: WORLD PERSPECTIVES ON AFFIRMATIVE ACTION (Routledge 2006).

<sup>36</sup> Maratha Reservations Judgement, *supra* note 7.

<sup>37</sup> Joshi, *supra* note 20.

<sup>38</sup> Jason Hickel, *The Case for Reparations*, JASON HICKEL (October 13, 2018), <https://www.jasonhickel.org/blog/2018/10/13/the-case-for-reparations>; Press Trust of India, *Shashi Tharoor demands reparation payments from UK for colonial rule*, ECONOMIC TIMES (July 22, 2015), <https://economictimes.indiatimes.com/news/politics-and-nation/shashi-tharoor-demands-reparation-payments-from-uk-for-colonial-rule/articleshow/48175727.cms?from=mdr>.

<sup>39</sup> John MacKenzie, *Viewpoint: Why Britain does not owe reparations to India*, BBC (July 28, 2015), <https://www.bbc.com/news/world-asia-india-33647422>.

<sup>40</sup> Ockert Dupper, *Remedying the Past or Reshaping the Future? Justifying Race-based Affirmative Action in South Africa and the United States*, 21 (1) INT'L J. COMP. LAB. L. & INDUS. REL. 89, 90-91 (2005).

<sup>41</sup> *Balaji*, *supra* note 31.

much less than 50% would depend upon the prevailing circumstances in each case”.<sup>42</sup> However, Balaji ignored the factum of equality enshrined under Article 15 (1) while observing that Article 15 (4) is an exception to the broader scheme of equality contained in Article 15 (1).<sup>43</sup> This observation was later overturned in *State of Kerala v. N.M. Thomas* (“Thomas”), and *Indra Sawhney v. Union of India* (“Indra Sawhney”) judgements with the Apex Court stating that Article 15 (4) was an important facet to the right to equality, and was not an exception.<sup>44</sup> Later and recent observations have made interesting remarks on the whole scheme of reservation with *Maratha Reservations Judgement* even observing that “to change the 50% limit is to have a society which is not founded on equality but based on caste rule”;<sup>45</sup> an observation which has been severely criticised.<sup>46</sup>

Going further in the series of ceiling judgements comes *T. Devadasan v. Union of India* (“Devadasan”),<sup>47</sup> a judgement on the validity of the carry-forward rule in employment. While *Devadasan* tried to concretise the bar on reservations, a later seven-judge judgement in *Thomas* questioned the bar on reservations. In a discordant note in *Thomas* judgement, Justice M. H. Beg called the 50% bar as being “unreasonable”. In addition, Justice Fazal Ali opined that the 50% ceiling at most is considered a “rule of caution” and not exhaustion.<sup>48</sup> Further doubt on the reasoning and applicability of *Balaji* was raised in *K.C. Vasanth Kumar v. State of Karnataka* (“Vasanth Kumar”)<sup>49</sup> when Justice Chinappa Reddy observed that he was reluctant to say that 50% ceiling is a proper provision to make. Rather than questioning the ratio of *Balaji*, he observed that “we are not prepared to read *Balaji* as arbitrarily laying down 50 per cent as the outer limit of reservation”<sup>50</sup> because it was an observation made on the facts of that case.

However, in *Vasanth Kumar*, Justice Venkataramiah, while referring to *Thomas*, observed that it was settled that reservation cannot breach the 50% ceiling.<sup>51</sup> In *Thomas*, Justice Ali expressed that Article 16 (1) allows for introducing categories, and hence, is comparable to Article 14 which

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<sup>42</sup> Maratha Reservations Judgement, *supra* note 7.

<sup>43</sup> Balaji, *supra* note 31.

<sup>44</sup> *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 [hereinafter “Thomas”]; *Indra Sawhney v. Union of India* (1992) Supp (3) SCC 217 [hereinafter “Sawhney”].

<sup>45</sup> Maratha Reservations Judgement, *supra* note 7, at 143.

<sup>46</sup> Gautam Bhatia, *A Critique of the Supreme Court’s Maratha Reservation Judgment – I: Equality*, CONST. L. & PHIL. (May 6, 2021), <https://indconlawphil.wordpress.com/2021/05/06/a-critique-of-the-supreme-courts-maratha-reservation-judgment-i-equality> [hereinafter “Bhatia”].

<sup>47</sup> *T. Devadasan v. Union of India*, AIR 1964 SC 179 [hereinafter “Devadasan”].

<sup>48</sup> *Thomas*, *supra* note 44, at 191.

<sup>49</sup> *K.C. Vasanth Kumar v. State of Karnataka*, (1985) SCC (Supp) 714 [hereinafter “Vasanth Kumar”].

<sup>50</sup> Vasanth Kumar, *supra* note 49, at 57.

<sup>51</sup> Vasanth Kumar, *supra* note 49, at 149.

inherently allows for categorisation under certain prerequisites. Thus, Article 16 (4), being a particular manifestation of categorisation, should not be considered as a contradiction to Article 16 (1); instead, it should be regarded as an integral component of Article 16 (1). Consequently, he concluded that the government has the authority to implement reservations under Article 16 (4) contingent upon fulfilling specific conditions. One of these conditions involves ensuring that the extent of reservation does not become overly disproportionate, thereby preserving the fundamental essence of equality.

The judgement in *Indra Sawhney*<sup>52</sup> referred to all of the abovementioned judgements<sup>53</sup> and, with seven of the nine judges agreeing as was pointed out in the *Maratha Reservations Judgement*,<sup>54</sup> observed that a 50% reservation ceiling cannot be breached “unless extraordinary situations warrant such departure”.<sup>55</sup> The later constitutional bench judgements of the Apex Court, thus, concretised the ceiling.

## 2. *The Concretisation*

In all of the ceiling judgements post-*Sawhney*, the reservation bar was part and parcel of the “equality doctrine” enshrined in the Indian Constitution. Justice Bhushan’s opinion in the *Maratha Reservations Judgement* reads: “The 50 percent ceiling limit for reservation laid down by *Indra Sawhney* case is based on the principle of equality as enshrined in Article 16 of the Constitution”. Justice Bhushan, to support this observation, referred to the judgement in *M. Nagaraj v. Union of India* (“Nagaraj”)<sup>56</sup> in which the Court observed that “a numerical benchmark would be the surest immunity against charges of discrimination”, and that “diluting the 50% benchmark further would effectively destroy the guarantee of equality, especially the right not to be discriminated against on the grounds of caste provided under Articles 15 and 16”.

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<sup>52</sup> *Sawhney*, *supra* note 44.

<sup>53</sup> Such judgement included *Balaji*, *supra* note 31; *P. Rajendran v. State of Madras*, (1968) 2 SCR 786; *A. Peeriakaruppan v. State of T.N.*, (1971) 1 SCC 38; *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660; *Devadasan*, *supra* note 47; *State of U.P. v. Pradeep Tandon*, (1975) 1 SCC 267; *Janki Prasad Parimoo v. State of J&K*, (1973) 1 SCC 420; *Thomas*, *supra* note 44; *Vasanth Kumar*, *supra* note 49.

<sup>54</sup> *Maratha Reservations Judgement*, *supra* note 7, at 55.

<sup>55</sup> *Maratha Reservations Judgement*, *supra* note 7, at 7 (Bhat J).

<sup>56</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 [hereinafter “Nagaraj”].

The Apex Court in *Maratha Reservations Judgement* rightfully culled out<sup>57</sup> the ratio laid down in *Indra Sawhney*<sup>58</sup> regarding the question of ceiling. In this regard, the most echoing and determining part of *Indra Sawhney* has been that:

While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life...some relaxation in this strict rule may become imperative.<sup>59</sup>

The above excerpt makes it clear that the ceiling cannot be politically escaped by permitting a very small exception window. The judgement in *Indra Sawhney* was subsequently followed in at least four constitution bench judgements namely the *Post-Graduate Institute of Medical Education & Research v. Faculty Association*,<sup>60</sup> *Nagaraj*,<sup>61</sup> *Krishna Murthy v. Union of India*,<sup>62</sup> and *Chebrolu Leela Prasad Rao v. State of A.P.* (“Chebrolu”).<sup>63</sup> *Chebrolu*, the most recent in this series, reiterated the ceiling doctrine. *Chebrolu* dealt with the validity of a Government Order (“G.O.”) providing 100% reservation to “ST candidates for the post of teachers in schools located in Scheduled Areas of Andhra Pradesh and Telangana”.<sup>64</sup> With the G.O. providing reservations to STs in scheduled areas, a different approach was needed for evaluating it on its merits.<sup>65</sup> Nevertheless, the Court went ahead to hold the reservations as being unconstitutional. The Apex Court showed its allegiance to the 50% ceiling more than anything else. Exploring deeply, the exceptions to the ceiling can be considered a highly technical question. Furthermore, the judgement in *Nagaraj* held that irrespective of the compelling reasons for breaching the ceiling, the State will not do it excessively so as to “obliterate the creamy layer or extend the reservation indefinitely”.<sup>66</sup> The observations made in all these cases make it hard to conclude the possibility of a prospective departure from the 50% ceiling.

<sup>57</sup> *Maratha Reservations Judgement*, *supra* note 7, at 6 (Bhat J).

<sup>58</sup> *Sawhney*, *supra* note 44.

<sup>59</sup> *Sawhney*, *supra* note 44, at 810.

<sup>60</sup> *Post Graduate Institute of Medical Education & Research v. Faculty Association*, (1998) AIR (SC) 1767.

<sup>61</sup> *Nagaraj*, *supra* note 56.

<sup>62</sup> *Dr Krishna Murthy v. Union of India*, (2010) 7 SCC 202.

<sup>63</sup> *Chebrolu Leela Prasad Rao v. State of A.P.*, (2020) SCC OnLine 383 [hereinafter “Chebrolu”].

<sup>64</sup> Ankush Rai, *Asymmetrical Federalism and the 100% Reservation Judgment*, 55 (26) E.P.W. 35 (2020).

<sup>65</sup> *Id.* at 37.

<sup>66</sup> *Nagaraj*, *supra* note 56, at 123.

In the *Maratha Reservations Judgement*, for referring the *Indra Sawhney* case to a larger bench, the State argued that the 50% ceiling on the reservation was judicial legislation, and hence, was “impermissible”,<sup>67</sup> an argument which was well found in the scholarly realm.<sup>68</sup> Unfortunately, this is a weak argument for breaching the reservation ceiling. There are many occasions when judicial activism expounded the scope of constitutional justice in the light of “transformative constitutionalism”. Such developments include the innovation of Public Interest Litigation,<sup>69</sup> basic structure doctrine, and the limited power of the parliament in amending the Indian Constitution.<sup>70</sup> All of them have been hailed as pathbreaking.<sup>71</sup> The ceiling question can be viewed from this angle. Thus, the authors find judicial manufacturing of the ceiling to be a convincing case in light of the powers of the Apex Court.<sup>72</sup>

Turning back to the U.S. jurisprudence which support the ceiling, we find that despite no quantification of permissibility for fostering diversity unlike India’s 50% ceiling, and a clear mandate against fixing racial quotas,<sup>73</sup> the SCOTUS has consistently required “affirmative action programs to be narrowly tailored to the purpose of remedying discrimination”.<sup>74</sup> This narrowly tailored conception, Oppenheimer argues, has to conform with certain ideals which include: (1) flexibility of affirmative action plan (50% ceiling is not flexible), (2) limited to fully-qualified applicants (notwithstanding ceiling, the reserved class is supposed to satisfy the certain criterion in India<sup>75</sup>), (3) “must provide continuing opportunities for whites and men” (read unreserved class, 50% ceiling ensures that unreserved castes and creamy layer get their share of opportunities), (4) “it must be temporary-designed to last no longer than necessary to remedy the discrimination that justified the plan” (the fate of reservations in India is uncertain in absence of judgements like *Grutter*), and (5) affirmative action plans must not reduce the existing positions occupied by whites

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<sup>67</sup> *Maratha Reservations Judgement*, *supra* note 7, at 83.

<sup>68</sup> Alok Prasanna Kumar, *On Maratha Reservations Judgement: Part-1*, 56 (21) E.P.W. 10, 12 (2021) [hereinafter “Kumar”].

<sup>69</sup> P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT’L L. 561 (1985).

<sup>70</sup> Nitu Mittal & Tarang Aggarwal, *Judicial Activism in India*, 1 (1) IND. J.L. & PUB. POL’Y 86, 89 (2014).

<sup>71</sup> Arvind Verma, *Taking Justice outside the Courts: Judicial Activism in India*, 40 (2) HOW. J. CRIM. JUST. 148 (2001).

<sup>72</sup> See, generally, INDIA CONST. art. 142.

<sup>73</sup> *Bakke*, *supra* note 14 (affirmative action plan disapproved); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (affirmative action plan approved subject to limitations).

<sup>74</sup> Oppenheimer, *supra* note 3, at 925.

<sup>75</sup> Utkarsh Anand, *Quota policy isn’t meant to deny merit: Supreme Court*, HINDUSTAN TIMES (December 19, 2020), <https://www.hindustantimes.com/india-news/quota-policy-isn-t-meant-to-deny-merit-supreme-court/story-dV07fk9c6uSQHywzxLZvRI.html>.

and men (Indian constitution specifically permits special provisions for women. However, as this would not affect the existing positions, the criterion stands satisfied).<sup>76</sup>

The above discussion leads us to three inferences. First, the reservation ceiling questions the notions of equality. Second, the present scheme of Indian reservations does not ensure transitional justice. Third, while the version of the diversity argument of the Apex Court is flawed, 21<sup>st</sup> century India may need to look beyond the traditional caste-based affirmative action regime.

#### IV. THE NOTION OF EQUALITY, RESERVATIONS AND THE 50% CEILING

*Indra Sawhney* referred to all the previous reservation judgements to reach the 50% ceiling.<sup>77</sup> Making this observation, *Maratha Reservations Judgement* denied the prayer for referring *Indra Sawhney* to a larger bench. A year before, the Court in *Mukesh Kumar v. State of Uttarakhand* made it clear that no mandamus lay against the government's inaction to not provide for reservations.<sup>78</sup> While the State cannot breach the 50% ceiling, it cannot be forced to provide reservations to ensure "substantive equality"<sup>79</sup> as well; And then comes an interesting argument. Justice Bhat quotes a 1988 Apex Court precedent which held that members of a class "deprived indirectly of the advantage of reservations which they were enjoying earlier while others who are similarly situated in the other departments are allowed to enjoy it make the action of Government discriminatory and invite intervention by this Court."<sup>80</sup> This warrants the State to observe "due justification" for limiting the benefits granted to a class earlier. This statement results in two conceptions. First, if the State seeks to decrease the reservations for providing reservations to new classes, be it economically or socially backward, it will have to justify why the decrease in benefits will not harm the interests of those previously reserved. Second, the State would be unable to provide any further reservations if it sticks to the 50% ceiling. This puts a full-stop on the conundrum pertaining to reservation policies.

In light of this, examining the claims of the poor among unreserved would mean breaching the 50% ceiling. This touches upon the 21<sup>st</sup>-century requirements for ensuring peace and justice as a transitional measure, and the possibilities of breaching the ceiling in light of the recent constitutional change in form of the EWS reservation. To this, at the outset of presentation, it was

<sup>76</sup> Oppenheimer, *supra* note 3, at 923.

<sup>77</sup> See, Vasanth Kumar, *supra* note 49.

<sup>78</sup> *Mukesh Kumar v. State of Uttarakhand*, (2020) 3 SCC 1.

<sup>79</sup> Chebrolu, *supra* note 63.

<sup>80</sup> P & T Scheduled Caste/Tribe Employee Welfare Association v. Union of India, 1988 SCR Supp (2) 623.

argued during the proceedings of *Janhit Abhiyan* that the initial rationale behind reservations was centred on combating discrimination, rather than in addressing deprivation. It was underscored that this principle formed the bedrock, and the recent Amendment's shift towards deprivation-based reservations contradicted this founding principle. Expanding on this, it was asserted that even if one were to consider reservations as a tool to alleviate deprivation, the exclusion of the socially disadvantaged groups, especially when they were economically more disadvantaged than their socially privileged counterparts, directly contravened the principles of equal treatment.

1. *The Systematic Discourse (Articles 14, 15, and 16)*

Article 14 of the Indian Constitution proclaiming the “equal protection clause” mandates the State to not deny “any person equality before the law or the equal protection of laws”.<sup>81</sup> Articles 15 and 16 further this goal by prohibiting discrimination based on religion, race, sex, caste or place of birth, and ensure equality of opportunity concerning public employment respectively. Articles 14, 15, and 16 can be termed as the equality framework of the Indian Constitution. Articles 15 and 16 further provide that the obligation of non-discrimination would not prevent the State from taking special measures or making any special provision for the advancements of social and educationally backward classes (“SEBCs”). Thus, the State has to balance the goals of non-discrimination with alleviation of inequality. Taking account of these provisions, the courts have termed the 50% ceiling as a “just” balance. As Justice Bhat observes in *Maratha Reservations Judgement*, the ceiling of 50% comes with the “extraordinary circumstances” exception, and hence, it is a just balance which may be referred to as the Indian version of “Goldilocks solution”,<sup>82</sup> *i.e.*, an affirmative action solution ensuring optimal balance. Also, using the term “special provision” under Article 15 (4) is of a “wider import”, than reservations.<sup>83</sup> The authors find these observations to be misplaced in the light of the judicial discourse on “substantive equality”. To understand this better, the judgement by Justice Chandrachud in *B.K. Pavitra v. Union of India* (“Pavitra”) is a good starting point.<sup>84</sup>

Justice Chandrachud referred to Justice Kapadia’s opinion in *Nagaraj* where he talked about “formal” and “proportionate equality”. While the former concerns non-discrimination, the latter “expects the States to take affirmative action in favour of disadvantaged sections of the society

<sup>81</sup> INDIA CONST. art. 14.

<sup>82</sup> See, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (Kagan J).

<sup>83</sup> *Maratha Reservations Judgement*, *supra* note 7, at 22 (Bhat J).

<sup>84</sup> *Pavitra*, *supra* note 21.

within the framework of liberal democracy”.<sup>85</sup> This observation supports the concept that recognition of “deep structural inequalities” and their eradication would be done through the Indian Constitution as a “transformative document”. This was very well acknowledged by the members of the Constituent Assembly.<sup>86</sup> In turn, formal equality was to be changed into “substantive equality” by application of the “equality paradigm” for providing special measures. In addition, while quoting data from the India Human Development Survey,<sup>87</sup> and the Sinho Commission Report<sup>88</sup>, it was submitted that both formal and substantive equality, forming a part of the equality code, could not be breached at the same time. However, two potential counters can be made to this understanding of the constitutional scheme.

First, it was the “transformative nature” of the Indian constitution in itself that paved the way for OBC reservations, thus changing the equality paradigm. This was in tune with Dr Ambedkar’s remark that there has to be a “balance between formal equality of opportunity and the needs of the disadvantaged classes of society”.<sup>89</sup> Hence, the question ought to be whether the transformative nature of the Indian Constitution permits affirmative action for a non-traditional disadvantaged class, *i.e.*, EWS, in the 21<sup>st</sup> century? Second, as the Constitution has been termed a transformative document, strict reference to the ideals expounded in the Constituent Assembly Debates for finding the root of the reservation ceiling cannot be a beneficial exercise because “the transformative potential of the Constitution has been founded on the evolution of equality away from its formal underpinnings to its substantive potential”.<sup>90</sup> The authors intend to establish in the upcoming sections that for revealing the transformative potential of the Constitution in the 21<sup>st</sup> century, maintaining the 50% ceiling as it exists not only hinders equality but also concretises reservations in India forever in a manner which is harmful to wider transitional justice project.

## 2. *The Social Lens*

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<sup>85</sup> Pavitra, *supra* note 21, at 111.

<sup>86</sup> Pavitra, *supra* note 21, at 105.

<sup>87</sup> INDIA HUMAN DEVELOPMENT SURVEY, <https://ihds.umd.edu/data> (last visited August 30, 2023).

<sup>88</sup> MAJ. GEN. (RTD.) S.R. SINHO COMMISSION, REPORT BY COMMISSION FOR ECONOMICALLY BACKWARD CLASSES (2010), <https://www.scobserver.in/wp-content/uploads/2021/10/Sinho-Commission-Report-2010-Neil-Aurelio-Nunes-v-Union-of-India-AIQ-Medical-Reservation-for-OBC-and-EWS.pdf>.

<sup>89</sup> *Constitution Assembly Debates, Volume VII*, CONSTITUTIONOFINDIA.NET (Nov. 30, 1948), <https://www.constitutionofindia.net/debates/30-nov-1948/>.

<sup>90</sup> Pavitra, *supra* note 21, at 109.

Commentators have cautioned that affirmative action can become a “barrier rather than a bridge to socio-economic equality”.<sup>91</sup> The arguments in this regard are two-fold. Firstly, affirmative action addresses historical injustice and socio-economic inequality in one way while completely neglecting the other, unreserved population. Secondly, distributive affirmative action remedies, like reservations, raise sub-categories, and thus, they “widen the differences within marginalised groups”.<sup>92</sup> The focal point of such arguments has always been that caste-based affirmative action “can end up helping the relatively privileged in the beneficiary group, rather than cutting across lines of race and class”.<sup>93</sup> Supporting this line of argumentation in the South African context, the affirmative action commentators have observed that redressal policies “do not consistently address the needs of the poor, and might even inhibit the ability of the poor to influence policy outcomes”.<sup>94</sup> While this discourse is well-conceived, we cannot remain oblivious to the classic arguments that reservation policies hinder merit, the efficiency of administration, and they give way to “reverse discrimination”.<sup>95</sup>

The authors do not seek to emphasise much on the legality of the method by which the Indian judiciary arrived at the 50% ceiling rather than a ceiling of 45 or 70 percentages. Rather, we intend to argue that howsoever the standard was arrived at, it ultimately hinders equality. It is well established that “a theory of equality focused solely on a single group seems unlikely to gain traction as a practical matter”.<sup>96</sup> We are talking three groups namely, SCs, STs, and OBCs. The sequence of STs, SCs, and OBCs is based upon the context of the relative historic and societal advantage coupled with their population size. This sequence, especially the demarcation between the reservations for OBCs and SCs, conforms to the notion that “to be born to a lower caste retains an enduring stigma”.<sup>97</sup> It can be argued that such stigma persists if “distributive measures” like caste-based reservations solely dominate the narrative of affirmative action.<sup>98</sup> As the argument

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<sup>91</sup> Joshi, *supra* note 20, at 32.

<sup>92</sup> Ayelet Shachar, *On Citizenship and Multicultural Vulnerability*, 28 (1) POL. THEORY 64, 65 (2000); “By now, there are affluents and socially and economically advanced classes within Scheduled Castes and Scheduled Tribes.” Chebrolu, *supra* note 63, at 146.

<sup>93</sup> Joshi, *supra* note 20, at 32.

<sup>94</sup> Nicoli Nattrass & Jeremy Seekings, *Democracy and Distribution in Highly Unequal Economies: The Case of South Africa*, 39 (3) J. MOD. AFR. STUD. 471 (2001).

<sup>95</sup> David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action and Racial Balancing*, WIS. L. REV. 657 (2000).

<sup>96</sup> K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 34-36 (1992).

<sup>97</sup> THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* 25-27 (Yale University Press 2004) [hereinafter “SOWELL”].

<sup>98</sup> TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* 215-243 (Oxford University Press 2015) [hereinafter “KHAITAN”].

of “proportionate representation” according to population size is not legally sound,<sup>99</sup> it would be wise to explore methods that may help to remove the stigma, and to secure basic necessities for both the reserved class, and the genuinely needy sections of the unreserved population.

With the advent of social media as an awareness medium, market-driven economy, and fewer government vacancies in recent years,<sup>100</sup> the utility of the 50% ceiling restricted to the government initiatives does not appear helpful. Instead, with the inequality literature now making a shift towards the private sector and employment firms,<sup>101</sup> for ensuring a dynamic and inclusive system, non-government employment measures have to be explored. As Prof. Khaitan argues in his seminal contribution:

Given that many members of relatively disadvantaged groups are also more likely to face absolute disadvantage, universalist welfare measures such as a guarantee of minimum wages, universal education, universal health care, universal food security, and universal pension benefits can play a significant role in reducing the advantage gap between groups.<sup>102</sup>

The above argument furthers the interest of the needy unreserved class. Leading caste and reservation scholars have argued that with OBC reservation coming into the picture, the stigmatisation based on caste has significantly reduced so far reservation policies are concerned. The idea flows from some basic ingredients of the process of stigmatisation itself which is defined as “mobility without dignity” in the Indian context.<sup>103</sup> This dignity equation has made a pathbreaking shift with OBC reservations coming into the picture as OBCs have succeeded in articulating their “demands and politics on the lines of region, religion and language” due to their high population, thus starting a new era of democratic politics.<sup>104</sup> Being internally heterogeneous, and “culturally, socially and economically differentiated”,<sup>105</sup> OBCs bring a lot to the reservation

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<sup>99</sup> “Dr. Ambedkar has categorically stated that reservation shall be confined to minority of seats”. Maratha Reservations Judgement, *supra* note 7, at 112.

<sup>100</sup> Sanya Dhingra, *UPSC, SSC, Railways, Banking — Recruitment for govt jobs shows massive dip in last 5 years*, THE PRINT (March 8, 2021), <https://theprint.in/india/governance/upsc-ssc-railways-banking-recruitment-for-govt-jobs-shows-massive-dip-in-last-5-years/616929/>; Pradeep Thakur, *10% quota's fine, but govt cutting jobs too*, TIMES OF INDIA (January 19, 2019), <https://timesofindia.indiatimes.com/india/10-quotas-fine-but-govt-cutting-jobs-too/articleshow/67595772.cms>.

<sup>101</sup> Sukhadeo Thorat, *On Reservation Policy for Private Sector*, 39 (25) E.P.W. 2560 (2004).

<sup>102</sup> KHAITAN, *supra* note 98, at 232.

<sup>103</sup> Ajay Gudavarthy, *Can We De-Stigmatise Reservations in India?*, 47 (6) E.P.W. 55, 55 (2012) [hereinafter “Gudavarthy”].

<sup>104</sup> *Id.* at 60.

<sup>105</sup> *Id.* at 57.

plate than SCs and STs who are often segregated and subjugated in most domains. The stigma that existed in the domain of reservations pre-OBC reservations has decreased because SCs and STs now share their plight with India's large population size of OBC communities. The reserved class now has cohesion, solidarity, and a sense of belonging. The concept of a creamy layer in OBCs coupled with the recent observation by the Apex court for introducing the same among SCs and STs have clarified the fate and rationale behind reservations.

The answer we get from the literature is clear: that social upliftment needs more dynamic measures than caste-based reservations restricted to the 50% ceiling. The rationale for trickling down the benefits narrows down the claim of the genuinely needy section in the 21<sup>st</sup> century. Hence, a transformation in the conception of ceiling is the need of the hour.

Due to the existing reservations ceiling, there exists a polarization of the affirmative action policies. If the remedial measures would be restricted to a certain class without revisions, inclusion and exclusion of deserving classes and making a shift towards economic factors, the present policies will continue to promote notions of caste inferiority and lead to a caste hostile setting.<sup>106</sup> These are the reasons why SCOTUS adopted 'strict scrutiny' for affirmative action claims.<sup>107</sup>

### 3. *The 21st Century Dimensions (Efficiency, Merit, Stigma, & Upliftment)*

Any debate on efficacy or the quantum of reservations turns to the stereotypical argument of merit,<sup>108</sup> which gets enough judicial attention in consonance with Article 335 of the Indian Constitution.<sup>109</sup> Since breaching the reservation ceiling would involve inclusion on a whole different level, the unreserved class can complain that compromising with merit and efficiency of administration will lead to "caste-rule".<sup>110</sup> The reason for this anxiety is obvious because there lies a "dilemma when innocent future generations are called upon to provide reparations for historical injustice".<sup>111</sup>

A fitting counter to the merit argument was provided by Justice Chandrachud in *Pavitra* when stating that "a meritorious candidate is not merely one who is 'talented' or 'successful' but also one

<sup>106</sup> Rubinfeld, *supra* note 4, at 446.

<sup>107</sup> See, generally, Rubinfeld, *supra* note 4.

<sup>108</sup> *Pavitra*, *supra* note 21, at 114.

<sup>109</sup> INDIA CONST. art. 335.

<sup>110</sup> *Maratha Reservations Judgement*, *supra* note 7, at 143.

<sup>111</sup> RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 141-143 (Oxford University Press 2000).

whose appointment fulfils the constitutional goals of uplifting members of the SCs and STs and ensuring a diverse and representative administration”.<sup>112</sup> Justice Chandrachud’s observation seems to acknowledge the U.S. conception of affirmative action which, in absence of an explicit provision, relies on the “diversity” argument<sup>113</sup> in order to sustain upliftment measures. Nevertheless, it must be acknowledged that since constitutional goals are not limited to historical disadvantage but cover all kinds of inhibitions and hindrances when including “educational backwardness”,<sup>114</sup> the diversity argument cannot be confined to the claims of backward “castes” only. Instead, they must encompass educationally and socially backward sections, in terms of both lifestyle and social standing beyond stigma, among forward classes, *i.e.*, in form of EWS and similar other reservations. However, the 50% ceiling fails to account for the same.

Further, the merit argument has gotten a limited spectrum. With speciality courses clearly out of the purview of reservations,<sup>115</sup> and studies showing no effect on efficiency due to employment of socially backward class through reservations in Indian Railways, which is one of the biggest employers in the world, thus warranting a question of efficiency in administration,<sup>116</sup> the argument of merit seems to be defeated to a greater level. Further, merit has a limited effect on the “constitutional vision of social justice” which is more concerned with social upliftment by bridging the gap amongst classes.

Efficiency,<sup>117</sup> and upliftment have lately gotten much attention. Prof. Michael Sandel’s moral discourse in form of “The Tyranny of Merit” is one such literature wherein themes of affirmative action in terms of social upliftment can be traced.<sup>118</sup> Although such a discourse always requires reconciliation with other moral encounters, preferential treatment premised on historical disadvantages which deny the benefit to a person of the unreserved caste may be termed as an argument from simplistic morality, and is a case of “manifest unfairness and injustice”.<sup>119</sup> Thus,

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<sup>112</sup> Pavitra, *supra* note 21, at 126.

<sup>113</sup> Bakke, *supra* note 14.

<sup>114</sup> The Indian Constitution talks about both social and educational backwardness.

<sup>115</sup> Press Trust of India, *SC refuses reservation in Super Specialty Medical Courses for 2020-21*, BUSINESS STANDARD (November 27, 2020), [https://www.business-standard.com/article/current-affairs/sc-refuses-reservation-in-super-specialty-medical-courses-for-2020-21-120112701292\\_1.html](https://www.business-standard.com/article/current-affairs/sc-refuses-reservation-in-super-specialty-medical-courses-for-2020-21-120112701292_1.html).

<sup>116</sup> Sukhadeo Thorat, Nitin Tagade & Ajaya K Naik, *Prejudice against Reservation Policies: How and Why?*, 51 (8) E.P.W. 61, 64 (2016) [hereinafter “Thorat”].

<sup>117</sup> See, generally, Anurag Bhaskar, *Reservations, Efficiency, and the Making of Indian Constitution*, 56 (19) E.P.W. 42 (2021).

<sup>118</sup> SANDEL, *supra* note 32.

<sup>119</sup> Rubinfeld, *supra* note 4, at 455.

“this approach to affirmative action might in turn point to a line of academic thought holding that constitutional interpretation should largely consist of seeking the best results that moral thinking can deliver”,<sup>120</sup> and hence, the constitutional permissibility and transformative potential of the Constitution become a “matter of moral philosophy”.<sup>121</sup>

Prof. Sandel offers interesting insights as to how we are making a departure from the concept of “common good” to one with “a sense of entitlement” for our success by attributing all of them to our “hard work”.<sup>122</sup> This moral string of argumentation has got much substance in the context of Indian reservations as well. With studies showing a lack of cohesion and solidarity among various sub-castes part of reserved classes<sup>123</sup> as well as agitation and conflict among the unreserved categories,<sup>124</sup> distributive affirmative action has failed to ensure the common good. Hence, while there is no possibility of decreasing the ceiling by resorting to the judicial precedents, breaching it may not be the only option for the equality project.

In the 21<sup>st</sup> century India, substantive equality can come from only those measures which are “dynamic, and respond to changing social realities”.<sup>125</sup> Combining the question of merit and efficiency on one hand with questions of upliftment and stigma on the other, we will find that the 50% ceiling, which is neither proportional nor substantive, hinders equality. Nonetheless, are there any solutions to this issue?

#### 4. *The Prospects of the Bar on Reservation and the ‘EWS’ Question*

The shift made with the 103<sup>rd</sup> Constitutional Amendment can be termed as a way to acknowledge the disparity existing amongst the unreserved sections of Indian society. The question of the hour is: Does such acknowledgement find a place in the constitutional scheme as well? The argument that the 50% reservation ceiling should be breached, since it hinders equality, can be directed in two ways. The first way would concern showing disproportionate results obtained under the existing scheme of reservations by arguing that backward classes have failed to achieve the true equality they were meant to achieve. The second way would be by showing that since 7.5, 15, and

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> SANDEL, *supra* note 32, at 18.

<sup>123</sup> Gudavarthy, *supra* note 103.

<sup>124</sup> *Id.*

<sup>125</sup> KHAITAN, *supra* note 98, at 238.

27 percent reservations for STs, SCs, and OBCs respectively touch the 50% bar when combined, the claims of other weaker sections, such as that of EWS, cannot be taken into account. As EWS would not get any reservations with the 50% ceiling surviving, it would be impossible to achieve substantive equality. A good starting point for the two-fold argument would be importing some observations. It has been established that “reservation politics dominate election campaigns, and attract corruption”. The political manipulation of OBC criteria for electoral advantage has been acknowledged in *Sawhney*.<sup>126</sup> Further, it has been observed that “rather like guests at the Hotel California, those that join the [OBC reservation] list never leave — including one or two castes that were allegedly included by mistake”.<sup>127</sup> Thus, while “new groups” continue in being added, only a few have been taken off the OBC list.<sup>128</sup>

*Maratha Reservations Judgement* did not pass any remark on the constitutionality of the EWS reservations. EWS aside, other laws granting reservations to unreserved classes are also under challenge.<sup>129</sup> With concretisation of the 50% bar, the only possible way to breach the ceiling would require the State to show that existence of extraordinary circumstances warrant such departure. With extraordinary situations defined restrictively,<sup>130</sup> making wealth and education classification at a certain level does not appear a wise and legally coherent choice. Nevertheless, wealth and caste classifications can be situated on a different footing. The observation that “caste classifications are always constitutionally odious whereas wealth classifications are only sometimes so” can come to the rescue of EWS.<sup>131</sup> Notwithstanding the discussion on the concretisation of the ceiling, solving the inequality equation warrants importing novel and practical tools of affirmative action which would be far more sustaining and stable than breaching the ceiling itself.

The novel ways would not be an escape route from the problem at hand but would involve enacting prudent solutions. They can be slowly developed as an alternative to the present scheme as well. Prof. Khaitan provides an interesting outlook in this regard arguing that “if Dalit applicants are significantly more likely not to have a parent who went to university than members of other

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<sup>126</sup> *Sawhney*, *supra* note 44.

<sup>127</sup> *With reservations*, THE ECONOMIST (October 4, 2007), <https://www.economist.com/briefing/2007/10/04/with-reservations>.

<sup>128</sup> SOWELL, *supra* note 97, at 50-51.

<sup>129</sup> Press Trust of India, *Supreme Court orders status quo on Jat quota in Haryana*, FINANCIAL EXPRESS (March 26, 2018), <https://www.financialexpress.com/india-news/supreme-court-orders-status-quo-on-jat-quota-in-haryana/1111698/>.

<sup>130</sup> *Maratha Reservations Judgement*, *supra* note 7, at 7 (Bhat J).

<sup>131</sup> Rubinfeld, *supra* note 4, at 438.

caste or religious groups in India, distributing a benefit based on whether a parent went to university is preferable to doing so directly based on caste”.<sup>132</sup> Thus, talking about universalist measures rather than distributive measures can be a good idea. This is practical as well. With fake caste,<sup>133</sup> and income certificates<sup>134</sup> dominating the Indian reservation narrative, utility of measures like EWS, which covers approximately the whole unreserved population,<sup>135</sup> can be better termed as political stunts rather than measures for realising equality. Thus, in addition to abandoning the ceiling which does not require any further implementation discussion, the authors intend to focus on those solutions for India’s betterment which conform to both constitutional and moral arguments of “common good”.<sup>136</sup> The implementation of such measures will also lead to substantive equality. However, before departing from the equality question arising from the 50% ceiling, it would be wise to first demonstrate why arguing on the 50% ceiling is an exercise in “vain”.

## V. ARGUMENTS IN VAIN?

Attaching the notion of equality with “reservations” was initially a limited and restrictive measure which has “crystallised” over time. The diversity discourse seeking more cohesion, amalgamation, and collectiveness among the protected groups can be questioned by unreserved classes based on “social justice” conception. Hence, affirmative action which “gives us all a stake in its success”<sup>137</sup> by making the mainstream more diverse has not worked out as was expected. The authors have previously discussed how non-distributive measures are conceivable solutions to the present scheme which hinders equality. We now attempt to demonstrate that when we argue solely on the 50% ceiling, we are, in fact, arguing in vain.

<sup>132</sup> KHAITAN, *supra* note 98, at 232.

<sup>133</sup> Subhash Gatade, *Phenomenon of False Caste Certificates*, 40 (43) E.P.W. 4587, 4588 (2005); Shreya Biswas, *Hundreds of fake OBC quota IIT aspirants back out of Joint Entrance Exams*, THE ECONOMIC TIMES (June 20, 2012), <https://economictimes.indiatimes.com/industry/services/education/hundreds-of-fake-obc-quota-iit-aspirants-back-out-of-joint-entrance-exams/articleshow/14281020.cms?from=mdr>.

<sup>134</sup> Prashant Jha, *Will hand over probe related to fake income certificates to SIT, says Uttarakhand govt*, TIMES OF INDIA (October 20, 2020), <https://timesofindia.indiatimes.com/city/dehradun/will-hand-over-probe-related-to-fake-income-certificates-to-sit-says-govt/articleshow/78755873.cms>; Sanya Dhingra, *Centre calls for immediate action against LAS officer who submitted ‘fake’ OBC certificate*, THE PRINT (July 7, 2020), <https://theprint.in/india/governance/centre-calls-for-immediate-action-against-ias-officer-who-submitted-fake-obc-certificate/455856/>.

<sup>135</sup> Bheemeshwar Reddy A, Sunny Jose, Pindiga Ambedkar, Vikranth Sagar Reddy & V.S. Nishikanth, *New Reservation Policy: Is It Empirically Justifiable?*, 54 (23) E.P.W. 12 (2019).

<sup>136</sup> SANDEL, *supra* note 32, at 18-19.

<sup>137</sup> KHAITAN, *supra* note 98, at 236.

With the reservations ceiling in place, the ostracization of the marginalised has become a question of judicial inclination rather than of government policy. Scholars have shown curiosity about the validity of EWS reservations in the light of *Maratha Reservations Judgement*.<sup>138</sup> With the possibility of “all entry” and “no exit” from reservations in India, the situation of backward classes is now better than that during Indian republic’s nascency.<sup>139</sup> Universal measures for provision of food, housing, and healthcare have enormously helped in creating a “level playing field”.<sup>140</sup> The only point where a level playing field has yet to have been achieved is with regards to the stigma attached to caste. Then again, the best way to eradicate the related stigma would require making a shift from the existing traditional policy to a more dynamic reservation policy. Reduction in government job vacancies also makes the 50% ceiling debate impracticable. The combination of all these factors demonstrate the need for a sustainable and long-term affirmative action design that caters to the legitimate expectations of the citizenry. As Prof. Khaitan argues, “once the State announces a particular policy and others rely on it to their detriment, it becomes difficult for the State to change course...the State must respect any legitimate expectations its actions may give rise to and live with the consequences”.<sup>141</sup> Breaching the ceiling requires extreme caution because doing so could pave way for subjective and “arbitrary” reservation policies promulgated for political gains.

A brief overview of the required universal measures can be traced to the observation of Justice Bhat in the *Maratha Reservations Judgement* is significant because of two reasons. First, it shows how universal affirmative action in the education sector has provided accessible avenues to the historically disadvantaged without compromising the opportunities for unreserved. Second, it shows how universal measures, not being restricted to admission to the educational institution, have made a deep impact. Justice Bhat observes that two important amendments to the Indian Constitution made in the last 15 years “have the effect of transforming the notion of equality”.<sup>142</sup> The amendments are: (1) the eighty-sixth amendment which inserted Article 21A providing the right to education to all children falling within the age group 6-14 years,<sup>143</sup> and (2) the ninety-third amendment which inserted Article 15 (5) in the Constitution which enabled the State to make

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<sup>138</sup> Bhatia, *supra* note 46; Kumar, *supra* note 68.

<sup>139</sup> Thorat, *supra* note 116, at 65-66; *Maratha Reservations Judgement*, *supra* note 7, at 280.

<sup>140</sup> See, generally, Dhruva Bhat, “*Harbinger of a New Era?*” *Evaluating the Effect of India’s Right to Education Act on Learning Outcomes*, (M-RCBG Associate Working Paper Series No. 76, 2017), [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/AWP\\_76\\_final.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/AWP_76_final.pdf).

<sup>141</sup> KHAITAN, *supra* note 98, at 235.

<sup>142</sup> *Maratha Reservations Judgement*, *supra* note 7, at 22 (Bhat J).

<sup>143</sup> Right of Children to Free and Compulsory Education Act, 2009 provides the broader framework for realisation of the right to education.

provisions for the advancement of SEBCs, SCs, and STs for “their admission to educational institutions including private educational institutions”<sup>144</sup> whether aided or unaided.

Reservation in private educational institutions was a landmark shift in the Indian affirmative action jurisprudence<sup>145</sup> which strengthens the claim of this article for finding measures “beyond government service” in search of substantive equality by providing “a path of the law” that will counter all the hindrances to the equality project. This departure has also been significant because “discrimination” scholars have argued that affirmative action measures “should not be imposed mandatorily on non-state bodies unless there are exceptional and compelling reasons for doing so”<sup>146</sup> in support of the claim that stigma and discrimination can acquire new forms when distributive measures by way of reservations emerge in private firms.

## VI. IMPLEMENTABLE SOLUTIONS

The above discussion has made it clear that for establishing substantive equality, further discussion on the reservation ceiling is neither practical nor beneficial, let alone sustainable. This section explores the wider possibility of affirmative action measures in India, *i.e.*, of affirmative action beyond reservations. For doing so, the authors offer four ways which will help us in re-defining reservations. They are, namely, (1) broadening the horizon of Corporate Social Responsibility (“CSR”), (2) continuing with weak distributive measures, (3) trying facilitative measures, and (4) finding new domains for implementing universal measures.

CSR has been defined as the “continuing commitment by businesses to contribute to economic development while improving the quality of life of the community and society at large”.<sup>147</sup> In India, after CSR was made compulsory in 2014, the corporations have effectively managed to contribute through two ways: (1) education of the under-privileged, and (2) supporting poor women through home-based work or micro-finance.<sup>148</sup> The significant impact of CSR so far can surpass all forms of affirmative action. By fixing a percentage like distributive affirmative action is not a viable and sustainable option, as Prof. Khaitan argues,<sup>149</sup> but the U.S. conception of diversity criteria can be imported to ensure substantive equality. Broadly defining the scope of CSR would be the first step

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<sup>144</sup> INDIA CONST. art. 15, cl. 5, *amended by* The Constitution (Ninety Third Amendment) Act, 2005.

<sup>145</sup> *Pramati Educational & Cultural Trust v. Union of India*, (2014) 8 SCC 1.

<sup>146</sup> KHAITAN, *supra* note 98, at 239.

<sup>147</sup> Sharmila Raman, *Corporate Social Responsibility - An Evaluation*, 7 NUALS L.J. 112, 114 (2013).

<sup>148</sup> *Maratha Reservations Judgement*, *supra* note 7, at 67 (Bhat J).

<sup>149</sup> KHAITAN, *supra* note 98, at 239.

for achieving all of this. Doing so will help in “including measures to counteract the natural tendencies towards the exclusion of certain groups”.<sup>150</sup> Sensitisation of the private sector about the plight of disadvantaged sections of the society would be a more urbane way for providing a reformistic perspective instead of imposing a certain diversity criterion. The objective of the sensitisation must be to make the corporate sector understand the broad idea of the “merit” conception so that businesses can be more sensitive towards the “societal patterns of exclusion”.<sup>151</sup> Here, the authors seek to clarify that the idea of diversity which in turn has translated into the conception of merit cannot help in ensuring efficiency with business since administration and corporate governance are different domains. Nevertheless, to bridge this gap, facilitative CSR measures ought to be developed.

The other three measures are a matter of upgradation and complexity. A reflection of facilitative measures can be seen in the unreserved job profiles like armed forces, atomic and medical research centres and other specialised posts. A very good example of such exclusion is the Indian higher judiciary. Such exclusion has been made for maintaining “merit”. The caveat is that the exclusion is not absolute but is backed by facilitative measures. The admission to National Defence Academy, the premier armed force training academy in India, is purely merit-based but because the exam is conducted at a higher-secondary level, it can be assumed that with a universal educational infrastructure till higher secondary provided by the Indian governments, a level playing field has been created for showcasing one’s ability. The same goes for the higher judiciary for which reserved lower judiciary may be considered a prominent facilitative measure.

The utility of facilitative measure comes from the fact that it can be incorporated at any level of employment for any amount of time in order to get any result of diversity and inclusivity while keeping a check on “stigma” or the “discontent” caused as a result of distributive measures through fixed quotas. Facilitative measures can also accompany CSR initiatives. The employer may provide extensive training as a facilitative measure before subjecting the individuals from all classes to a common screening test to check their suitability for the job profile. Since “facilitative measures are not necessarily zero-sum in the same way that distributive measures are, and they do not give the beneficiaries any advantage over others in the actual selection”, they encourage a sense of merit

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<sup>150</sup> Maratha Reservations Judgement, *supra* note 7, at 38 (Bhat J).

<sup>151</sup> Maratha Reservations Judgement, *supra* note 7, at 38 (Bhat J).

amongst the SEBCs while reducing stigma.<sup>152</sup> Those who fail the screening test can come again in the next shift after up-skilling themselves in consonance with the workplace expectations.

It is now established that caste cannot be a sole criterion for reservation.<sup>153</sup> Nevertheless, as caste has been the leading criteria paving the way for the polarised politics to take over the equality debate, weak distributive measures would be helpful. Weak distributive measures, as Prof. Khaitan argues, “use caste only as one of many factors in the eventual distribution, thus incurring less expressive costs than strong distributive measures”.<sup>154</sup> Thus, weak distributive measures that can bridge the gap amongst individuals belonging to SCs, STs, or OBCs as well as the weaker sections among unreserved would go a long way in ensuring substantive equality. For doing so, taking into account the educational qualifications and job profiles of parents among the SCs and STs, on lines similar to that of determination of creamy layer in OBCs, will prove helpful.<sup>155</sup>

Coming to existing universal measures like Education for All and UPSC preparation schemes<sup>156</sup> for educating and preparing underprivileged children, Ayushman Bharat for health insurance, Jan Dhan Yojana in the economic realm, and demarcation of Public Distribution System primarily on income level, it can be said that smarter designs of such measures have reduced the social cost incurred by the beneficiaries with regards to the benefits derived from such distributive measures. Universal measures which “do not single out protected groups in the same way like affirmative action measures are preferable to affirmative action measures”.<sup>157</sup> By adopting a utilitarian perspective, it can be stated that if benefits are comparable, “indirect measures are better than direct ones, and facilitative means should be explored before distributive measures are adopted”.<sup>158</sup> Universalist measures have been previously advocated by leading scholars as well. Rubinfeld vehemently argues that if he had to choose, he would “probably vote to scrap the entire patchwork

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<sup>152</sup> “Facilitative measures are encouraging and empowering. Because the beneficiaries eventually pass the same selection criteria as everyone else, they do not stigmatize them to the same extent.” KHAITAN, *supra* note 98, at 222.

<sup>153</sup> Balaji, *supra* note 31.

<sup>154</sup> KHAITAN, *supra* note 98, at 223.

<sup>155</sup> For observations on creamy layer among SCs and STs, see, *Jarnail Singh v. Lachhmi Narain Gupta*, (2018) 10 SCC 396.

<sup>156</sup> Sanya Dhingra, *Most UPSC aspirants can't afford private coaching, so states are stepping in to bridge gap*, THE PRINT (February 11, 2021), <https://theprint.in/india/governance/most-upsc-aspirants-cant-afford-private-coaching-so-states-are-stepping-in-to-bridge-gap/602658/>.

<sup>157</sup> KHAITAN, *supra* note 98, at 233.

<sup>158</sup> *Id.*

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of affirmative action measures in favour of a massive capital infusion into inner-city daycare and educational facilities”.<sup>159</sup>

Universal measures are sustainable too. They take into account the interests of the members of the dominant group as well as<sup>160</sup> fostering cohesion and a sense of solidarity within the civil society. Thus, as an alternative to the present scheme of reservations, the Government can come up with new forms of universalist measures. While such measures would bridge the increasing level of inequality among different classes, they would forever answer the ceiling question that Indian legal and political regimes struggle to grapple with. This would also put a stop to discussions on the question till when the reservations survive. We need to acknowledge the plight of those communities which despite not sharing a historical outlook of oppression find it hard to survive in modern-day India. It is the right time to find creative and considerate ways to depart from the 50% ceiling which hinders equality towards a better affirmative action domain that establishes substantive equality without putting a bar on the extent of affirmative actions.

## VII. CONCLUDING THOUGHTS

A review of both social and legal literature on reservations reflects the judicial anxiety in breaching the 50% ceiling. While the courts have done as such, they have also offered in judgements, like *Maratha Reservations Judgement*, measures for establishing equality in the true sense. As argued throughout, with lesser government jobs and more privatisation, breaching the ceiling as the singular solution would not ensure substantive equality. Unfortunate as it may seem, the exclusion of the private sector from the Indian affirmative action project has furthered the inequality. There is a need to universalise the basic needs on a much higher scale. A departure must be made from the current Government’s job-oriented approach to skill-building through CSR so that a trained individual can seek and participate in economic activities globally. The arguments made in this article have shown a way to reconcile judicial anxiety by adopting non-conventional affirmative action measures. Should the authors’ suggestions be accepted, not only would the deprived and historically oppressed section benefit but also the genuinely needy and deserving from the unreserved class. The necessity of securing the common good, and meritocratic values beyond test scores through the aid of diversity can all be achieved by recognising that “transformative

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<sup>159</sup> Rubinfeld, *supra* note 4, at 471.

<sup>160</sup> “Measures which have a lower adverse impact on the members of dominant groups ought to be preferred over those which have a greater impact”. KHATTAN, *supra* note 98, at 232

constitutionalism” allows us to make a shift from the traditional reservations to the “new” affirmative action jurisprudence for fulfilling the goals enshrined in the preamble of the Indian Constitution.